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UNDERHILL
ON
CRIMINAL EVIDENCE

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POCKET EDITION

ISSUED APRIL, 1912

A TREATISE ON THE
LAW OF

CRIMINAL EVIDENCE

INCLUDING

THE RULES REGULATING THE PROPER PRESENTATION OF EVIDENCE
AND ITS RELEVANCY; THE MODE OF PROOF IN PARTICULAR
CLASSES OF CRIMES AND THE COMPETENCY AND
EXAMINATION OF WITNESSES

By

H. C. UNDERHILL, LL.B.

OF THE NEW YORK BAR

SECOND EDITION

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PREFACE

The general conditions involved in a consideration of the law of criminal evidence are substantially the same as twelve years ago when the First Edition of this work was published. The author therefore trusts that he may be pardoned for quoting at length from the Preface of the First Edition.

"The existing law of criminal evidence is almost wholly the product of the judiciary of England and America during the last hundred years. The disadvantages by which the accused was oppressed during the earlier periods of English criminal jurisprudence inaugurated a process of judicial legislation which evolved a series of extremely technical rules. These rules mitigated, in a large degree, the severity of the law, and frequently enabled an accused person to establish his innocence. The advance of education and of humane ideas which has, during the present century, effected so radical a reform in our criminal law to the advantage of the accused, has obviated the necessity for these rules.

"The rules of modern criminal procedure have been conceived in a liberal spirit, and such safeguards are still thrown around the accused as enable him to defend himself with much greater advantage than he could possess if he were defending a civil action. But the state, as well as the prisoner, has rights in criminal proceedings, and it has been my aim to define these rights as far as possible.

"I have endeavored to present :

"First. A concise, but comprehensive and systematic treatment of those fundamental doctrines of the law of evidence which are exclusively invoked in the trial of crimes.

"Second. Those rules and principles of the law of evidence, which, while not confined in their application to criminal trials, are very frequently under consideration during such proceedings.

"The relevancy of particular classes of facts and the mode of proving them are considered.

"In the preparation of this work I have confined myself to a presentation of the rules and principles of the law as I have found them stated in the cases which have been decided by the courts of last resort.

"The general rules of proof constituting the body of the law of evidence are so well settled as to obviate their discussion in detail in this work. The main difficulty in judicial proceedings is to determine when and to what extent general principles are applicable to the facts and circumstances of particular cases. The solution of this difficulty is to be found, first in ascertaining what the facts and circumstances are, and next in determining how the general principle claimed to be applicable has been applied in analogous cases."

In this Second Edition the author has endeavored to cite all important cases which have been decided since the publication of the First Edition and thus bring the work down to the date of going to press. In the preparation of the First Edition nearly nine thousand cases were analyzed, examined and cited, and several thousand have been added to this number in the present edition. The sections of the original text have been rewritten and enlarged and many new sections have been added as developments in the law have made such changes necessary. The total addition to the text is considerably over two hundred pages.

In order to make the book more useful to the practitioner, citations are given not only to the official State Reports, but also to the L. R. A., the American Decisions, the American Reports, the American State Reports and to the Reporter System.

1367 Broadway, Brooklyn, N. Y.

H. C. UNDERHILL.

September 10, 1910.

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CRIMINAL EVIDENCE.

CHAPTER I.

CIRCUMSTANTIAL EVIDENCE AND REASONABLE DOUBT.

- § 1. Necessity for rules of evidence in judicial proceedings.
2. Elements of probability and improbability as affecting the proof of facts and circumstances.
3. The character and mental capacity of a witness as relating to the credibility of his testimony.
4. The motive of the witness to misrepresent.
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7. Circumstantial evidence to prove *corpus delicti* in trial for homicide.
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13. Precaution to be employed in defining reasonable doubt.
14. Doctrine of reasonable doubt applicable to misdemeanors as well as to felonies.
15. Reasonable doubt in the mind of one juror.
16. Statutory changes in rules of evidence and modes of procedure.
- 16a. Number of witnesses required and positive and negative evidence.

§ 1. **Necessity for rules of evidence in judicial proceedings.**—That the major part of the knowledge which is possessed by any individual is derived wholly from information imparted to him by others is a truism. In other words the facts which constitute the starting point in the search for truth in any sphere of investigation are usually furnished to the mind through other channels than

observation or experience. This is particularly the case in the judicial investigation of crime, by means of trial by jury, for the fact that any person has a knowledge of the facts of the crime is sufficient to disqualify him as a juror. So, too, the jurors are sworn to render a verdict upon the evidence alone, and if any one of them knows anything of his own knowledge he must be sworn as a witness.

We must recognize the fact that the disposition to believe, that is, to rely upon what others tell us, is inherent, and persists until we become incredulous, and learn to distrust the statements of our fellows because we may have been so frequently deceived by them. For at a very early period in life we learn, because of the falsehoods uttered to us, or to others in our hearing, that an urgent necessity exists for the discovery of principles, and the creation and use of rules, by which the truth of what is said may be separated from the false. Hence, the necessity and importance of rules of evidence which will facilitate the ascertainment of truth.

Besides the technical rules which regulate the science of judicial evidence and the production and employment of testimony in court, other well-known principles of general application in everyday life exist which are commonly employed in ascertaining the truth. These we must now consider.

§ 2. Elements of probability and improbability as affecting the proof of facts and circumstances.—The truth of any statement of fact may be considered from the standpoint of the probability or improbability of the fact *per se*. Its probability or improbability is to be measured by the degree with which the fact stated accords with the general experience of mankind. If the new fact is in accord with other facts which are a part of the sum total of our knowledge, we say it is probable, and less evidence, or evidence of a less satisfactory character, is required to convince us of its truth than when the new fact is wholly unlike anything in our experience. Thus, we may readily believe that a man is dead if it be proved that he has had a knife thrust through his heart, from our knowledge of the physiological functions of that organ and the mortal character of such a wound.

The confirmation of the truth of a statement of fact by means

of knowledge already possessed will vary according to the nature of the new fact and the situation of the individual. So a statement involving a scientific discovery or invention, as, for example, that oral communication can be had by telephone between persons who are hundreds of miles apart, will be regarded as extremely probable or as utterly absurd, according as it is made to a well-educated man or to an illiterate savage. If the new fact is utterly irreconcilable, not only with the experience and knowledge already possessed by us, but with the known laws that govern the operation of the physical universe, we say that it is impossible, that it cannot be true. The dividing line between the possible and the probable is difficult of ascertainment. It wavers according to the general comprehension of the rules which regulate the physical universe and the mutations of human affairs. So that new facts which now seem utterly impossible, may, in the light of a fuller investigation and knowledge of natural laws, be regarded merely as improbable.

So if it should be asserted as a fact that an idiot or an imbecile, while absolutely devoid of mental capacity, had successfully demonstrated an abstruse scientific problem, the impossibility that such a statement was true would cause its immediate rejection. If, however, it were asserted that an idiot had, after a surgical operation, manifested a limited degree of mental power, we would not, in view of the wonderful modern development of surgical science, regard such an assertion as impossible, though it may be highly improbable. A statement affirming a fact which is impossible is absolutely incredible, and no testimony can make us believe it. But the mere possibility of an event does not render a statement credible except so far as its probability appears upon a comparison with our experience. So it is possible for a very strong man to lift a barrel of merchandise weighing several hundred pounds. But the statement that a person of ordinary strength had stolen a barrel containing four hundred pounds of lead, and had, without any means of conveyance, carried the same half a mile, is so improbable that no sane man would believe it.^a

§ 3. The character and mental capacity of a witness as relating to the credibility of his testimony.—Our knowledge that a witness

^a See Elliott Ev., § 2708, *et seq.*

habitually tells the truth is a most important element in forming our estimate of the credibility of his evidence. For this reason it is always permissible to show that a witness is reputed to be untruthful or immoral among those who know him best, and by such an attack upon his character for veracity, morality the credibility of his evidence may be impeached. And the same principle is at the basis of impeachment by proving contradictory statements.

An habitual respect for truth, while very important, is but one element in credibility. It is necessary that the witness should possess adequate mental capacity to comprehend the facts to which he is testifying. He should also have had a reasonably good opportunity for observation and should have directed his attention to the facts in question. Because of the absence of fully developed mental powers, the evidence of infants and weak-minded or insane persons, while no longer incompetent, is only credible so far as their mental capacity is commensurate with the facts seen and testified to by them.¹

The memory of a witness must also be considered. Some persons have a good memory for abstract principles, while finding it extremely difficult, and often impossible, to recollect facts, figures or faces. Others have a good verbal memory, which retains accurately and fully the language of others. With the great majority of persons, however, the memory is chiefly concerned with and exercised upon the common events and incidents of their own experience; or of the experience of others with whom they have maintained social or business relations. Hence, it follows that facts which most affect the personal interests of the witness will make the deepest impression on his memory, and his mind will be most active and retentive of that knowledge the recollection of which will be of the greatest advantage to him.

In this connection it may be noted that the vividness of the recollection of an event is in proportion to its proximity in point of time as well as its personal importance in relation to the witness. So where the trial takes place many years after the commission of a crime, the facts that the chief prosecuting witness was a

¹ *Post*, § 202; *Elliott Ev.*, § 2721. 802; necessity of instructions as to law of circumstantial evidence, see 97 Am. St. 771-69 L. R. A. 193-217.

young child at the date of the crime and that the other witnesses for the state are now very old are to be considered by the jury.²

§ 4. The motive of the witness to misrepresent.—Though we may have been repeatedly deceived by the misrepresentations of others, we find, by experience, that men, as a rule, tell the truth. Where neither prejudice nor passion exists, and where the individual has no private or personal interests to advance by distorting the truth, we may rely upon the credibility of his testimony, if it is probable and if we know him to be an intelligent man, possessing adequate powers and opportunities for acquiring knowledge. The entire absence of all motive to give false testimony justifies an assumption that his testimony is true, for sane men do not usually act without motive, and will not ordinarily violate the principles of truth without some object in doing so, particularly if they are questioned under oath, with the fear of punishment for perjury before their eyes. Accordingly, in the case of persons, such as police and private detectives and others engaged in the detection of crime, or expert witnesses who testify under pay,³ who, from their professional occupation, character, or position, are inclined to take prejudiced or distorted views of human nature, it will require a high degree of credibility in the evidence to satisfy the mind of an impartial hearer.

On the other hand, where no motive can be imagined strong enough to prompt the witness to make a false statement, and where all motives that exist in his bosom prompt him to tell the truth, we have every reason to accept his evidence as credible, irrespective of the poor opinion we may have of his veracity under circumstances where he would have a motive to misrepresent the truth.

Again, our belief in the truthfulness of a witness is confirmed when we find him narrating incidents which we have ourselves observed, when placed in similar circumstances. On the other hand, he may relate minor incidents which, being credible and probable, as well as consistent with the main facts, are so startling

² *People v. Hancock*, 7 Utah 170, 25 Pac. 1093.

³ "Skilled witnesses come with such a bias on their minds to support the

cause in which they are embarked that hardly any weight should be given to their evidence." Tracy, *In re*, 10 Cl. & F. 154, 191.

and original that, considering his mental capacity, they could not have been invented by him.

§ 5. **Concurrent or corroborative testimony.**—The confidence we place in the testimony of a witness may be increased or diminished by the concurrence of his testimony with that of others. If the testimony of other witnesses to the same facts, or to facts calculated to produce as evidence the same results, is credible in itself, consistent with the testimony first offered, and the character of the witnesses is not impeached, the corroboration, in the absence of collusion, is almost conclusive. The same result is effected where the evidence of one witness is confirmed by that of another witness to the same facts, and it also appears that the witnesses are hostile to each other and hence actuated by different motives. Here the relations of both witnesses to the issue are so diametrically opposed that collusion is absolutely impossible.

No witness can fairly be expected to remember all the details of any transaction, and if he claims to do so suspicion is quickly aroused. But where he unintentionally omits details which are supplied by other witnesses, or where he apparently contradicts other witnesses on minor points and the contradiction is fully reconcilable by any one who possesses a full knowledge of the whole subject or transaction, his hearers may well feel justified in believing that his narrative is trustworthy because wholly unpremeditated and unfabricated by him.

Another element affecting the credibility of evidence is found in the frequent occurrence of undesigned coincidences, which, though sometimes startling and unexpected, are unaccountable except upon the hypothesis that the narrative, of which they form a part, is true. No event stands alone. It is the result of others which precede it. It may in its turn be the fruitful cause of many others which follow or relate to it. So every fact or circumstance is connected with others of a collateral nature, rendering it well nigh impossible for any one to concoct a narrative which, upon comparison with other and related circumstances, will stand the test. Even by comparing the various parts of the story, a mind trained in the habit of investigation may quickly ascertain the truth or falsity of the narrative; for, in such a case, the fabrication, however skillfully constructed, will crumble to pieces by reason of its inherent lack of verity.

Again, the well-recognized connection often observed between collateral or subordinate facts which are proved or admitted and the main fact in issue frequently furnishes most cogent and satisfactory proof of the existence of the latter. This is only applying to the law of evidence the principles of inductive reasoning, which are used, often unconsciously, by all men in the conduct of their most trivial as well as of their most important affairs. Such a process furnishes a basis for the division of evidence into direct and circumstantial. Direct evidence of the crime is the evidence of an eye-witness that it was committed. This includes in criminal law, the confessions and admissions of the accused and dying declarations. Circumstantial evidence consists of facts proved from which the jury may infer by a process of reasoning or inference that the accused committed the crime. The application of the principles of reasoning allows the jury to draw inferences or presumptions, of fact from other facts which are proved to their complete satisfaction. On the other hand, the rules of circumstantial evidence have opened the door for presumptions of law, which are only presumptions of fact that have, from frequent recurrence, become rules of law.⁴

§ 6. Circumstantial evidence—To sustain conviction must exclude every rational hypothesis except that of guilt.—The necessity of frequent resort to circumstantial evidence to prove guilt in criminal

⁴“All evidence is, in a strict sense, more or less circumstantial; whether consisting of facts which permit the inference of guilt, or whether given by eye-witnesses; for the testimony of eye-witnesses is based upon circumstances more or less distinctly and directly observed. But, of course, there is a difference between evidence consisting in facts of a peculiar nature, and hence giving rise to presumptions, and evidence which is direct as consisting in the positive testimony of witnesses, and the difference is material according to the degree of exactness and relevancy, the weight of the circumstances and the credibility of witnesses. The mind may be reluctant to conclude upon the issue of guilt in criminal cases upon evidence which is not direct, and yet, if the facts brought out, taken together, all point in the one direction of guilt, and to the exclusion of any other hypothesis there is no substantial reason for reluctance. Purely circumstantial evidence may be often more satisfactory and a safer form of evidence, for it must rest upon facts which must tend collectively to establish the guilt of the accused.” Gray, J., in *People v. Harris*, 136 N. Y. 423, 428, 33 N. E. 65.

proceedings is apparent in the very nature of things. Whenever it is possible the criminal will endeavor to perform his nefarious deeds in secrecy, and where no eye-witnesses are present to behold him. So he will choose the time and occasion which are most favorable to concealment, and sedulously scheme to render detection impossible. Circumstantial evidence alone is enough to support a verdict of guilty of the most heinous crime, provided the jury believe beyond a reasonable doubt that the accused is guilty upon the evidence.⁵ No greater degree of certainty in proof is required where the evidence is all circumstantial than where it is direct, for in either case the jury must be convinced of the prisoner's guilt beyond a reasonable doubt.⁶ They are bound by their oath to render a verdict upon all the evidence, and the law makes no distinction between direct evidence of a fact and evidence of circumstances from which the existence of the fact may be inferred.⁷

⁵ *Carlton v. People*, 150 Ill. 181, 187, 37 N. E. 244, 41 Am. St. 346; *State v. Atkinson*, 40 S. Car. 363, 18 S. E. 1021, 42 Am. St. 877; *People v. Cronin*, 34 Cal. 191, 202; *People v. Daniels* (Cal.), 34 Pac. 233; *State v. Hunter*, 50 Kan. 302, 304, 32 Pac. 37; *State v. Avery*, 113 Mo. 475, 495, 21 S. W. 193; *State v. Slingerland*, 19 Nev. 135, 141, 7 Pac. 280; *State v. Elsham*, 70 Iowa 531, 31 N. W. 66; *State v. Moelchen*, 53 Iowa 310, 5 N. W. 186; *Epps v. State*, 102 Ind. 539, 554, 1 N. E. 491; *Griffin v. State*, 2 Ga. App. 534, 58 S. E. 781; *Murphy v. State*, 118 Ga. 780, 45 S. E. 609; *Commonwealth v. Sheffer*, 218 Pa. 437, 67 Atl. 761; *Vernon v. United States*, 146 Fed. 121, 76 C. C. A. 547; *Oakley v. State*, 135 Ala. 29, 33 So. 693; *Martin v. State*, 125 Ala. 64, 28 So. 92; *People v. Hiltel*, 131 Cal. 577, 63 Pac. 919; *State v. Evans*, 1 Marv. (Del.) 477, 41 Atl. 136; *Andrews v. State*, 116 Ga. 83, 42 S. E. 476; *State v. Hunter*, 50 Kan. 302, 32 Pac. 37; *Thomas v. Commonwealth* (Ky.), 20 S. W. 226, 14 Ky. L. 288; *Cunning-*

ham v. State, 56 Neb. 691, 77 N. W. 60; *State v. Atkinson*, 40 S. Car. 363, 18 S. E. 1021, 42 Am. St. 877; *Bill v. State*, 5 Humph. (Tenn.) 155. Direct and circumstantial evidence differ merely in their logical relation to the fact in issue. Evidence as to the existence of the fact is direct. Circumstantial evidence is composed of facts which raise a logical inference as to the existence of the fact in issue. A conviction may well be had upon circumstantial evidence, but to warrant such conviction the proven facts must not only be consistent with the hypothesis of guilt, but must clearly and satisfactorily exclude every other reasonable hypothesis save that of guilt. *United States v. Greene*, 146 Fed. 803.

⁶ Though circumstantial evidence is often the most satisfactory and convincing that can be produced, the convincing effect that follows from positive evidence is not necessarily expected. *State v. Levy*, 9 Idaho 483, 75 Pac. 227.

⁷ *Spraggins v. State*, 139 Ala. 93, 35 So. 1000. "A fact has the sense of

Hence a prejudice against circumstantial evidence may be sufficient to disqualify a person who entertains it from serving as a member of the jury.⁸ But to sustain a verdict founded on circumstances not directly proving a crime, the circumstances themselves must be proved to the satisfaction of the jury. The danger that the jurors, unused to logical mental processes, may assume as proved circumstances in support of which the evidence is wholly or partially inadequate, is always present. It has been often said that witnesses may lie, but that circumstances never do. It should not be forgotten, however, that the circumstances from which guilt may be inferred must be proved by the direct evidence of witnesses who saw them, and that such witnesses may misrepresent or forget, or be mistaken as to the circumstances they testify to.

The first duty of the jury is to determine carefully upon all the testimony as stated by the witnesses whether the incriminating circumstances, from which they may infer guilt, are proved, beyond a reasonable doubt.⁹ No general rule can or should be laid down as to what constitutes proof of circumstances in any particular case. Each case is a rule unto itself, and is to be determined upon its peculiar circumstances. But all the circumstances as proved must be consistent with each other, and, taken together, they must point surely and unerringly in the direction of guilt.

and is equivalent to a truth or that which is real. It is in the ingenious combination of facts that they may be made to deceive or to express what is not the truth. In the evidence of eye-witnesses to prove the facts of an occurrence, we are not guaranteed against mistake and falsehood, or the distortion of truth by exaggeration or prejudice, but when we are dealing with a number of established facts, if, upon arranging, examining and weighing them in our mind, we reach only the conclusion of guilt, the judgment rests upon pillars as substantial and as sound as though resting upon the testimony of eye-witnesses." Gray, J., in *People v. Harris*, 136 N. Y. 423, 429, 33 N. E.

65; *State v. McKay* (N. Car.), 63 S. E. 1059. Circumstantial evidence is admissible, though there are eye-witnesses to the crime. *Commonwealth v. Karamarkovic*, 218 Pa. 405, 67 Atl. 650; *State v. Ryder*, 80 Vt. 422, 68 Atl. 652; *State v. Tyre* (Del.), 67 Atl. 199; *State v. Cephus* (Del.), 67 Atl. 150; *Tatum v. State*, 1 Ga. App. 778, 57 S. E. 956; *Riley v. State*, 1 Ga. App. 651, 57 S. E. 1031; *State v. Samuels* (Del.), 67 Atl. 164.

⁸ *State v. Leabo*, 89 Mo. 247, 252, 1 S. W. 288; *Cluverius v. Commonwealth*, 81 Va. 787, 794, 795; *State v. West*, 69 Mo. 401, 33 Am. 506.

⁹ *Jenkins v. State*, 62 Wis. 49, 21 N. W. 232.

All the facts and circumstances taken together as proved must not only be consistent with the inference that the accused is guilty. but they must at the same time be inconsistent with the hypothesis that he is innocent and with every other rational hypothesis.¹⁰

Where the only incriminating evidence for the prosecution is circumstantial, it is the duty of the court to instruct upon the

¹⁰ State v. Johnson, 19 Iowa 230; State v. Miller, 9 Houst. (Del.) 564, 571, 32 Atl. 137; Echols v. State, 81 Ga. 696, 699, 8 S. E. 443; Green v. State, 51 Ark. 189, 10 S. W. 266; Findley v. State, 5 Blackf. (Ind.) 576, 579, 36 Am. Dec. 557; James v. State, 45 Miss. 572, 575; State v. Asbell, 57 Kan. 398, 46 Pac. 770; People v. Ward, 105 Cal. 335, 38 Pac. 945; State v. David, 131 Mo. 380, 33 S. W. 28; Jones v. State, 34 Tex. Cr. App. 490, 30 S. W. 1059; State v. Avery, 113 Mo. 475, 495, 21 S. W. 193; State v. Miller, 100 Mo. 606, 626, 13 S. W. 832, 1051; Commonwealth v. Goodwin, 14 Gray (Mass.) 55; Chitister v. State, 33 Tex. Cr. App. 635, 638, 28 S. W. 683; State v. Hunter, 50 Kan. 302, 306, 32 Pac. 37; Kennedy v. State, 31 Fla. 428, 12 So. 858; State v. Davenport, 38 S. Car. 348, 352, 17 S. E. 37; Carlton v. People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; Gannon v. People, 127 Ill. 507, 521, 21 N. E. 525, 11 Am. St. 147; Commonwealth v. Costley, 118 Mass. 1; Coleman v. People, 26 Fla. 61, 71, 7 So. 367; Lancaster v. State, 91 Tenn. 267, 18 S. W. 777; State v. Keeler, 28 Iowa 551, 553; People v. Foley, 64 Mich. 148, 31 N. W. 94; Wright v. State, 21 Neb. 496, 32 N. W. 576; People v. Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. 512; Cavender v. State, 126 Ind. 47, 48, 35 N. E. 875; United States v. Reder, 69 Fed. 965; Hamilton v. State, 96 Ga. 301, 22 S. E. 528; Smith v. State, 35 Tex. Cr. App. 618, 33 S. W. 339, 34 S. W. 960; Howard v. State, 108 Ala. 571, 18 So. 813; Wantland v. State, 145 Ind. 38, 43 N. E. 931; State v. Hart, 94 Iowa 749, 64 N. W. 278; Webb v. State, 73 Miss. 456, 19 So. 238; Baldez v. State, 37 Tex. Cr. App. 413, 35 S. W. 664; State v. Moxley, 102 Mo. 374, 14 S. W. 969; People v. Shuler, 28 Cal. 490, 496; Morgan v. State, 51 Neb. 672, 71 N. W. 788; Sherrill v. State, 138 Ala. 3, 35 So. 129; Neilson v. State, 40 So. 221, 146 Ala. 683 (not reported in full); Duckworth v. State, 83 Ark. 192, 103 S. W. 601; State v. Tilghman (Del.), 63 Atl. 772; State v. Emory, 5 Penn. (Del.) 126, 58 Atl. 1036; Mangum v. State, — Ga. App. —, 63 S. E. 543; Long v. State, — Ga. App. —, 62 S. E. 711; Campbell v. State, 123 Ga. 533, 51 S. E. 644; State v. Sweizewski, 73 Kan. 733, 85 Pac. 800; State v. Terrio, 98 Me. 17, 56 Atl. 217; State v. Psycker, 179 Mo. 140, 77 S. W. 836; State v. Francis, 199 Mo. 671, 98 S. W. 11; State v. Morney, 196 Mo. 43, 93 S. W. 1117; Shumway v. State, — Neb. —, 117 N. W. 407; Sweet v. State, 75 Neb. 263, 106 N. W. 31; State v. Hutchings, 30 Utah 319, 84 Pac. 893; Schwantes v. State, 127 Wis. 160, 106 N. W. 237; State v. Abbott, — W. Va. —, 62 S. E. 693; State v. Trail, 59 W. Va. 175, 53 S. E. 17; United States v. Cole, 153 Fed. 801; United States v. Breese, 131 Fed.

nature of circumstantial evidence and upon the rules of law regulating it.¹¹

If, however, there is some direct evidence in the case for the state which would be sufficient, if believed by the jury, to show the prisoner's guilt, an instruction on circumstantial evidence need not be given, though there be circumstantial evidence in the case.¹²

For example, if the confession of the accused is direct evidence of his guilt an instruction on circumstantial evidence is not required.¹³

An instruction that circumstantial evidence must be clear, convincing and conclusive, excluding all rational doubt as to the prisoner's guilt, and that from the material and necessary circum-

915; *Bryant v. State*, 116 Ala. 445, 23 So. 40; *Medley v. State*, — Ala. —, 47 So. 218; *Thayer v. State*, 138 Ala. 39, 35 So. 406; *Bones v. State*, 117 Ala. 138, 23 So. 138. The rule of the text is applied to the facts which are found by the jury after they have heard the evidence for and against the accused and determined what is true and what is untrue. It should be applied not to the items of evidence themselves, as these are given by the witness. *State v. Kidwell*, 62 W. Va. 466, 59 S. E. 494. The state is not restricted to direct proof of the date of the offense. *Taylor v. State*, 62 S. E. 1048; *Elliott Ev.*, § 2709.

¹¹ *Gilmore v. State*, 99 Ala. 154, 13 So. 536; *Jones v. State*, 105 Ga. 649, 31 S. E. 574; *State v. Cohen*, 108 Iowa 208, 78 N. W. 857, 75 Am. St. 213.

¹² *Welch v. State*, 124 Ala. 41, 27 So. 307; *Vaughan v. State*, 57 Ark. 1, 20 S. W. 588; *People v. Burns*, 121 Cal. 529, 53 Pac. 1096; *Langdon v. People*, 133 Ill. 382, 408, 24 N. E. 874; *State v. Mitchell* (Iowa), 116 N. W. 808; *State v. Robinson*, 117 Mo. 649, 663, 23 S. W. 1066; *State v. Donnelly*, 130 Mo. 642, 32 S. W. 1124; *Purvis v. State*, 71 Miss. 706, 14 So. 268;

State v. Wooley, — Mo. —, 115 S. W. 417; *State v. Calder*, 23 Mont. 504, 59 Pac. 903; *Barnards v. State*, 88 Tenn. 183, 12 S. W. 431; *Granado v. State*, 37 Tex. Cr. App. 426, 35 S. W. 1069; *Ellis v. State*, 33 Tex. Cr. App. 86, 87, 24 S. W. 894; *White v. State*, 32 Tex. Cr. App. 625, 25 S. W. 784; *Wampler v. State*, 28 Tex. App. 352, 353, 13 S. W. 144.

¹³ *Green v. State*, 97 Ala. 59, 12 So. 416, 15 So. 242; *Perry v. State*, 110 Ga. 234, 36 S. E. 781; *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066; *Mathews v. State*, 41 Tex. Cr. App. 98, 51 S. W. 915. "Despite the fact that inferences drawn from circumstances may be and often are erroneous, circumstantial evidence may be, and in many cases is, as conclusive and convincing as the direct and positive testimony of eye-witnesses. Where it is strong and satisfactory to the jurors it is their duty to act on it. They should give it its just and fair weight, and if upon a candid, careful and guarded judgment of all the circumstances proved they are convinced of the guilt of the accused it is their duty to convict him. They may not go outside of the facts and circumstances proved to fancy others which

stances his guilt must be established beyond a reasonable doubt, is correct.¹⁴

An instruction that before the accused can be convicted upon circumstantial evidence alone the facts must form a complete chain and point to his guilt and must be irreconcilable with any reasonable theory of his innocence, and that the facts must be such as to exclude to a moral certainty every hypothesis but that of his guilt, is a sufficient charge on the law of circumstantial evidence.¹⁵

§ 7. **Circumstantial evidence to prove corpus delicti in trial for homicide.**—The rule seems at one time to have prevailed that a conviction could not be sustained, so far as a charge of homicide was concerned, unless the *corpus delicti* was proved by direct evidence, which in such case necessitated the finding of the victim's body.¹⁶ As an objection of considerable force it has been urged that this rule offers a premium on homicide by proclaiming to assassins that they will be safe from punishment if they shall succeed in utterly destroying the corpses of their victims by fire or chemicals, or by sinking them to a great depth in the ocean, so that they cannot be identified by direct evidence.¹⁷

may point to his innocence, but are to base the verdict upon the reasonable inferences drawn from the circumstances proven that reasonable men would entertain. If all inferences thus made are consistent with the guilt of the prisoner and inconsistent with his innocence, then they must convict him." *State v. Elsham*, 70 Iowa 531, 31 N. W. 66.

¹⁴ *State v. Wilcox*, 132 N. Car. 1120, 44 S. E. 625.

¹⁵ *State v. Sharpless*, 212 Mo. 176, 111 S. W. 69.

¹⁶ 2 Hale P. C. 290; *Rex v. Burdett*, 4 B. & Ald. 95.

¹⁷ *United States v. Gibert*, 2 Sum. (U. S.) 19, 27, 25 Fed. Cas. 15204; *State v. Williams*, 7 Jones (N. Car.) 446, 454, 78 Am. Dec. 248n; *State v. Westcott*, 130 Iowa 1, 104 N. W. 341; *Miles v. State*, 129 Ga. 589, 59 S. E.

274. The expression *corpus delicti* has been somewhat loosely employed to mean two separate and distinct things. In its original and primary sense, it means the fact that a crime has been committed and is thus defined by Webster's Dictionary and in *Starkey on Evidence*, § 575. The fact that a crime has been committed is usually not so much a fact as an inference from other facts which are divided into two classes, the first of which is the facts constituting the circumstances or event aside from any personal agency in it, and second, the existence of a criminal and personal agency or element. *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *Pitts v. State*, 43 Miss. 472; *Rulloff v. People*, 18 N. Y. 179. Beside this and particularly in relation to the crime of homicide, the words

There are many cases, however, which do not require such direct and strict proof of *corpus delicti*, but allow it to be proved by circumstantial evidence if sufficiently clear and cogent to convince the jury beyond a reasonable doubt in connection with the other evidence.¹⁸

This would be the case where it is proved by direct evidence that the body of the person murdered had been thrown overboard and never subsequently recovered;¹⁹ or where the body has been wholly or partly consumed by fire.²⁰

Such cases may, however, be regarded as exceptions to the general rule which is applicable and usually, if direct evidence exists of the death of the victim of the homicide, it will be required.²¹

A broader, more accurate and more inclusive statement of the general rule would be that the *corpus delicti* of homicide must be proved either by showing that the party alleged to have been killed is actually dead by proof of the finding and identifying his corpse, or by showing that the murder was accomplished or accompanied by the employment of violence in such a manner as to sufficiently account for the disappearance of the body and render

have required a secondary meaning: Then they mean the dead body or remains of the victim of the homicide. It is in the secondary sense that the word is used in the text and in the cases which are cited to support it. See Burrill Law Dictionary; Wharton's Crim. Evid., § 325, and Burrill on Circumstantial Evidence 119.

¹⁸ Zoldoske v. State, 82 Wis. 580, 52 N. W. 778; Rex v. Burdett, 4 B. & Ald. 95; Lightfoot v. State, 20 Tex. App. 77-100; Johnson v. Commonwealth, 81 Ky. 325; State v. Dineen, 10 Minn. 407; State v. Keeler, 28 Iowa 551, 553; Anderson v. State, 20 Fla. 381; State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312; State v. Williams, 7 Jones (N. Car.) 446, 453, 78 Am. Dec. 248n; State v. Gillis, 73 S. Car. 318, 53 S. E. 487, 5 L. R. A. (N.

S.) 571n; Schwantes v. State, 127 Wis. 160, 106 N. W. 237. A statute which requires direct proof of the death of a person alleged to have been killed does not exclude evidence of circumstances indicating identity, People v. Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. 423, or evidence of resemblance of features between a mutilated body which was found and the person alleged to have been killed. People v. Beckwith, 108 N. Y. 67, 15 N. E. 53.

¹⁹ United States v. Williams, 1 Cliff. (U. S.) 5, 28 Fed. Cas. 16707.

²⁰ State v. Barnes, 47 Ore. 592, 85 Pac. 998, 7 L. R. A. (N. S.) 181n.

²¹ People v. Alviso, 55 Cal. 230; State v. Williams, 7 Jones (N. Car.) 446, 453, 78 Am. Dec. 248n; McCulloch v. State, 48 Ind. 109.

direct evidence of its whereabouts or appearance impossible to be obtained. So it has been held in a case of homicide where the body of the victim was destroyed that it was not necessary to prove, beyond a doubt, the precise means by which his death was produced.²²

The evidence of an accomplice is always admissible to prove the *corpus delicti* of homicide and if it is corroborated, even by the confession of the accused, it may be sufficient.²³

But in every case of homicide, if a body is found or if any remains are found, they must be identified as those of the victim. The disappearance of the person supposed to have been killed with circumstantial evidence of the guilt of the accused, will not sustain a conviction if the body is not identified.²⁴

§ 8. Distinction between civil and criminal proceedings as regards relevancy and manner of proof.—It has been remarked, both by the writers of text-books and in the adjudications, that “there is no difference in the rules of evidence between civil and criminal cases; what may be received in the one may be received in the other; what is rejected in the one will be rejected in the other.”²⁵ And such a rule would seem to be not only just and logical, but necessary when we consider that the sole object of evidence is the ascertainment of truth; in other words, that every species of evidence is merely a means towards an end, and that end the establishment or discovery of facts unknown or disputed. However universal such a principle of uniformity may have been in the

²² Smith v. Commonwealth, 21 Gratt. (Va.) 809, 820; Pitts v. State, 43 Miss. 472, 481; State v. Keeler, 28 Iowa 551, 553; Lancaster v. State, 91 Tenn. 267, 18 S. W. 777; Ruloff v. People, 18 N. Y. 179; State v. Winner, 17 Kan. 298; State v. Dickson, 78 Mo. 438; State v. Davidson, 30 Vt. 377, 386, 73 Am. Dec. 312; State v. Barrington, 198 Mo. 23, 95 S. W. 235; Schwantes v. State, 127 Wis. 160, 106 N. W. 237. See, also, *post*, § 338a.

²³ Follis v. State, 51 Tex. Cr. App. 186, 101 S. W. 242.

²⁴ Walker v. State, 14 Tex. App.

609. Evidence of scars, moles, congenital marks or those artificially made, as by tattooing, the color of the hair and beard, the condition, number of and marks on the teeth, the measurement, weight and stature of a person are always admissible to identify a dead body. Lindsay v. People, 63 N. Y. 143. The body must be identified as that of the person whose death is the subject of inquiry. Wall v. State, — Ga. App. —, 63 S. E. 27.

²⁵ Rex v. Watson, 2 Stark. 104, 155.

early and formative period of the common law, it has long since ceased to be so. The present tendency is to widen the margin or borderland which lies between the domains of civil and criminal jurisprudence so that criminal evidence differs from civil evidence, not merely in the issues to which it is to be applied, but in the manner in which it may be employed and the facts which may be introduced.

In general the rules which regulate most of the various subdivisions into which the subject of evidence is divided, with the exception of the weight of evidence, and the presumption of the innocence of the accused, are substantially identical in both civil and criminal proceedings. But there are exceptions to these rules which must be considered. No general rule has ever been discovered by which it is possible to determine in every case whether any given fact is relevant or not. Usually one fact is relevant to prove another when, by itself or in combination with other relevant facts, it proves or renders probable the existence of the other. The rules as to the relevancy of facts and as to the proof of relevant facts are generally the same in criminal as in civil proceedings. If it is essential to prove that A is dead the fact may be proved in the same way in a criminal trial for his homicide as in an action to recover for an insurance on his life. So a witness who saw his dead body and knew it to be the body of A may testify orally to these facts. But some facts are relevant in criminal proceedings which would not be received in a civil trial where the same fact was in issue. For example, the fact that the accused is reputed among his neighbors to be honest may be proved in a criminal trial for theft, not only to reinforce the presumption of innocence, but as affirmative evidence to prove that he did not steal, while the state may prove his bad character for dishonesty to show that it is extremely probable that he is a thief.

It need hardly be said that if the fact of larceny by the defendant is in issue in a civil proceeding, his character as an honest man or the reverse is not admissible. So, too, there are several rules of evidence which are applicable exclusively to criminal proceedings.

The first and most important of these exclusively criminal rules is that under which every person who is charged with crime is presumed to be innocent until his guilt is determined by the ver-

dict of a jury. Growing out of it, and always connected with it, is the rule fixing the amount of evidence necessary in criminal trials, and requiring that all the jurors shall be convinced of the guilt of the accused beyond a reasonable doubt. Other rules, peculiar to criminal cases, admit confessions and dying declarations, contrary to the general principle under which, in modern times, hearsay evidence is uniformly rejected.

§ 9. The weight of evidence—Rules in civil and criminal cases distinguished—Reasonable doubt.—In cases where civil rights alone are involved extreme strictness of proof, as regards the weight of the evidence, is never required. The jury may decide for either party according to the probability and the weight of the evidence, its cogency and the degree of credibility they may attach to it. The verdict will be sustained, it matters not how contradictory the evidence may be, so long as it is in favor of that litigant upon whose side the facts proved preponderate.

In criminal cases the jury are not permitted to render a verdict of guilty upon a mere preponderance of proof, but are required, particularly where the evidence is circumstantial, or contradictory, to be satisfied or convinced upon all the evidence beyond a reasonable doubt that the accused is guilty.²⁶ The rule that a preponderance of evidence is sufficient to sustain a verdict in a civil suit is due partly to the fact that before any evidence is offered in behalf of either litigant, no presumption is indulged in favor of either, but mainly to the fact that the proof will only result in a judgment for pecuniary damages, or establish a civil right.

In a criminal trial the accused starts with a legal presumption that he is innocent of the crime charged, which some authorities regard as evidence in his favor and which must be overcome, in addition to any evidence which he shall introduce in his own behalf. So the reputation, the future livelihood, and career, and, perhaps, even the life of the accused are involved, while in civil cases any loss the party may sustain, however great, may usually be retrieved by his future efforts.

§ 10. Difficulty of defining reasonable doubt.—The meaning of the term "reasonable doubt" has been the subject of a vast amount

²⁶ See §§ 11-15; Elliott Ev., § 2713.

of discussion, and innumerable attempts have been made to define it. What a reasonable doubt is, does not seem easy of explanation. The most learned jurists, who possessed unusual facility in the use of language, have found it difficult to formulate or convey to their own satisfaction the idea expressed by these words. For the difficulty is not so much in understanding the meaning of the words as in conveying their meaning to others.²⁷ Many of the cases point out the terseness and seeming simplicity of the phrase and the inutility of attempting a definition which must necessarily consist in a restatement of the proposition in a different form of words, which are not any more easily understood,²⁸ but which render the original expression more obscure and tend to create doubts and confusion rather than to remove them.

§ 11. Demonstration and belief beyond a reasonable doubt distinguished.—In the whole domain of knowledge, mathematical facts alone are capable of that precise and logical demonstration which absolutely convinces the mind and leaves no room for any doubt whatever. So when one has solved a given problem in geometry and has demonstrated the correctness of his solution by applying to it the rules of that science, and the knowledge which he already possesses, the certainty of the facts involved has been demonstrated by a chain of facts and argument which must completely convince the mind of every sane man. Such a demonstration not only convinces the mind of the truth of a proposition or hypothesis, but absolutely excludes the possibility that a contradictory or inconsistent proposition is true.

But with inductive or inferential facts a very different prin-

²⁷ *State v. Reed*, 62 Me. 129, 142; *Elliott Ev.*, §§ 2706, 2707. For comprehensive note on reasonable doubt, see 4 Am. St. 567; also 96 Am. St. 210.

²⁸ "Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a doubt is a fluctuation or uncertainty of mind arising

from defect of knowledge, or of evidence, and that a doubt of the guilt of the accused, *honestly entertained*, is a reasonable doubt." *People v. Stubenvoll*, 62 Mich. 329, 334, 28 N. W. 883, and see also, *Hamilton v. People*, 29 Mich. 173, 194, 195; *State v. Reed*, 62 Me. 129, 142, 145; *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481; *State v. James*, 37 Conn. 355, 360; *United States v. Harper*, 33 Fed. 471, 483.

ciple obtains. It is absolutely impossible as regards our knowledge of human affairs derived from the testimony of witnesses to have this sort of demonstrative certainty. Such facts cannot be scientifically demonstrated to be true. We can be convinced only beyond a reasonable doubt, or, in other words, we can have only a moral certainty,²⁹ varying in degree and never absolute. Whether we shall have any certainty at all as the result of our consideration of the evidence depends upon various and complicated circumstances.^{29a}

Thus if the facts attested are in themselves probable, if the witnesses called to prove them are of good repute and apparently credible, their opportunities and capacity for observation good and their evidence consistent or uncontradicted, we would have a very high degree of certainty and any doubt would be unreasonable and not justified by the circumstances. As the above elements of belief diminish and disappear or become inoperative and the evidence becomes contradictory or incredible, the presence of doubts becomes manifest. If one is reasonably certain, and, *a fortiori*, if he is absolutely certain of the existence of a fact, he cannot be reasonably doubtful, that is, he cannot have a reasonable doubt. Where the evidence in support of a fact is equally balanced by other evidence there can be no certainty. We say then that there is a reasonable doubt of the existence of the fact, and if the fact is the guilt of an accused person he is entitled to the benefit of the doubt.

§ 12. Attempted definitions of reasonable doubt.—The doubt of the guilt of the prisoner to be a reasonable doubt must have something to rest upon. In other words, it must be a substantial doubt. It must arise from the evidence or from the lack of evidence and it cannot be a reasonable doubt where it is based solely on the arguments of counsel.³⁰

Hence, an instruction that if a doubt is raised in the minds of the jury by the evidence or by the ingenuity of counsel, that doubt is decisive in favor of the prisoner may be refused.³¹

²⁹ Jones v. State, 100 Ala. 88, 14 So. 772. So. 1011; State v. Lally, 2 Marv. (Del.) 424, 43 Atl. 258.

^{29a} See remarks of the court in Giles v. State, 6 Ga. 276, 285. ³¹ Strobhar v. State, 55 Fla. 167, 47 So. 4; United States v. Dexter, 154

³⁰ Walker v. State, 139 Ala. 56, 35 Fed. 890.

The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth.⁸² A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in their minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt.⁸³

A doubt is not reasonable that, in the face of overwhelming or even strong evidence assumes that the accused may possibly be innocent.⁸⁴

There must be sincerity and common sense as the basis for the doubt and in this connection it may be said that the mental operations of all sane men are governed by the same rules, whether they are in the jury box or out of it. The jurors ought to be convinced as jurors by the same proof that would convince them as men and upon which they would act in the management of their own most important affairs and concerns.⁸⁵

On the other hand, the jurors should doubt as jurors what they would doubt as men.⁸⁶

If they have an abiding and conscientious conviction of the prisoner's guilt after a candid consideration of all the facts which

⁸² *State v. Stewart* (Del.), 67 Atl. 786.

⁸³ *Dempsey v. State*, 83 Ark. 81, 102 S. W. 704; *State v. DiGuglielmo*, 4 Penn. (Del.) 336, 55 Atl. 350.

⁸⁴ *State v. Brinte*, 4 Penn. (Del.) 551, 58 Atl. 258.

⁸⁵ *State v. Honey* (Del.), 65 Atl. 764; *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. 655, 31 L. R. A. 294; *Lawhead v. State*, 46 Neb. 607, 65 N. W. 779; *People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105; *People v. Wayman*, 128 N. Y. 585, 27 N. E. 1070; *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481; *Giles v. State*, 6

Ga. 276, 285; *Arnold v. State*, 23 Ind. 170; *State v. Dineen*, 10 Minn. 407, 417; *State v. Pierce*, 65 Iowa 85, 89, 21 N. W. 195; *McGuire v. People*, 44 Mich. 286, 6 N. W. 669, 38 Am. 265; *State v. Bridges*, 29 Kan. 138; *State v. Kearley*, 26 Kan. 77, 87; *Stout v. State*, 90 Ind. 1, 12; *Toops v. State*, 92 Ind. 13, 16; *Commonwealth v. Conroy*, 207 Pa. 212, 56 Atl. 427.

⁸⁶ *United States v. Heath*, 19 Wash. Law R. 818; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320; *State v. Rounds*, 76 Me. 123; *Fanton v. State*, 50 Neb. 351, 69 N. W. 953, 36 L. R. A. 158.

are, in their opinion proved, then they are convinced beyond a reasonable doubt. But the law does not require that each particular incriminating fact which may aid the jury in determining that the accused is guilty shall be proved beyond a reasonable doubt. The doubt which will justify an acquittal is not a doubt of any particular fact constituting the sum of the prisoner's guilt, but a doubt upon all the evidence that he is guilty.⁸⁷

A reasonable doubt has also been defined as "a doubt for which a reason can be given,"⁸⁸ as a doubt which must satisfy a reasonable mind, after a full comparison and consideration of the evidence,⁸⁹ as a doubt that has something to rest upon such as a sensible and honest man would reasonably entertain,⁴⁰ as a doubt growing out of the evidence and the circumstances of the case,⁴¹ having a foundation in reason,⁴² a substantial doubt arising from insufficiency of evidence not a mere possibility,⁴³ or probability of innocence,⁴⁴ and as an honest, substantial misgiving generated by an insufficiency of proof.⁴⁵ But negative definitions

⁸⁷ *Pitts v. State*, 140 Ala. 70, 37 So. 101; *Kossakowski v. People*, 177 Ill. 563, 53 N. E. 115; *Delahoyde v. People*, 212 Ill. 554, 72 N. E. 732. The words "beyond a reasonable doubt" and "to a moral certainty," explanatory of the *quantum* of proof required to convict in a criminal prosecution, are synonymous. *People v. Bonifacio*, 190 N. Y. 150, 82 N. E. 1098, affirming 21 N. Y. Crim. 122, 104 N. Y. Supp. 181.

⁸⁸ *Jones v. State*, 120 Ala. 303, 25 So. 204; *Hodge v. State*, 97 Ala. 37, 41, 12 So. 164, 38 Am. St. 145; *Cohen v. State*, 50 Ala. 108, 112; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493. But it has also been said that the jurors need not be able to give a reason for their doubt. See *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642n; *Siberry v. State*, 133 Ind. 677, 688, 33 N. E. 681; *People v. Ah Sing*, 51 Cal. 372; *Densmore v. State*, 67 Ind. 306, 33 Am. 96; *Leonard v. State*, 150 Ala. 89, 43 So. 214.

⁸⁹ *Wood v. State*, 31 Fla. 221, 240, 12 So. 539; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493; *Miller v. State* (Wis. 1908), 119 N. W. 850.

⁴⁰ *Fletcher v. State*, 90 Ga. 468; 17 S. E. 100; *State v. Emory*, 5 Penn. (Del.) 126, 58 Atl. 1036; *State v. Walls*, 4 Penn. (Del.) 408, 56 Atl. 111.

⁴¹ *Malone v. State*, 49 Ga. 210, 218; *State v. Davidson*, 44 Mo. App. 513.

⁴² *Conrad v. State*, 132 Ind. 254, 258, 31 N. E. 805; *People v. Barker*, 153 N. Y. 111, 47 N. E. 31; *Barnard v. State*, 119 Ga. 436, 46 S. E. 644.

⁴³ *State v. Wells*, 111 Mo. 533, 20 S. W. 232; *State v. Briscoe* (Del.), 67 Atl. 154; *State v. Mahoney*, 122 Iowa 168, 97 N. W. 1089; *Way v. State* (Ala.), 46 So. 273.

⁴⁴ *Bain v. State*, 74 Ala. 38; *State v. David*, 131 Mo. 380, 33 S. W. 28.

⁴⁵ *United States v. Newton*, 52 Fed. 275, 290; *Densmore v. State*, 67 Ind. 306, 33 Am. 96; *Siberry v. State*, 133 Ind. 677, 688, 33 N. E. 681; *Lovett v.*

are more frequent and perhaps safer and more helpful. Hence, a mere whim, or a groundless surmise,⁴⁶ a vague conjecture,⁴⁷ a whimsical or vague doubt,⁴⁸ a capricious and speculative doubt,⁴⁹ a desire for more evidence of guilt,⁵⁰ a captious doubt or misgiving, suggested by an ingenious counsel, or arising from a merciful disposition, or kindly feeling towards the prisoner, or from sympathy for him or for his family, is not a reasonable doubt.⁵¹

State, 30 Fla. 142, 162, 11 So. 550, 17 L. R. A. 705n; Lyons v. People, 137 Ill. 602, 618, 27 N. E. 677; Carroll v. People, 136 Ill. 456, 27 N. E. 18; Woodruff v. State, 31 Fla. 320, 12 So. 653; People v. Pallister, 138 N. Y. 601, 33 N. E. 741; Carpenter v. State, 62 Ark. 286, 36 S. W. 900; Little v. People, 157 Ill. 153, 42 N. E. 389; State v. David, 131 Mo. 380, 33 S. W. 28; People v. Ross, 115 Cal. 233, 46 Pac. 1059; State v. Blue, 136 Mo. 41, 37 S. W. 796; Burney v. State, 100 Ga. 65, 25 S. E. 911; Baker v. State, 120 Wis. 135, 97 N. W. 566; State v. Harmon, 4 Penn. (Del.) 580, 60 Atl. 366.

⁴⁶ Welsh v. State, 96 Ala. 92, 11 So. 450.

⁴⁷ Fletcher v. State, 90 Ga. 468, 470, 17 S. E. 100; Bluett v. State, 151 Ala. 41, 44 So. 84; State v. Adams (Del.), 65 Atl. 510.

⁴⁸ Commonwealth v. Drum, 58 Pa. St. 9; State v. Bodekee, 34 Iowa 520; State v. Tyre (Del.), 67 Atl. 199; State v. Abbott (W. Va.), 62 S. E. 693.

⁴⁹ Talbert v. State, 121 Ala. 33, 25 So. 690.

⁵⁰ Shepperd v. State, 94 Ala. 102, 10 So. 663.

⁵¹ United States v. Newton, 52 Fed. 275, 290. In State v. Talmadge, 107 Mo. 543, 551, 17 S. W. 990, the court said in charging the jury: "If you have a reasonable doubt of the defendant's guilt you must acquit him,

but a doubt, to authorize an acquittal, must be a substantial doubt, arising from the insufficiency of evidence and not a mere possibility of innocence," and "a reasonable doubt is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge." So in Cross v. State, 132 Ind. 65, 31 N. E. 473, the subject is thus discussed: "A doubt produced by undue sensibility in the mind of the juror, in view of the consequences of his verdict, is not a reasonable doubt; and a juror is not allowed to create sources or material for doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts, differing from that established by the evidence. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. When a circumstance is of doubtful character in its bearings, you are to give the accused the benefit of the doubt. If, however, all the facts established necessarily lead the mind to the conclusion that the defendant is guilty, though there be a bare possibility, merely, not supported by some good reason therefor, that he is innocent, you should find him guilty. A juror's duty to the state, to so-

§ 13. Precaution to be employed in defining reasonable doubt.—
The danger of confusing the minds of the jurors in attempting to

ciety, and to himself is equally sacred to hold for conviction if he has an abiding satisfaction of defendant's guilt; and if, after deliberation, no juror is possessed of any good reason to doubt the defendant's guilt, it is the duty of the jury to convict."

"The court instructs the jury as matter of law that in considering the case the jury are not to go beyond the evidence to hunt up doubts nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of "not guilty." If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." *Spies v. People*, 122 Ill. 1, 8, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320n. See also, *Painter v. People*, 147 Ill. 444, 35 N. E. 64; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346.

In *State v. Reed*, 62 Me. 129, on p. 143, the court says: "There is no exact mathematical test by which we may certainly know whether a doubt, entertained in any case, is reasonable or otherwise. What would be reasonable to one person might be far otherwise to another. Therefore, no certain line, as upon a plan, can be drawn, that shall be recognized by

every one as the dividing line between the mere skeptical doubt and that which has the sanction of reason. Hence, whatever explanation may be given of the phrase, its meaning practically must depend very largely upon the character of the mind of the person acting. Lexicographers tell us that reasonable is that which is 'agreeable or conformable to reason.' The doubt, therefore, which conforms to the reason of the person examining, is to him a reasonable doubt. If it does not so conform, to him it is unreasonable, and will not be entertained. We must assume that the jurors are reasonable men, and as such they must be addressed. When told that, in order to convict, the proof must remove every reasonable doubt of guilt from their minds, whatever the form of words used, if any heed is given to the instruction, the result must be that each individual juror will understand it and act according to the dictates of his own reason; and if, tried by that test, the doubt is reasonable, conviction must fall. Otherwise it would follow."

"A reasonable doubt is not such a doubt as any man may start by questioning for the sake of a doubt, nor a doubt surmised without foundation in the facts or testimony. It is such a doubt only as a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of importance, prevents the jury from coming to a conclusion in which their minds rest satisfied. If so using the mind, and considering all the evidence produced, it leads to a conclusion which

define words seemingly so plain as "reasonable doubt," has prompted some judges to refuse to attempt any definition.⁵² Any explanation which may be given is apt to be couched in language more intricate and harder to be understood than the original phrase, and to be little more than a judicial paraphrase of the original expression. By such subtle and scholastic definitions as have been given in many of the cases the minds of the jurors,

satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact, it is the duty of the jury so to declare the fact by their verdict. It is possible always to question any conclusion derived from testimony. Such questioning is not a reasonable doubt, but the circumstances, if the case is one of circumstantial evidence, must so concur that no well-established fact or circumstance which is capable of controlling the case should go counter to the conclusions sought to be reached or which are to be reached. If all the circumstances concur in one result, it is for the jury to say whether those circumstances are sufficient to establish that result, or whether there is a failure to cover probabilities of the case so as to make it reasonably certain that the fact has been made out." *Commonwealth v. Costley*, 118 Mass. 1, 16.

For other cases in which reasonable doubt has been defined, see: *State v. Kearley*, 26 Kan. 77, 87; *State v. Witt*, 34 Kan. 488, 490, 8 Pac. 769; *State v. Buckley*, 40 Conn. 246; *Commonwealth v. Leonard*, 140 Mass. 473, 480, 4 N. E. 96, 54 Am. 485; *Parker v. State*, 136 Ind. 284, 35 N. E. 1105; *Oneil v. State*, 48 Ga. 66; *McKleroy v. State*, 77 Ala. 95; *People v. Johnson*, 140 N. Y. 350, 35 N. E. 604; *Commonwealth v. Tuttle*, 12 Cush. (Mass.) 502, 505; *Padfield*

v. People, 146 Ill. 660, 35 N. E. 469; *State v. Dineen*, 10 Minn. 407, 417; *Hudelson v. State*, 94 Ind. 426, 430, 48 Am. 171; *Sullivan v. State*, 52 Ind. 309, 311; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481; *State v. Padillia*, 42 Cal. 535; *State v. Vansant*, 80 Mo. 67; *Dunn v. People*, 109 Ill. 635; *State v. Pierce*, 65 Iowa 85, 89, 21 N. W. 195; *State v. Hayden*, 45 Iowa 11, 17; *Minich v. People*, 8 Colo. 440, 454, 9 Pac. 4; *James v. State*, 45 Miss. 572, 575; *Polin v. State*, 14 Neb. 540, 547, 16 N. W. 898; *State v. Oscar*, 7 Jones (N. Car.) 305, 307; *Ray v. State*, 50 Ala. 104; *State v. Rounds*, 76 Me. 123, 125; *McGuire v. People*, 44 Mich. 286, 289, 6 N. W. 669, 38 Am. 265; *People v. Finley*, 38 Mich. 482, 485, 6 N. W. 669; *Mixon v. State*, 55 Miss. 525, 527.

⁵² "The term reasonable doubt is almost incapable of any definition which will add much to what the words themselves imply. In fact it is easier to state what it is not, than to state what it is; and it may be doubted whether any attempt to define it will not be more likely to confuse than to enlighten a juror. A man is the best judge of his own feelings, and he knows for himself whether he doubts better than any one can tell him." *State v. Sauer*, 38 Minn. 438, 439, 38 N. W. 355.

unused to threading such devious intellectual mazes, have been confused and bewildered. They receive the erroneous impression that after entering the jury box their intellectual processes are no longer to be regulated by the ordinary rules employed by them in their every-day affairs, but by some new system whose principles they must receive from the lips of the court. In other words they receive the impression that "the verdict is not to be the result of the natural impression which the evidence has made upon their minds, but of the operation of some artificial and altogether new rules, which the law has created for them to apply in reaching it."⁵³

§ 14. Doctrine of reasonable doubt applicable to misdemeanors as well as to felonies.—The rule now under consideration is applicable in all criminal cases, *i. e.*, in misdemeanors as well as felonies.⁵⁴ But it should be noted that the rule does not mean that the jury must be convinced beyond a reasonable doubt of the truth of every proposition of fact alleged in the case against the accused. The rule does not permit one or more facts, however material in constituting the crime, to be selected out of the mass of facts in evidence and require the jury to be convinced of them beyond a reasonable doubt. If, therefore, the court has instructed the jury accurately as to the true rule of reasonable doubt, it cannot be required to subdivide its instruction and charge separately as to each of the elements composing the crime.⁵⁵

It has been held according to the majority of the decisions that to warrant a conviction upon circumstantial evidence alone each fact relied upon and necessary to the proof of the guilt of the accused need not be proved beyond a reasonable doubt. No particular fact or class of facts should be considered alone, but all the facts and circumstances must be considered together; and if those which are proved, in the opinion of the jury, taken together are sufficient to satisfy the minds of the jurors beyond a reason-

⁵³ Thompson on Trials, § 2463.

⁵⁴ Vandeventer v. State, 38 Neb. 592, 57 N. W. 397; Stewart v. State, 44 Ind. 237; Sowder v. Commonwealth, 8 Bush (Ky.) 432; Wasden v. State, 18 Ga. 264; Commonwealth

v. Liquors, 115 Mass. 142, 145, 105 Mass. 595; Fuller v. State, 12 Ohio St. 433, 436; 1 Bishop Cr. Proc. 1093; State v. Hicks, 125 N. Car. 636, 34 S. E. 247.

⁵⁵ Walker v. People, 88 N. Y. 81.

able doubt that the accused is guilty, they should not acquit because they believe that some particular fact, taken alone and not in connection with all the circumstances, is not proved beyond a reasonable doubt.⁵⁶

According to other authorities it has been held that where the proof of certain facts is necessary to the guilt of the accused he should be acquitted if the jury entertain a reasonable doubt as to the proof of any of these facts.⁵⁷

§ 15. Reasonable doubt in the mind of one juror.—The proposition that the jury must be convinced of the guilt of the prisoner beyond a reasonable doubt does not require an instruction that a reasonable doubt must be entertained by or arise in the mind of every juror,⁵⁸ and that an acquittal is not warranted unless a reasonable doubt is entertained by all of them.⁵⁹ On the other hand, every one of the jurors must be convinced of the prisoner's guilt in order that his conviction should be sustained. The law contemplates, and, indeed, demands, the concurrence of twelve minds in the conclusion that the accused is guilty, as indicted, before he can be convicted.⁶⁰ Each individual mind has to arrive at this conclusion separately, and each juror, having in view the oath he has taken, and his duty and responsibility thereunder, should have

⁵⁶ *Spraggins v. State*, 139 Ala. 93, 35 So. 1000; *Spraggins v. State*, 150 Ala. 89, 43 So. 214; *Murphy v. State*, 108 Ala. 10, 18 So. 557; *Allen v. State*, 60 Ala. 19; *Lackey v. State*, 67 Ark. 416, 55 S. W. 213; *Houser v. State*, 58 Ga. 78; *People v. Probst*, 237 Ill. 390, 86 N. E. 588; *Williams v. People*, 166 Ill. 132, 46 N. E. 749; *Davis v. People*, 114 Ill. 86, 29 N. E. 192; *Keating v. People*, 160 Ill. 480, 43 N. E. 724; *State v. Hayden*, 45 Iowa 11, 17; *State v. Schoenwald*, 31 Mo. 147, 155; *Morgan v. State*, 51 Neb. 672, 71 N. W. 788; *State v. Shines*, 125 N. Car. 730, 34 S. E. 552; *Kastner v. State*, 58 Neb. 767, 79 N. W. 713. *Contra*, *Kaufman v. State*, 49 Ind. 248, 251; *Rudy v. Common-*

wealth, 128 Pa. St. 500, 508, 18 Atl. 344.

⁵⁷ *People v. Ah Chung*, 54 Cal. 398; *State v. Blydenburgh*, 135 Iowa 264, 112 N. W. 634; *Gavin v. State*, 42 Fla. 332, 29 So. 405; *State v. Maher*, 25 Nev. 465, 62 Pac. 236; *Hodge v. Territory*, 12 Okla. 108, 69 Pac. 1077; *Mahaffey v. Territory*, 11 Okla. 213, 66 Pac. 342; *Harrison v. State*, 6 Tex. App. 42; *Black v. State*, 1 Tex. App. 368.

⁵⁸ *State v. Sloan*, 55 Iowa 217, 220, 7 N. W. 516.

⁵⁹ *Stitz v. State*, 104 Ind. 359, 362, 4 N. E. 145.

⁶⁰ *Jackson v. State*, 91 Wis. 253, 64 N. W. 838.

his own mind convinced beyond a reasonable doubt upon all the evidence before he can conscientiously consent to a verdict of guilty.⁶¹ But the fact that one, or even a majority, of the jurors are not convinced of the prisoner's guilt beyond a reasonable doubt, does not necessarily call for the acquittal of the prisoner, and the jury should be so instructed.⁶²

Under such circumstances the jury should report that an agreement is impossible. Each juror must act on his own judgment of the evidence, and while he may be aided by conferring with his fellow jurors in reaching the truth, he is not required to surrender his conviction of the guilt or innocence of the prisoner, or his reasonable doubt of guilt, remaining after a consideration of the evidence and consultation with his associates, merely to prevent a disagreement.⁶³

§ 16. Statutory changes in rules of evidence and in modes of procedure.—Many very numerous and important changes in the rules of evidence established at the common law have been made by statute, in the United States and England. The changes and modifications have, as a rule, been intended to afford the accused a better opportunity to clear himself of the charge against him. Thus, for example, he has been made a competent witness in his own behalf contrary to the rules of the common law.

⁶¹ *Castle v. State*, 75 Ind. 146; *State v. Witt*, 34 Kan. 488, 496, 8 Pac. 769; *State v. Sloan*, 55 Iowa 217, 220, 7 N. W. 516; *State v. Stewart*, 52 Iowa 284, 3 N. W. 99; *Rhodes v. State*, 128 Ind. 189, 194, 27 N. E. 866, 25 Am. St. 429; *Little v. People*, 157 Ill. 153, 42 N. E. 389.

⁶² *Boyd v. State*, 33 Fla. 316, 14 So. 836; *Davis v. State*, 51 Neb. 301, 70 N. W. 984.

⁶³ *State v. Hamilton*, 57 Iowa 596, 598, 11 N. W. 5; *State v. Witt*, 34 Kan. 488, 496, 8 Pac. 769. In *Castle v. State*, 75 Ind. 146, the court said: "The proposition embodied in the charge asked, that if any one of the jury, after having considered all the

evidence, and after having consulted with his fellow jurymen, entertains such reasonable doubt, the jury cannot in such case find the defendant guilty, is correct. See *Clem v. State*, 42 Ind. 420, 13 Am. 369. * * * Each juror should feel the responsibility resting on him as a member of the body, and should realize that his own mind must be convinced beyond a reasonable doubt before he can consent to a verdict of guilty." See also, *State v. Rogers*, 56 Kan. 362, 43 Pac. 256; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *Allen v. United States*, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. 154.

Laws which prescribe the evidential force of proof of certain facts by enacting that upon proof of such facts a given presumption shall arise, or which determine what facts shall constitute a *prima facie* case against the accused, casting the burden of proof upon him of disproving or rebutting the presumption, are not generally regarded as unconstitutional, even though they may destroy the presumption of innocence. An accused person has no vested right in this or any other presumption, or law of evidence, or procedure, that the law-making power cannot, within constitutional limits, deprive him of.⁶⁴ The existing rules of evidence may be changed at any time by legislative enactment. But the legislative power must be exercised within constitutional limitations so that no constitutional right or privilege of the accused is destroyed. He cannot be deprived of a fair and impartial trial by a jury of his peers and according to the law of the land. But the constitutional prohibition of *ex post facto* laws is not applicable to statutes which merely alter the method and details of the procedure of a criminal trial, even though the statute was passed after the crime was committed.⁶⁵ Thus, a statute which simply enlarges the class of persons who may be competent to testify against the accused is not an *ex post facto* law as regards crimes previously committed.⁶⁶

§ 16a. Number of witnesses required and positive and negative evidence.—In the common law in all cases of a criminal character, the testimony of one witness to facts constituting a crime and convicting the accused if uncontradicted is sufficient for a conviction, if it is credible and the jury believe it.⁶⁷

* *State v. Kyle*, 14 Wash. 702, 45 Pac. 147; *Commonwealth v. Smith*, 166 Mass. 370, 44 N. E. 503; *State v. Beach* (Ind.), 43 N. E. 949; *In re Wong Hane*, 108 Cal. 680, 41 Pac. 693, 49 Am. St. 138.

* *Stokes v. People*, 53 N. Y. 164, 174, 13 Am. 492.

* *Hopt v. Utah*, 110 U. S. 574, 589-590, 28 L. ed. 262, 4 Sup. Ct. 202. See, also, 25 Am. Law Reg. 680-695,

and *Cf. State v. Hoyt*, 47 Conn. 518, 532, 36 Am. 89n.

* 3 Bl. Comm. 370; *Foster Crown L.* 233; 2 Hawkins P. C., c. 25, § 131, c. 46, § 2; *Starkie Ev.* 857; *Lipsev v. People*, 227 Ill. 364, 81 N. E. 348; *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492; *McLain v. Commonwealth*, 99 Pa. St. 86; *Commonwealth v. Pioso*, 18 Lanc. L. Rev. (Pa.) 185; *State v. Kane*, 1 McCord (S. Car.) 482.

In England, by statute, certain exceptions to the rule were created. These exceptions depended upon the nature of the crime and the principal reason for creating them was either that the crime was of such a character that of necessity two witnesses were required to prove it, as in the case of perjury, or for the protection of the accused against his political enemies as in the case of treason.

A statute that provides that no person shall be convicted of any crime punishable by death, without the testimony of two witnesses or its equivalent, does not require the testimony of two living witnesses.

It is enough that the testimony in the minds of the jury is equivalent to that of two witnesses. It is not necessary that two witnesses shall testify to every important fact, but it is sufficient for two or more witnesses each to testify to different parts of the same transaction or to different circumstances surrounding the case, because such evidence tends directly to show the guilt of the accused. In other words, the evidence is sufficient if the proof being given by two or more witnesses taken as a whole convinces the jury of the guilt of the prisoner beyond a reasonable doubt.⁶⁸

So it may be said, that the jury in a criminal as in a civil case, are not bound to believe that side of the case which produces the larger number of witnesses. Thus, where a witness for the prosecution testifies positively and substantially to the facts constituting the crime, it is not error for the jury to believe him and to convict, though all his evidence was directly contradicted by two witnesses.⁶⁹

For it is a general rule, that as between witnesses whom the jury may determine are of equal credibility, a witness who testifies to the affirmative of a proposition is entitled to be believed rather than a witness who testifies to the negative of a proposition. For illustration, it is more likely that a witness who, being present when an assault and battery take place, testifies that he saw a blow struck is speaking the truth than one who, being present at the same time, testifies that he did not see the blow

⁶⁸ State v. Smith, 49 Conn. 376; ⁶⁹ White v. State (Tex. Cr. App.), State v. Washelesky (Conn.), 70 Atl. 50 S. W. 1015.

struck, assuming, of course, that both the witnesses are disinterested persons and have no motive to deceive.

This, however, is not a rule of law, and an instruction which directs the jury to believe affirmative evidence rather than negative evidence, regardless of the character, or of the motive of the witnesses, or of the surrounding circumstances, is erroneous.⁷⁰

The rule is wholly for the guidance of the jury according to the particular facts, and they must take into consideration with it, all the circumstances of the case and the character, motives and demeanor of the witnesses. Its basis is simply the well-recognized fact that a witness who testifies negatively may have forgotten what actually occurred in his presence, or his observation may have been so imperfect, or his mind so inattentive that he did not see what took place. On the other hand, the witness who testifies affirmatively that something did happen and that he saw it, if he be otherwise credible, should be believed, because it is impossible to remember what never happened.⁷¹

The rule does not apply where two witnesses with equal opportunity for knowledge contradict each other as to the existence or non-existence of a fact.^{71a}

Again, evidence is not necessarily to be accepted as true by the jury because it is not directly contradicted or expressly impeached by an attack on the character of the witness, or by his cross-examination.⁷²

The jury have the same right to employ their common sense and judgment in weighing the testimony of an uncontradicted witness as they have in determining the credibility of uncontradicted statements made to them in their ordinary every-day affairs.

If the testimony of the witness is inherently improbable so that a fair-minded and reasonable man would disbelieve it, the jury may disregard it, though the witness is not directly contradicted. His credit may be impeached by the facts he relates as completely as by adverse testimony. His credibility may be destroyed by the improbability of his own testimony, and the jury have a right to

⁷⁰ *State v. Dean*, 71 Wis. 678, 38 N. Starkie Ev. 867; *Wills Circ. Ev.* 224. W. 341; *Hunter v. State*, 4 Ga. App. 761, 62 S. E. 466.

^{71a} *Phillips v. State*, 1 Ga. App. 687, 57 S. E. 1079.

⁷² *McReynolds v. State*, 4 Tex. App. 327; *State v. Hawkins*, 23 Wash. 289, 63 Pac. 258; *Best Prin. Ev.* 280; *Commonwealth v. Loewe*, 162 Mass. 518, 39 N. E. 192; *People v. Duncan*, 104 Mich. 460, 62 N. W. 556.

believe that a witness lies and reject all his testimony from the omissions of relevant facts which occur in his story and from the improbable things he testifies to.⁷³

In Georgia, it has been held reversible error to instruct on the comparative weight of positive or negative evidence where there is no negative evidence.⁷⁴ And in that state the court has ruled that such an instruction should not be given where there are two witnesses who having equal facilities for seeing and hearing a thing about which they testify directly contradict each other.⁷⁵

⁷³ *Quock Ting v. United States*, 140 U. S. 417, 35 L. ed. 501, 11 S. Ct. 733, 851; *United States v. Candler*, 65 Fed. 308.

⁷⁴ *Peak v. State* (Ga. App.), 62 S. E. 665.

⁷⁵ *Hunter v. State*, 4 Ga. App. 761, 62 S. E. 466; *Skinner v. State*, 108 Ga. 747, 32 S. E. 844. In England, a difference has been made between civil and criminal evidence. Thus, by statutes, 1 Edward VI, c. 12, and 5 & 6 Edward VI, c. 11, two witnesses were required to convict in high treason and petty treason unless the accused confessed. The same rule was applied to counterfeiting by statute P. & M., c. 10. This was followed and enforced in subsequent statutes. Under these statutes a confession of the person taken out of court before a magistrate or other person having competent authority to take it and proved by two witnesses was sufficient to convict. By statute 7 William III, it was also declared that both witnesses must testify to the same overt act of treason and no evidence was admitted to prove any overt act not laid in the indictment. Blackstone says that in almost every other accusation one positive witness is sufficient. In case of indictment for perjury, at the common law, the

testimony of one witness was not sufficient to convict because here is only one oath against another. This last observation may also be the basis of the requirement of two witnesses in treason, for the oath of allegiance by the accused might in theory be regarded as the testimony of a witness. The principal reason, however, was to secure the subject and to protect him in his life and liberty against his political enemies who might endeavor to compass his destruction by securing his indictment for treason. And Blackstone further adds that all presumptive, *i. e.*, circumstantial evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape, than that one innocent man shall suffer. Sir Matthew Hale, in 2 Hale P. C. 290, lays down two rules, the first of which is never to convict a man for stealing the goods of a person unknown merely because he will give no account of how he came by them unless an actual felony be proven in such case; and second, never to convict any person of murder or manslaughter until at least the body be found dead. The former rule is still recognized to be good law, but the latter rule, stated in its ancient strictness, has been and is repeatedly departed from.

CHAPTER II.

PRESUMPTIONS AND BURDEN OF PROOF.

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| § 17. The presumption of innocence
—General rule. | 22. Burden of proof and presumption of innocence distinguished. |
| 18. The presumption of innocence accompanies the accused until a verdict is rendered. | 23. Burden of proof—General rule casting it upon prosecution. |
| 19. Presumption of chastity of female, of continuance of life, etc., conflicting with the presumption of innocence. | 24. Burden of proving a negative—Facts peculiarly within knowledge of party alleging them. |
| 20. Presumptions from infancy. | 24a. Constitutionality of statutes regulating the burden of proof. |
| 21. Certain facts which the courts are presumed to know. | |

§ 17. **The presumption of innocence—General rule.**—It is a cardinal and important rule of the law of evidence that the defendant in a criminal trial, however degraded or debased he may be, and no matter what may be the enormity of the crime charged against him, must always be presumed innocent of the crime for which he is indicted until his guilt is proved beyond a reasonable doubt.¹

¹ *People v. Graney*, 91 Mich. 646, 52 N. W. 66; *United States v. Heath*, 20 D. C. 272; *People v. Pallister*, 138 N. Y. 601, 605, 33 N. E. 741; *Gardner v. State*, 55 N. J. L. 17, 652, 26 Atl. 30; *People v. Coughlin*, 65 Mich. 704, 32 N. W. 905; *Castle v. State*, 75 Ind. 146, 147; *Farley v. State*, 127 Ind. 419, 421, 26 N. E. 808; *People v. Resh*, 107 Mich. 251, 65 N. W. 99; *Williams v. State*, 35 Tex. Cr. App. 606, 34 S. W. 943; *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *Rogers v. State*, 117 Ala. 192, 23 So. 82; *Waters v. State*, 117 Ala. 108, 22 So. 490;

Wilson v. State, 140 Ala. 43, 37 So. 93; *McArthur v. State*, 59 Ark. 431, 27 S. W. 628; *People v. Arlington*, 131 Cal. 231, 63 Pac. 347; *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297; *People v. Linares*, 142 Cal. 17, 75 Pac. 308; *State v. Smith*, 65 Conn. 283, 31 Atl. 206; *State v. Johns* (Del.), 65 Atl. 763; *Long v. State*, 42 Fla. 509, 28 So. 775; *Dorsey v. State*, 110 Ga. 331, 35 S. E. 651; *State v. Wolf* (Del.), 66 Atl. 739; *State v. Snyder*, 137 Iowa 600, 115 N. W. 225; *Tweedy v. State*, 5 Iowa 433; *State v. Linhoff*, 121 Iowa 632, 97 N. W. 77;

Nothing need be proved nor is any evidence necessary as a basis for this presumption. The imputation of the innocence of the accused is rather a legal assumption of a fact than a presumption. The doctrine is based upon the well-recognized fact which the courts judicially notice that men generally obey the rules of the criminal law, and upon the impossibility of obtaining, and the consequent injustice of requiring, affirmative proof from the accused that he has done so in this particular case. This presumption is merely stating concisely the rule that any party, whether the state or a natural person desirous of redress for an injury, who seeks the aid of a court of justice, has the burden of proving the existence or non-existence of the facts he affirms or denies.

The presumption of innocence is always rebuttable.^{1a} As is elsewhere explained, the evidence which will conclusively rebut this presumption must be sufficient to convince the jury upon all

Schintz v. People, 178 Ill. 320, 52 N. E. 903; Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33n; Keeton v. Commonwealth, 32 Ky. L. 1164, 108 S. W. 315; Watkins v. Commonwealth, 123 Ky. 817, 97 S. W. 740, 29 Ky. L. 1273; Wilkerson v. Commonwealth, 25 Ky. L. 780, 76 S. W. 359; People v. Potter, 89 Mich. 353, 50 N. W. 994; People v. DeFore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. 863n; State v. Wilson, 130 Mo. App. 151, 108 S. W. 1086; Hemingway v. State, 68 Miss. 371, 8 So. 317; Thompson v. State, 83 Miss. 287, 35 So. 689; State v. Scheve, 65 Neb. 853, 93 N. W. 169, 59 L. R. A. 927; Morehead v. State, 34 Ohio St. 212; Huggins v. State, 42 Tex. Cr. App. 364, 60 S. W. 52; United States v. Richards, 149 Fed. 443. Note on presumption of innocence in *habeas corpus* proceeding, 22 L. R. A. 678; note on presumption that party intended natural consequences of acts, 11 L. R. A. 810; note on presumption and burden of proof as to violations of liquor law, 41 L.

R. A. 672; note on presumption as to burglary from possession of stolen property, 12 L. R. A. (N. S.) 200; note on presumption of malice from killing in prosecution for homicide, 4 L. R. A. (N. S.) 934; note on presumption as to voluntariness of subsequent confession, 18 L. R. A. (N. S.) 857; note on presumption as to character of confession, 18 L. R. A. (N. S.) 783; note on presumption of intent to defraud in false pretenses, 25 Am. St. Rep. 380; note on effect on presumption of probable cause for prosecution of fact that conviction was procured by fraud, perjury or other undue means, 15 L. R. A. (N. S.) 1143.

^{1a} The presumption of innocence is evidence in favor of the defendant in a criminal case and stands as his sufficient protection unless it has been overcome and removed by the evidence in the case, taken as a whole, proving his guilt beyond a reasonable doubt. United States v. Kenney, 90 Fed. 257.

the facts beyond a reasonable doubt that the accused is guilty of the crime charged against him.²

The state need not, however, prove that it is impossible for the crime to have been perpetrated by any other person than the accused,³ that no one else had an opportunity to commit it or that it might not possibly have been the act of some one else.⁴

§ 18. The presumption of innocence accompanies the accused until a verdict is rendered.—The presumption of innocence does not cease when the jury retires. It accompanies the accused through the trial down to and until the jury reach a verdict of guilty,⁵ and it is their duty if possible to reconcile the facts proven with this presumption.⁶

It is reversible error for the court to refuse so to charge,⁷ or to refuse a request for a separate instruction upon the presumption of innocence, though it does instruct fully and correctly upon the necessity for proof of the defendant's guilt beyond a reasonable doubt.⁸

If the court instructs the jury correctly upon the presumption of innocence, and the doctrine of reasonable doubt, a further instruction that the state must show facts which are not only consistent with the guilt of the accused, but inconsistent with any other rational hypothesis, may, according to some of the cases, be properly refused.⁹

² §§ 9-16.

³ Commonwealth v. Leach, 160 Mass. 542, 36 N. E. 471, 472.

⁴ Houser v. State, 58 Ga. 78, 81.

⁵ People v. Macard, 73 Mich. 15, 26, 40 N. W. 784; State v. Krug, 12 Wash. 288, 41 Pac. 126; People v. McNamara, 94 Cal. 509, 515, 29 Pac. 953; Edwards v. State, 69 Neb. 386, 95 N. W. 1038; Neilson v. State, 146 Ala. 683, 40 So. 221; State v. Samuels (Del.), 67 Atl. 164; Gow v. Bingham, 57 Misc. (N. Y.) 66, 107 N. Y. S. 1011.

⁶ Castle v. State, 75 Ind. 146, 147; Aszman v. State, 123 Ind. 347, 361, 24 N. E. 123, 8 L. R. A. 33n; Farley

v. State, 127 Ind. 419, 421, 26 N. E. 898; Vanhouser v. State, 52 Tex. Cr. App. 572, 108 S. W. 386; Thompson v. State, 83 Miss. 287, 35 So. 689; Burton v. Commonwealth, 108 Va. 892, 62 S. E. 376.

⁷ State v. Gonce, 79 Mo. 600, 602; People v. Potter, 89 Mich. 353, 354, 50 N. W. 994; Reeves v. State, 29 Fla. 527, 10 So. 901, 905.

⁸ People v. Van Houter, 38 Hun (N. Y.) 168, 173; Stokes v. People, 53 N. Y. 164, 183, 13 Am. 492. *Contra*, People v. Osstrander, 110 Mich. 60, 67 N. W. 1079; State v. Heinze, 2 Mo. App. 1314.

⁹ Reed v. State, 54 Ark. 621, 16 S.

It was at one time held that the law presumes that the relations existing between husband and wife are amicable, and that such friendly relations continue during the existence of the marital connection, unless the contrary is shown affirmatively. In a prosecution for wife murder, where the incriminatory evidence is wholly circumstantial, the defendant is entitled to the benefit of this presumption as well as to the advantage accruing from the presumption of innocence, and the prosecution must rebut both.¹⁰ This appears to be no longer the law.¹¹

§ 19. Presumption of chastity of female, of continuance of life, etc., conflicting with the presumption of innocence.—It often happens from the nature of the crime that the presumption that the accused is innocent encounters or is opposed by a presumption of innocence invoked, or existing, in behalf of some other person. So, in prosecutions for seduction, or for slander in imputing unchastity to a female, the rebuttable presumption that all women are chaste has sometimes, but rarely, been permitted to overcome the presumption of innocence. In other words, the state has been absolved from proving as a part of its case the female's chastity.¹²

But it should be particularly noted that the presumption of innocence, though popularly attributed to every person, so that it is said, "that every person is presumed innocent until proved guilty," is restricted in its legal sense and application to the defendant in a criminal trial. It is to be used as a weapon of defense by the prisoner, not as a means of assault upon him to procure his conviction, when proof of some fact necessary to show his guilt is lacking.

W. 819, 820, 821; *Williamson v. State*, 30 Tex. App. 330, 17 S. W. 722. *Cf. contra*, *Lancaster v. State*, 91 Tenn. 267, 18 S. W. 777; *State v. Moxley*, 102 Mo. 374, 388, 14 S. W. 969, 15 S. W. 556; *People v. Cunningham*, 6 Park. Cr. Rep. (N. Y.) 398; *Turner v. State*, 102 Ind. 425, 427, 1 N. E. 869; *Anderson v. State*, 104 Ind. 467, 473, 4 N. E. 63, 5 N. E. 711.

¹⁰ *State v. Soper*, 148 Mo. 217, 49 S. W. 1007; *Hawes v. State*, 88 Ala. 37, 7 So. 302.

¹¹ See *Slocum v. People*, 90 Ill. 274, 280; *Kerr v. United States*, 7 Ind. Terr. 486, 104 S. W. 809; *Wilhite v. State*, 84 Ark. 67, 104 S. W. 531. *Contra*, *State v. McDaniel*, 84 N. Car. 803, 806.

¹² *State v. Moxley*, 102 Mo. 374,

So, though the decisions are not harmonious, the better and more reasonable view is that the law will not countenance any presumption, which by overcoming the presumption of innocence will cast the burden of proving his innocence upon the defendant. Hence, where presumptions apparently conflict the law will recognize the presumption of innocence alone and will impose no restriction on its operation, but will apply it to the whole scope of the charge against the accused and to every fact essential to the crime.¹³

A man is presumed to be alive until his death is shown,¹⁴ or until a counter presumption of his death arises from evidence that he has been absent and has not been heard from for a considerable period, by those who would naturally have heard from him if he were alive. But the presumption of the continuance of life must give way before that of innocence.¹⁵

§ 20. **Presumptions from infancy.**—An infant under the age of seven years is conclusively presumed to be *doli incapax*. Between that age and the age of fourteen the absence of criminal intent or guilty knowledge will be presumed; though in this case the presumption is rebuttable by proving circumstances from which, despite his youth, intent may be inferred. Hence, if the jury are convinced on all the evidence and beyond a reasonable doubt that the infant between the ages of seven and fourteen understood the nature and consequences of his act, and that it was done with deliberation and legal intent, they may convict him of a capital crime or other felony.¹⁶

¹³ State v. McDaniel, 84 N. Car. 803, 806; McArthur v. State, 59 Ark. 431, 27 S. W. 628; Persons v. State, 90 Tenn. 291, 295, 16 S. W. 726; Zabriskie v. State, 43 N. J. L. 640, 39 Am. 610; Oliver v. Commonwealth, 101 Pa. St. 215, 218, 47 Am. 704. Cf. *contra*, Dunlop v. United States, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. 375; State v. Shean, 32 Iowa 88; Slocum v. People, 90 Ill. 274, 280; Wilson v. State, 73 Ala. 527, 534, and *post*, § 393. There is no presumption against death by sui-

cide, when the body of a man is found whose death by violence is not questioned, as against the presumption of innocence. Persons v. State, 90 Tenn. 291, 295, 16 S. W. 726.

¹⁴ Underhill on Evid., § 233.

¹⁵ Cameron v. State, 14 Ala. 546, 48 Am. Dec. 1111; People v. Feilen, 58 Cal. 218, 41 Am. 258; Reg. v. Willshire, L. R. 6 Q. B. D. 366.

¹⁶ Commonwealth v. Mead, 10 Allen (Mass.) 396, 398; State v. Learnard, 41 Vt. 585, 589; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494n; State v.

The evidence to rebut the presumption of criminal incapacity in the case of a child between the ages of seven and fourteen years must be strong and clear, and prove his capacity to commit crime beyond all reasonable doubt;¹⁷ though direct proof of malice is not necessary.¹⁸ The state must not only show the history and character of accused and the degree of his intelligence but facts showing that he knew that the offense charged was criminal and would subject him to punishment.¹⁹ All presumptions in favor of infancy cease when the child is older than fourteen, for above that age he will be presumed to be capable, mentally and physically, of committing any crime.²⁰

§ 21. **Certain facts which the courts are presumed to know.**—The general rules regulating and indicating those facts which the courts will judicially notice are equally applicable to the processes of proving facts in civil and criminal cases. These rules have been very frequently formulated in statutes which should be consulted in order to ascertain their precise effect and operation. Elsewhere in this work the subject of judicial notice will be found referred to in connection with the facts of which no proof is required.²¹

Goin, 9 Humph. (Tenn.) 175, 176, 177; Willet v. Commonwealth, 13 Bush (Ky.) 230, 232; People v. Randolph, 2 Park. Cr. Rep. (N. Y.) 174.

¹⁷ 4 Bl. Com. 24; State v. Tice, 90 Mo. 112, 2 S. W. 269; State v. Learnard, 41 Vt. 585; Angelo v. People, 96 Ill. 209, 212, 36 Am. 132.

¹⁸ What evidence will be required depends wholly upon the circumstances of each case, as the education and intelligence of the child, his moral character and training and the nature of the crime, its attendant circumstances and the motives which prompted it.

¹⁹ Binkley v. State, 51 Tex. Cr. App. 54, 100 S. W. 780.

²⁰ 1 Hale P. C. 20; Irby v. State, 32 Ga. 496, 498; State v. Di Guglielmo (Del.), 55 Atl. 350; State v. Goin, 9 Humph. (Tenn.) 175, 176; McDaniel

v. State, 5 Tex. App. 475; People v. Kendall, 25 Wend. (N. Y.) 399; Rex v. Sutton, 3 Adol. & E. 597; Hill v. State, 63 Ga. 578, 582, 36 Am. 120. See § 403, *post*.

²¹ The subject of judicial notice is treated *in extenso* in Chapter XVIII Underhill on Evidence. A few instances of facts which have been judicially noticed in criminal cases are here given. The names of the judges, Kennedy v. Commonwealth, 78 Ky. 447, 454; the names of the court officers, State v. Campbell, 210 Mo. 202, 109 S. W. 706; and the terms of the courts. Kennedy v. Commonwealth, 78 Ky. 447, 454; Dorman v. State, 56 Ind. 454, 456; Rodgers v. State, 50 Ala. 102, 103; State v. Green, 52 S. Car. 520, 30 S. E. 683. The records of the court. State v. Bowen, 16 Kan. 475, 477.

Where the number of grand jurors depends upon the population of the county, the grand jurors and the court will take ju-

Judicial notice may be taken that the sheriff is the legal keeper of the jail of the county of which he is sheriff, and in that capacity is the custodian of all prisoners confined therein. *Ex parte Bargagliotti*, 6 Cal. App. 333, 92 Pac. 96. The power of municipal corporations to elect officials. *Gallagher v. State*, 10 Tex. App. 469, 471. That certain well-known liquors, as lager beer, wine and whiskey, are intoxicating, and that there is malt in beer. *Briffitt v. State*, 58 Wis. 39, 41-45, 16 N. W. 39, 46 Am. 621; *State v. Goyette*, 11 R. I. 592; *Rau v. People*, 63 N. Y. 277; *Waller v. State*, 38 Ark. 656, 660; *Cripe v. State*, 4 Ga. App. 832, 62 S. E. 567; (lager beer) *Tompkins v. State*, 2 Ga. App. 639, 58 S. E. 1111; *Fears v. State*, 125 Ga. 740, 54 S. E. 661; *State v. Carmody*, 50 Ore. 1, 91 Pac. 446, 1081, 12 L. R. A. (N. S.) 828; *Nussbaumer v. State*, 54 Fla. 87, 44 So. 712; that whiskey is a spirituous or distilled liquor, *State v. York*, 74 N. H. 125, 65 Atl. 685; *O'Connell v. State* (Ga. App.), 62 S. E. 1007. Great public and historical events. *Williams v. State*, 67 Ga. 260, 262. Facts of geography, particularly of territorial subdivisions established by law. *Moore v. State*, 126 Ga. 414, 55 S. E. 327; *State v. Thompson*, 85 Me. 189, 194, 27 Atl. 97; *State v. Wagner*, 61 Me. 178; *People v. Brooks*, 101 Mich. 98, 101, 59 N. W. 444; *Forehand v. State*, 53 Ark. 46, 13 S. W. 728; *People v. Wood*, 131 N. Y. 617, 30 N. E. 243; *State v. Dunwell*, 3 R. I. 127; *United States v. Beebe*, 2 Dak. 292, 293, 11 N. W.

505; *State v. Reader*, 60 Iowa 527, 15 N. W. 423; *People v. Suppiger*, 103 Ill. 434. The court will take judicial notice of the boundaries of the state and of the county, that a designated county is in the state, and a designated town in the county. *Reed v. Territory* (Okla. App.), 98 Pac. 583; *State v. Burns*, 48 Mo. 438; *State v. Pennington*, 124 Mo. 388, 391, 27 S. W. 1106; *Commonwealth v. Desmond*, 103 Mass. 445; *State v. Fishel* (Iowa), 118 N. W. 763; *Commonwealth v. Wheeler*, 162 Mass. 429, 431, 38 N. E. 1115; *State v. Dunwell*, 3 R. I. 127; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *Moye v. State*, 65 Ga. 754; *Huston v. People*, 53 Ill. App. 501, 502; *People v. Etting*, 99 Cal. 577, 579, 34 Pac. 237; *State v. Farley*, 87 Iowa 22, 53 N. W. 1089; *People v. Curley*, 99 Mich. 238, 58 N. W. 68. Also of the boundaries of counties. *Fuller v. Territory* (Okla. App.), 99 Pac. 1098. Crimes committed within a military post or fort are beyond the jurisdiction of state courts. *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 1065, 28 Am. St. 922; *Wills v. State*, 3 Heisk. (Tenn.) 141, 148.

In a prosecution for an unlawful sale of liquor, the court will take judicial notice that the county where the sale was charged to have been made was a prohibition county. *Irby v. State*, 91 Miss. 542, 44 So. 801. The courts will take notice of general state elections, but not of special elections. *Gay v. Eugene* (Ore.), 100 Pac. 306.

dicial notice of the census in determining whether the grand jury is properly constituted.²²

Judicial notice will be taken of the fact that a city is by statute a city of the second class where it has been made such by a proclamation of the state executive.²³

The courts will take judicial notice of the contents of the journals of the legislature far enough to determine whether an act published was actually passed and is constitutional.²⁴

²² *State v. Braskamp*, 87 Iowa 588, 590, 591, 54 N. W. 532.

²³ *State v. Ricksicker*, 73 Kan. 495, 85 Pac. 547. As regards public streets and squares, it may be said that though a court may take judicial notice that the public place is located in a city or town in the county, it is not compelled to do. The safer plan is to prove the location of the street or square in the city in which the venue is laid. *Dougherty v. People*, 118 Ill. 160, 8 N. E. 673; *Evans v. State*, 17 Fla. 192; *Commonwealth v. Ackland*, 107 Mass. 211.

²⁴ *McDonald v. State*, 80 Wis. 407, 411, 50 N. W. 185; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

The facts which the courts will notice judicially, and which therefore need neither be alleged in the indictment, nor proved at the trial, may be thus concisely summarized:

The true signification of all English words and phrases and abbreviations in common use (*McDonald v. State*, 55 Fla. 134, 46 So. 176) and of all legal expressions. *United States v. Heinze*, 161 Fed. 425; *State v. Nipert*, 74 Kan. 371, 86 Pac. 478; *Sims v. State*, 1 Ga. App. 776, 57 S. E. 1029 (meaning of the words "craps" as a game with dice and that "quarter" means twenty-five cents).

The statutory and common law and generally whatever is established by law. Courts are bound to take no-

tice of every public statute, and the facts they recite or state, including the time at which they take effect, though that time depends on the result of a popular vote, to be declared by proclamation issued by the secretary of State. *Farmer v. Salisbury*, 77 Vt. 161, 59 Atl. 201.

Public and private official acts of the legislative, executive and judicial departments of the state and of the United States. *State v. Tully*, 31 Mont. 365, 78 Pac. 760; *Prather v. United States*, 9 App. D. C. 82.

The seals of all the courts of the state and of the United States.

The accession to office and the official signatures and seals of the principal officers of government in the legislative, executive and judicial departments of the state and of the United States.

The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.

The seals of courts of admiralty and maritime jurisdiction and of notaries public.

The laws of nature, the measure of time, the value and nature of the circulating medium, and the geographical divisions and the facts of political history. That the sale of liquors is prohibited by law in a particular county. *Bass v. State*, 1 Ga. App. 728, 790, 57 S. E. 1054.

So also, the appellate courts will judicially notice the fact of a prior reversal, and indeed all prior proceedings in the record such as the verdict on a demurrer to the plea of former jeopardy.²⁵

The appellate courts, however, will not take notice in deciding one case of the record of another case. The latter record must be made part of the case on appeal.²⁶

Generally, the higher courts, such as the supreme court and the courts of appellate jurisdiction, will not take notice of the existence of municipal ordinances.²⁷

But the municipal courts will usually take judicial notice of city ordinances.²⁸

Thus, where an appeal is from a conviction of violating a municipal ordinance a court having appellate jurisdiction, will, on a trial *de novo*, notice judicially all facts which would have been noticed by the lower court.²⁹ The court will take judicial notice of the meaning of scientific and medical terms, such as "anatomy," etc. Nevertheless, standard medical works and other publications defining such words may be consulted by the court.³⁰

§ 22. Burden of proof and presumption of innocence distinguished.

—The principle that the accused is innocent until the jury has pronounced him guilty upon all the evidence, and the rule that regulates the burden of proof must be clearly distinguished. The former is a rule of substantive law, existing before any evidence is offered and accompanying the accused throughout the trial down to the moment of his conviction. But the burden of proof, designed mainly as a rule of procedure, confers only a temporary

²⁵ *McNish v. State*, 47 Fla. 69, 36 So. 176; *McGuire v. State*, 76 Miss. 504, 25 So. 495.

²⁶ *McNish v. State*, 47 Fla. 69, 36 So. 176.

²⁷ *Gardner v. State*, 80 Ark. 264, 97 S. W. 48; *Tarkio v. Loyd*, 179 Mo. 600, 78 S. W. 797; *Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354.

²⁸ *Steiner v. State*, 78 Neb. 147, 110 N. W. 723.

²⁹ *Steiner v. State*, 78 Neb. 147, 110 N. W. 723.

³⁰ This rule was applied in the

prosecution for practicing medicines without a license. *State v. Wilhite*, 132 Iowa 226, 109 N. W. 730. Judicial notice will be taken that vaccination is commonly believed to be a safe and valuable means of preventing the spread of smallpox, and that this belief is supported by high medical authority. *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. 358, *aff'g Commonwealth v. Pear*, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935.

benefit upon him. Under the burden of proof the prosecution is compelled in the first instance to make out a *prima facie* case proving the essential facts embraced in the criminal transaction alleged, including the intent. If this is done, and the accused offers no evidence, the case as made out by the state must go to the jury. They are to consider it, but only in connection with the presumption of innocence to which the accused is always entitled, though he may have introduced no evidence whatever. In thus complying with the requirement that it shall sustain the burden of proof, the state must produce such evidence as will overcome the presumption of innocence and convince the jury of the guilt of the accused beyond a reasonable doubt. After the state has introduced all the proof which it regards as sufficient to convict the prisoner, he may meet the case thus made out against him in three different ways: First. He may plead not guilty generally. By this plea he puts in issue all the allegations of the indictment. He denies the truth of all the evidence which may be offered against him. Second. He may deny the truth of some particular ingredient in the criminal transaction, as shown by the state, as when he pleads an *alibi*, or, admitting the doing of the act charged, denies the presence of a malicious intent, or alleges that he was *non compos mentis* at the date of the alleged crime and is, therefore, not responsible for what he did. Third. He may put in a defense not traversing the allegations of the indictment, but involving some matters or facts which are entirely separate, distinct from, and independent of the original transaction set forth therein. Thus, for example, he may plead that the court has no jurisdiction of the charge, or he may plead that he had a statutory license to do what he did, or he may claim that he has been already tried and acquitted or convicted of the same crime. We will first consider a case where the accused pleads not guilty merely and traverses the allegations of the indictment.

§ 23. Burden of proof—General rule casting it upon prosecution.—

The general rule stated broadly, as laid down by the cases, is that the burden of proof and the obligation to convince the jury of the prisoner's guilt beyond a reasonable doubt as to all facts and circumstances essential to the guilt of the accused, including the criminal intent, are upon the prosecution throughout the

trial.^{80a} There is no shifting of the burden of proof during the trial.⁸¹

The making out of a *prima facie* case does not shift the burden of proof to the defendant but it remains with the prosecution until the verdict is reached.

This rule is clearly applicable in every case where the defendant by pleading "not guilty" alone, and without qualification, stands upon a negative allegation, and does not rely upon any facts which are separate and distinct from, or independent of, the original transaction set forth in the indictment. By such a plea the prisoner restricts himself to denying and disproving the facts

^{80a} Note on burden of proof as to insanity, 76 Am. St. Rep. 92, 97; note on burden of proof in prosecution for false pretenses, 25 Am. St. Rep. 385; note on freedom from fault by defendant in homicide, who began conflict, 45 L. R. A. 706; note on burden of proof as to alibi, 41 L. R. A. 530, 541; note on burden and measure of proof of alibi, 41 L. R. A. 530; note on burden of proof that confession was voluntary, 6 Am. St. Rep. 244, 245. See Elliott Ev., § 2706.

⁸¹ State v. Conway, 56 Kan. 682, 44 Pac. 627; State v. Harvey, 131 Mo. 339, 32 S. W. 1110; State v. Lowry, 42 W. Va. 205, 24 S. E. 561; People v. Coughlin, 65 Mich. 704, 705, 32 N. W. 905; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Walker v. People, 88 N. Y. 81, 88; O'Connell v. People, 87 N. Y. 377, 380, 41 Am. 379; Gravely v. State, 38 Neb. 871, 873, 57 N. W. 751; Holmes v. State, 100 Ala. 80, 84, 14 So. 864; Jones v. State, 51 Ohio St. 331, 38 N. E. 79; State v. Hirsch, 45 Mo. 429, 431; People v. Plath, 100 N. Y. 590, 592, 3 N. E. 790, 53 Am. 236; People v. Curtis, 97 Mich. 489, 490, 56 N. W. 925; People v. McWhorter, 93 Mich. 641, 643, 644, 53 N. W. 780; Burger

v. State, 34 Neb. 397, 400, 51 N. W. 1027; Bishop v. State, 62 Miss. 289; Hansford v. State (Miss.), 11 So. 106; Slade v. State, 29 Tex. App. 381, 392, 393, 16 S. W. 253; People v. Elliott, 80 Cal. 296, 22 Pac. 207; Neilson v. State, 146 Ala. 683, 40 So. 221; State v. Samuels (Del.), 67 Atl. 164. "In every criminal case the burden is throughout upon the prosecution. Whatever course the defense deems it prudent to take, in order to explain suspicious circumstances or remove doubts, it is incumbent on the prosecution to show, under all the circumstances, as a part of their case, unless admitted or shown by the defense, that there is no innocent theory possible, which will, without violation of reason, accord with the facts. So, in a case of alleged poisoning, where the symptoms and appearances during the last illness become controlling in determining whether death was from poison or disease, the charge is not made out unless the state negative everything but poison as the cause of death. This it can do only by showing that the combined symptoms and the absolutely certain facts with which they are associated are inconsistent with

involved in the original transaction upon which the charge is based, including, of course, all the accompanying circumstances.³²

The defendant is entitled to the benefit of the presumption of innocence before he introduces any evidence. Hence, though he offers no evidence, the court has no legal power to direct a verdict, but the *prima facie* case against him must be submitted to the jury. They must take into consideration the presumption of innocence, and should not convict unless the state has sustained the burden of proof. But when the defendant pleads any substantive, distinct and independent matter as a defense, either as justification or excuse or as an exemption from criminal liability, which upon its face does not necessarily constitute an element of the transaction with which he is charged, and which is wholly disconnected from the offense, it has been said that the burden of proving such defense devolves upon him.³³ The accused must prove the independent exculpatory facts upon which he relies, and

any other disease." *People v. Millard*, 53 Mich. 63, 18 N. W. 562. See, also, *Underhill on Evid.*, § 247.

³² For a full discussion of the question, see *Commonwealth v. McKie*, 1 Gray (Mass.) 61, 61 Am. Dec. 410. But the rule does not require an instruction that the burden of proof in every criminal case is on the state to prove all the allegations in the indictment. *Young v. State*, 149 Ala. 16, 43 So. 100.

³³ *State v. Rollins*, 113 N. Car. 722, 729, 734, 18 S. E. 394; *State v. Welsh*, 29 S. Car. 4, 7, 6 S. E. 894; *Robertson v. Commonwealth* (Va.), 22 S. E. 359, 362; *Myers v. Commonwealth*, 90 Va. 705, 706, 19 S. E. 881; *Cleveland v. State*, 86 Ala. 1, 10, 5 So. 426; *Commonwealth v. Eddy*, 7 Gray (Mass.) 583, 584; *United States v. Holmes*, 1 Cliff. (U. S.) 98, 117, 26 Fed. Cas. 15382; *Stitt v. State*, 91 Ala. 10, 8 So. 669, 24 Am. St. 853; *Day v. State*, 21 Tex. App. 213, 17 S. W. 262; *Stokes v. People*, 53 N. Y. 164, 13 Am. 492; *State v. Wingo*, 66

Mo. 181, 183, 186, 27 Am. 329; *State v. Johnson*, 91 Mo. 439, 443, 3 S. W. 868; *Weaver v. State*, 24 Ohio St. 584, 588, 589; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481; *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998; *Kriel v. Commonwealth*, 5 Bush (Ky.) 362; *Bergin v. State*, 31 Ohio St. 111, 115; *Rayburn v. State*, 69 Ark. 177, 63 S. W. 356; *People v. Boo Doo Hong*, 122 Cal. 606, 55 Pac. 402; *State v. Schweitzer*, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125; *State v. Kavanaugh*, 4 Pen. (Del.) 131, 53 Atl. 335; *Padgett v. State*, 40 Fla. 451, 24 So. 145; *Williams v. People*, 121 Ill. 84, 11 N. E. 881; *State v. Wright*, 134 Mo. 404, 35 S. W. 1145; *State v. Hickam*, 95 Mo. 322, 8 S. W. 252, 6 Am. St. 54; *State v. Davis*, 14 Nev. 439, 33 Am. 563; *People v. Riordan*, 117 N. Y. 71, 22 N. E. 455; *Commonwealth v. Zelt*, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602; *King v. State*, 91 Tenn. 617, 20 S. W. 169; *State v. McCaffrey*, 69 Vt. 85, 37 Atl. 234.

in this respect and to this extent, it is correct to say the burden lies on him. Notwithstanding this, if, after all the evidence is in, it is found that upon the whole case the prosecution has not sustained the burden of proof in convincing the jury of the prisoner's guilt beyond a reasonable doubt, he should be acquitted.

It may happen that the facts which sustain, or tend to sustain a defense of justification or excuse, shall come out during the examination of the witness for the prosecution. The defendant is entitled to the benefit of this for the rule that the burden of proof of an affirmative and independent defense is on the accused does not necessarily mean that he must prove it wholly by his testimony or that of his own witnesses. And no matter what the evidence may be showing justification or excuse, and whether it be strong or whether it be weak, or whether it shall proceed from the state's witnesses or from the witnesses for the accused, the accused is entitled, where there is any evidence sustaining an affirmative defense, to have it considered by the jury, with all the evidence in the case; and he is entitled to an instruction that though the burden is on him to prove an affirmative defense, yet upon all the evidence, the state must establish his guilt beyond a reasonable doubt.

§ 24. Burden of proving a negative—Facts peculiarly within knowledge of party alleging them.—The general rule is that the burden of proof is upon him who maintains the affirmative, for the reason that the affirmative is the most susceptible of direct proof. Hence the prosecution has the burden of proof as the indictment is composed of allegations of an affirmative character.

The difficulty lies mainly in applying the rule. That it is a real difficulty no one will hesitate to believe who has struggled through the bewildering jungle of contradictory and irreconcilable decisions endeavoring to find some common principle upon which they could be harmonized or at least rendered more intelligible. The main source of the confusion which has arisen has been the forgetfulness of the fact that there is no conceivable proposition of fact affirmative in its form which does not blend a negative with it, or in other words which does not imply the negation or denial of its opposite. Thus, for example, in a prosecution for rape the allegation that the defendant violated the prosecutrix by force or

fraud involves the negative allegation that she did not consent to the intercourse.

So a charge of larceny necessitates proof that the owner of the property stolen did not consent to the taking. The allegation that personal property was stolen is inseparable from the allegation that it was taken from the owner without his consent, and for the state to prove one necessarily requires that it shall prove the other. Hence the rule that the burden of proof is upon the prosecution because it has made affirmative allegations is not affected by the existence of the implied negatives in the original transaction. The prosecution is permitted and required to prove these negatives as a part of its case, and cannot shift the burden of proving their affirmative opposites upon the accused. And in criminal cases the presumption of innocence which attaches to the accused casts the burden of proving the guilt of the accused upon the state throughout. Hence if the non-existence of some fact, or the non-performance of some duty, is a constituent and essential element in the crime with which the accused is charged, the burden of proving this negative allegation of non-existence or non-performance is upon the state. Thus, under an indictment for selling goods not produced in the United States, the burden is on the state to show that the goods were foreign. But if a fact is peculiarly within the knowledge of the accused, as, for example, his own age when he pleads non-age as a defense,⁸⁴ or the fact that he has a license to carry on a prohibited business or to do a forbidden act, the burden of proof is on him as he has much better means of proving the negative fact alleged than the prosecution has of proving the contrary. The matter is peculiarly within his knowledge, and to require the state to prove the lack of a license is to require proof of a negative allegation.⁸⁵

⁸⁴ *Ellis v. State*, 30 Tex. App. 601, 18 S. W. 139; *State v. Arnold*, 13 Ired. (N. Car.) 184, 187.

⁸⁵ *Sharp v. State*, 17 Ga. 290; *Gen- ing v. State*, 1 McCord (S. Car.) 573, 574; *People v. Townsey*, 5 Denio (N. Y.) 70; *People v. Safford*, 5 Denio (N. Y.) 112; *Hodgman v. People*, 4 Denio (N. Y.) 235; *Con- yers v. State*, 50 Ga. 103, 106, 15 Am.

686; *Commonwealth v. Thurlow*, 24 Pick. (Mass.) 374, 381; *State v. Hirsch*, 45 Mo. 429; *Commonwealth v. Zelt*, 138 Pa. St. 615, 628, 21 Atl. 7, 11 L. R. A. 602; *State v. Wood- ward*, 34 Me. 293, 295; *Farrall v. State*, 32 Ala. 557; *State v. Wilson*, 39 Mo. App. 114, 115; *People v. Nyce*, 34 Hun (N. Y.) 298, 300; *People v. Maxwell*, 83 Hun (N. Y.) 157, 31 N.

§ 24a. Constitutionality of statutes regulating the burden of proof.

—In some states statutes have been passed which cast upon the accused the burden of proving certain particular and specific facts which may arise under the indictment. These statutes generally provide that a certain act of the accused when proved, shall be presumed to have been done with a criminal or illegal intent. Thus it has been provided that one accused of burglary, must prove the innocent character of his entrance on the premises.⁸⁶ And again, there are statutes which provide that the evidence of the sale or keeping of liquors shall be *prima facie* evidence that the sale or keeping was illegal.⁸⁷ These statutes by which the jury are bound to infer that some act which would otherwise be an innocent act is proof of guilt until the accused shall convince them his act was not criminal are constitutional.⁸⁸

Y. S. 564; State v. McGlynn, 34 N. H. 422; State v. Simons, 17 N. H. 83; State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; State v. Keggon, 55 N. H. 19, 20; Wheat v. State, 6 Mo. 455, 456; State v. Crow, 53 Kan. 662, 663, 37 Pac. 170; State v. Camden, 48 N. J. L. 89, 90. *Contra* by statute, Commonwealth v. Thurlow, 24 Pick. (Mass.) 374; Commonwealth v. Locke, 114 Mass. 288, 294; Mehan v. State, 7 Wis. 670. The same principle is applicable where several exceptions or qualifications exist by statute, and the accused alleges he is under one of them. Rex v. Turner, 5 Maule & Selw. 206, 211, 213; Hines v. State, 93 Ga. 187, 189, 18 S. E. 558; Commonwealth v. Zelt, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602; State v. Kriechbaum, 81 Iowa 633, 47 N. W. 872; State v. Hill, 46 La. Ann. 27, 49 Am. St. 316; Commonwealth v. Samuel, 2 Pick. (Mass.) 103. Thus, for example, a parent who is prosecuted for failing to send his child to school for the period prescribed in a truancy statute, has the

burden of showing he is within the exception of the statute. State v. McCaffrey, 69 Vt. 85, 37 Atl. 234. See as to a statute forbidding one not an employe in the discharge of his duty, riding on a train without the permission of conductor or engineer. Gains v. State, 149 Ala. 29, 43 So. 137, where it was held incumbent on the accused to prove he was an employe.

⁸⁶ State v. Wilson, 9 Wash. 218, 37 Pac. 424; State v. Anderson, 5 Wash. 350, 31 Pac. 969.

⁸⁷ State v. Higgins, 13 R. I. 330, 43 Am. St. 26.

⁸⁸ State v. Beach (Ind.), 43 N. E. 949; Santo v. State, 2 Iowa 165, 63 Am. Dec. 487; Commonwealth v. Minor, 88 Ky. 422, 11 S. W. 472, 10 Ky. L. 1008; Commonwealth v. Smith, 166 Mass. 370, 44 N. E. 503; State v. Altoffer, 3 Ohio Dec. 288, 2 Ohio N. P. 97; State v. Kyle, 14 Wash. 550, 45 Pac. 147. *Contra*, Wong Hane, *In re*, 108 Cal. 680, 41 Pac. 693, 49 Am. St. 138.

CHAPTER III.

EVIDENCE BEFORE THE GRAND JURY.

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| § 25. <i>Ex parte</i> character of evidence before the grand jury. | 27. The accused as a witness before the grand jury. |
| 26. Legal and proper evidence only receivable—Effect of basing indictment on incompetent evidence. | 28. Sufficiency of evidence before the grand jury. |
| | 29. Contempt by witnesses before the grand jury. |
| | 30. The indictment is not evidence. |

§ 25. *Ex parte* character of evidence before the grand jury.—The common law regarded the proceedings of grand jurors as absolutely *ex parte* in their character. This, it will be seen, must of necessity be the case, and for this reason the accused is not entitled, as of course, to appear before them either in person or by counsel.¹ It is, however, discretionary with the court, but never matter of right, to call the accused before the grand jury and, perhaps, under peculiar circumstances, to permit him to cross-examine the witnesses against him. The accused party has no right to submit any evidence. He cannot produce witnesses before the grand jury nor submit evidence in his own behalf, even with the permission of the state's attorney.² The office of the grand jury is to examine the foundation on which the charge is made by

¹The grand jury are, in the absence of statute, to hear evidence in support of the charge only. *Lung's Case*, 1 Conn. 428; *United States v. Palmer*, 2 Cranch C. C. (U. S.) 11, 27 Fed. Cas. 15989. They can not inquire into the insanity of the accused. That is matter of defense to be proved in his trial. *Reg. v. Hodges*, 8 C. & P. 195.

²*State v. Hamlin*, 47 Conn. 95, 105, 36 Am. 54; *United States v. Blodgett*,

35 Ga. 336, 342, Fed. Case 18312; *United States v. White*, 2 Wash. C. C. (U. S.) 29, 30, 28 Fed. Cas. 16685; *United States v. Edgerton*, 80 Fed. 374; *Respublica v. Shaffer*, 1 Dall. (U. S.) 236, 1 L. ed. 116; *United States v. Palmer*, 2 Cranch C. C. (U. S.) 11, 27 Fed. Cas. 15989; *United States v. Lawrence*, 4 Cranch C. C. (U. S.) 574, 26 Fed. Cas. 15576; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

the state and not that on which it is denied. This rule, though apparently working an injustice to an accused person, is actually calculated to inure to his benefit. For, if he were allowed to introduce witnesses and evidence in his own behalf and the grand jury were then to indict him on all the evidence and after argument of counsel, an indictment would partake of the nature of a verdict of guilty. It would, perhaps, raise such bias and presumption of guilt that all hope and expectation of impartiality in the traverse jurors would be at an end.

The seeming harshness of a rule that permits a presumably innocent and honorable man to be branded with an indictment on *ex parte* testimony which may, perhaps, prompted by malice or manufactured for the occasion, or which may be the result of a popular outburst of indignation against him and which he may be perfectly able to disprove without any opportunity of meeting the charge in its inception, has caused the rule to be modified in some jurisdictions. It is provided by statute in some states that the grand jury, though not always bound to hear exculpatory evidence, ought, as a matter of duty, to weigh all evidence submitted to them, and when they have reason to believe that they can procure other evidence which will explain away the charge, they should order it to be produced.

From the rules above set forth it follows that the fact that the accused during the inquiry by the grand jury, which resulted in his being indicted, was confined in the state's prison, had no notice of the proceedings against him, and, consequently had no opportunity to be present does not thereby invalidate the indictment.³

So the fact that the court permits the accused, before he is indicted to be brought handcuffed into the court-room in the presence of the grand jury, is not sufficient to invalidate the indictment since it may be presumed that this would have no influence on them as they may know that he is in jail and handcuffed even though they did not see him,⁴ and the knowledge of this fact is in any case not material.

§ 26. Legal and proper evidence only receivable—Effect of basing indictment on incompetent evidence.—The grand jury is bound to

³ State v. Wolcott, 21 Conn. 272.

⁴ Commonwealth v. Weber, 167 Pa. St. 153, 31 Atl. 481.

require the production of the most satisfactory and convincing evidence which the case permits.^{4a} The witnesses should be sworn⁵ and the prosecuting attorney should never, in justice and fairness, introduce evidence which he knows, or has good reason to believe, will be ruled out as incompetent at the trial.⁶ Many statutes exist expressly providing that grand juries shall receive legal evidence only. Sometimes it is enacted that the best evidence must be produced.⁷

For investigations before grand juries must be made in accordance with the well-established rules of evidence, and they must hear the best legal proofs of which the case admits. No evidence should be received by a grand jury which would not be admissible in a court upon the trial of the cause. And hearsay evidence upon questions before a grand jury is no more admissible than before the court.⁸

Though usually the witnesses should be produced and sworn before the grand jury, depositions, containing the evidence taken at the preliminary examination, may be received where the accused has had at the preliminary examination an opportunity to cross-examine though he may not have done so.⁹ As the accused has no right to cross-examine witnesses before the grand jury, it is not grounds for quashing an indictment that it was based solely on depositions.¹⁰ It should be remembered, however, that

^{4a} Note on incompetency of evidence before the grand jury, 28 L. R. A. 318; note on documentary evidence before the grand jury, 28 L. R. A. 320; note on use of depositions and affidavits before the grand jury, 28 L. R. A. 319; note on competency of evidence before the grand jury, confessions, admissions and refusal to testify, 28 L. R. A. 318; note on evidence of criminals before grand jury, 28 L. R. A. 319.

⁵ State v. Kilcrease, 6 S. Car. 444; United States v. Coolidge, 2 Gall. (U. S.) 364, 25 Fed. Cas. 14858. The oath must be administered by a legally appointed official, Joyner v. State, 78 Ala. 448, or by the foreman of the

grand jury, Bird v. State, 50 Ga. 585.

⁶ People v. Sellick, 4 N. Y. Cr. Rep. 329, 334; State v. Logan, 1 Nev. 509, 516.

⁷ Ky. Cr. Code, § 107; Comp. L. Nev., 1873, § 1831; Cal. Penal Code, § 919; Minn. St. at Large, 1873, § 108, page 1036; N. Y. Code Cr. Pro., § 256; People v. Brickner, 8 N. Y. Cr. Rep. 217, 221.

⁸ United States v. Reed, 2 Blatchf. (U. S.) 435, 27 Fed. Cas. 16134; United States v. Kilpatrick, 16 Fed. 765.

⁹ N. Y. Code Cr. Pro., § 255; Thompson and Merriam on Juries, § 641.

¹⁰ People v. Stuart, 4 Cal. 218, 225.

the testimony goes before the grand jury in the absence of the judge, and very often while the prosecuting officer is not in the grand jury room. Hence, to confine grand juries to the technical rules of evidence may be intolerable in practice.¹¹ As a general rule the fact that some incompetent evidence was received by the grand jury in connection with competent evidence, or an incompetent witness¹² examined, is not ground for quashing an indictment, if there is enough competent evidence, since these errors may be corrected on the trial.¹³

So an indictment is not void because it was found by the grand jury after hearing testimony from one of the grand jurors, since a grand jury may properly act upon the personal knowledge of any of its members.¹⁴

Many of the trial courts absolutely refuse to inquire into the question of the character, the insufficiency, or the incompetency of the evidence on which the indictment is based, regarding the finding of the indictment and its indorsement as conclusive of the legality, propriety and sufficiency of the evidence.¹⁵

But an indictment which plainly appears to the trial court to have no evidence to support it, except that which is wholly in-

¹¹ *State v. Wolcott*, 21 Conn. 272, 280; *State v. Boyd*, 2 Hill (S. Car.) 288, 289.

¹² "Whether witnesses are competent is often a very difficult question of law. To hold that if a grand jury happen to examine a single incompetent witness their finding will be vitiated, is taking extreme ground." Dillon, J., in *State v. Tucker*, 20 Iowa 508, 510.

¹³ *Commonwealth v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270; *State v. Fasset*, 16 Conn. 458, 471; *Bloomer v. State*, 3 Sneed (Tenn.) 66, 70; *Rex v. Marsh*, 6 Ad. & El. 236; *State v. M'Leod*, 1 Hawks (N. Car.) 344; *State v. Logan*, 1 Nev. 509, 516; *State v. Baker*, 20 Mo.

338; *Hope v. People*, 83 N. Y. 418, 423, 38 Am. 460.

¹⁴ *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. St. 468, 28 L. R. A. 318.

¹⁵ *Creek v. State*, 24 Ind. 151, 156; *Hammond v. State*, 74 Miss. 214, 21 So. 149; *State v. Shreve*, 137 Mo. 1, 38 S. W. 548; *People v. Sebring*, 66 Mich. 705, 707, 33 N. W. 808; *United States v. Reed*, 2 Blatchf. (U. S.) 435, 466, 27 Fed. Cas. 16134; *Low's Case*, 4 Greenl. (Me.) 439, 446, 16 Am. Dec. 271n; *Stewart v. State*, 24 Ind. 142, 145; *People v. Hulbut*, 4 Denio (N. Y.) 133, 135, 47 Am. Dec. 244; *Hope v. People*, 83 N. Y. 418, 38 Am. 460; *State v. Fowler*, 52 Iowa 103, 104, 2 N. W. 983; *People v. Naughton*, 7 Abb. Pr. N. S. (N. Y.) 421.

competent, must be set aside.¹⁶ Thus, an indictment which is based *wholly* on the evidence of the accused, who, in violation of his constitutional rights and privileges was compelled to testify against himself before the grand jury,¹⁷ or on the knowledge of a grand juror who was not sworn as a witness,¹⁸ or partly on evidence given by the wife of the accused,¹⁹ which is incompetent because confidential or privileged, or upon the evidence of a physician of communications by his patient to him which came under the rule of statutory privilege,²⁰ is invalid.²¹

An indictment cannot stand unless it is based on evidence which, at some time or another, has been considered by the grand jury which finds the indictment. The grand jury may, without re-examining witnesses, find one indictment as a substitute for another previously found.²² But an indictment which has been quashed, or on which a *nol. pros.* has been entered, is not alone evidence enough to support a new indictment.²³

As a general rule, a grand jury should hear no other evidence than that adduced by the prosecution, but they are sworn "to in-

¹⁶ *Sparrenberger v. State*, 53 Ala. 481, 486, 25 Am. 643; *People v. Restenblatt*, 1 Abb. Pr. (N. Y.) 268, 272; *United States v. Farrington*, 5 Fed. 343; *State v. Logan*, 1 Nev. 509, 516; *United States v. Coolidge*, 2 Gall. (U. S.) 364, 25 Fed. Cas. 14858; *Commonwealth v. Knapp*, 9 Pick. (Mass.) 496, 498, 20 Am. Dec. 491; *People v. Briggs*, 60 How. Pr. (N. Y.) 17, 30; *Royce v. Territory*, 5 Okla. 61, 47 Pac. 1083; *State v. Grady*, 84 Mo. 220, aff'g 12 Mo. App. 361.

¹⁷ *State v. Froiseth*, 16 Minn. 296, 298; *United States v. Edgerton*, 80 Fed. 374; *post*, § 27.

¹⁸ *State v. Cain*, 1 Hawks. (N. Car.) 352, 353. Cf. *Commonwealth v. Hayden*, 163 Mass. 453, 455, 40 N. E. 846, 47 Am. St. 468, 28 L. R. A. 318n.

¹⁹ *People v. Briggs*, 60 How. Pr. (N. Y.) 17; *Commonwealth v. Woodcroft*, 17 Pa. Co. Ct. 554.

²⁰ *People v. Sellick*, 4 N. Y. Cr. Rep. 329.

²¹ In *United States v. Coolidge*, 2 Gall. (U. S.) 364, 25 Fed. Cas. 14858, the court said, setting aside an indictment based upon the evidence of a witness not sworn: "The grand jury is the great inquest between the government and the citizen. It is of the highest importance that this institution be preserved in its purity and no citizen tried until he has been regularly accused. Every indictment is subject to the control of the court, and this indictment having been found irregularly, and upon the mere unsworn statement of a witness, which was not evidence, a *cassetur* must be entered."

²² *Commonwealth v. Woods*, 10 Gray (Mass.) 477, 483; *Creek v. State*, 24 Ind. 151, 156.

²³ *Sparrenberger v. State*, 53 Ala. 481, 486, 25 Am. 643.

quire and true presentment make;" and if, in course of their inquiries, they have reason to believe that there is other evidence not presented and within reach, which would qualify or explain away the charge under investigation, it would be their duty to order such evidence to be produced.²⁴

§ 27. The accused as a witness before the grand jury.—Under the universal constitutional provisions that no one shall be compelled in any criminal matter to be a witness against himself, an indictment should be quashed when the defendant was compelled by subpoena to testify before the grand jury, and the indictment is founded on his testimony alone.²⁵ The fact that the accused voluntarily testifies before the grand jury affords no ground for setting aside the indictment. It must be shown, however, not only that his appearance was voluntary, but that he confessed his wrong-doing voluntarily and not inadvertently, or under the compulsion or constraint of his situation, or under the obligation of an oath.²⁶

The question arises, ought an indictment to be quashed on motion merely because the accused, being at that time not charged with any crime, happened to be one of several witnesses summoned and examined by the grand jury in investigating a crime?

If any person summoned fails to claim his privilege against answering incriminating or implicating questions, the mere fact that he has testified is not enough to invalidate an indictment against him, though based solely upon his testimony.²⁷ Nor will the fact that a suspected person has been required to give evidence in another matter be sufficient to set aside an indictment on the ground that he was compelled to testify against himself, unless

²⁴ *United States v. Kilpatrick*, 16 Fed. 765.

²⁵ *State v. Froiseth*, 16 Minn. 296, 298; *Boone v. People*, 148 Ill. 440, 449, 36 N. E. 99; *People v. Haines*, 1 N. Y. S. 55; *United States v. Edgerton*, 80 Fed. 374. This rule is applicable, though the accused was cautioned that he was under no obligation to answer and was not sworn. *People v. Singer*, 5 N. Y. Cr. 1-4, 18

Abb. N. Cas. (N. Y.) 96; *State v. Donelon*, 45 La. Ann. 744, 12 So. 922, 923.

²⁶ *People v. King*, 28 Cal. 265, 272; *United States v. Brown*, 1 Sawy. (U. S.) 531, 537, 24 Fed. Cas. 14671.

²⁷ *United States v. Brown*, 1 Sawy. (U. S.) 531, 24 Fed. Cas. 14671; *Boone v. People*, 148 Ill. 440, 36 N. E. 99.

it affirmatively appears that he was indicted wholly or in part on his own admissions.²⁸

§ 28. **Sufficiency of evidence before the grand jury.**—The early judges, prompted, doubtless, by a too great subserviency to the Crown, and by a disgraceful zeal for securing the punishment of those who were obnoxious to the royal power, did not require that the evidence presented to the grand jurors on which an indictment was based should be either copious or convincing. "If there be probable evidence, they ought to find the bill," says Hale,²⁹ "because it is but an accusation, and the trial follows." The better and more modern rule, as stated by Blackstone, is that "a grand jury ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes, and not to rest satisfied with remote probabilities."³⁰ In other words, the grand jury ought not to indict unless they are convinced that the accused is guilty and that the evidence before them is sufficient, if unexplained and uncontradicted, to convict him.³¹

§ 29. **Contempt by witnesses before the grand jury.**—The grand jury is a part of the court. Its session is a session of the court, and witnesses when summoned before it are amenable to punishment for contempt if they refuse to appear or on appearing refuse to testify.³² The grand jurors may direct their own officer to take

²⁸ Mackin v. People, 115 Ill. 312, 3 N. E. 222, 56 Am. 167; State v. Hawks, 56 Minn. 129, 139, 57 N. W. 455. Where co-defendants jointly indicted were examined by the grand jury prior to the indictment, no presumption exists that either was examined against himself. State v. Frizell, 111 N. Car. 722, 723, 16 S. E. 409.

²⁹ 2 Hale P. C. 157.

³⁰ 4 Bl. Com. 303.

³¹ *In re Grand Jury*, 2 Sawy. (U. S.) 667; 1 Chitty Cr. Law 318; People v. Hyler, 2 Park Cr. 570, 575; People v. Price, 53 Hun (N. Y.) 185, 6 N. Y. S. 833; People v. Baker, 10 How. Pr. (N. Y.) 567; People v. Vaughan, 42 N. Y. S. 959; State v. Addison, 2

S. Car. 356; State v. Fasset, 16 Conn. 458, 473; *In re Grand Jury*, 62 Fed. 840. And this is the statutory rule in many states, but the ancient rule that the court will not revise the judgment of the grand jury for the purpose of determining whether or not the finding was on sufficient evidence was upheld in United States v. Reed, 2 Blatchf. (U. S.) 435, 27 Fed. Cas. 16134; Raney v. Commonwealth, 2 Ky Law 62; State v. Lewis, 38 La. Ann. 680. Note on sufficiency of evidence before grand jury to sustain indictment, 28 L. R. A. 324.

³² Taylor, *In re*, 8 Misc. (N. Y.) 159, 28 N. Y. S. 500, 509; Commonwealth v. Crans, 3 Pa. L. J. 442, 453.

the witness before the judge in order that he may be punished if he remains contumacious, and the judicial sentence on the contempt, whether fine or imprisonment, is final and conclusive.⁸³

§ 30. The indictment is not evidence.—The indictment is read in the statement of the case of the prosecution. It does not when thus read have the weight and significance which attach to it if read in evidence. Its true and sole use is to charge the crime, and to inform the accused of the offense alleged against him. The indictment is not evidence and should not be read to or by the jurors either in the court-room or elsewhere. If the court shall permit this, and the indictment is thus placed in evidence without any limitation or any explanation of the purpose of its introduction, the jury may take it as an intimation from the court that the mere fact of the accused having been indicted is evidence, and that the indictment must be considered in determining his guilt.⁸⁴

⁸³ Taylor, *In re*, 8 Misc. (N. Y.) 159, self-incriminating questions before
28 N. Y. S. 500, 504; Lockwood v. the grand jury. State v. Lewis, 96
State, 1 Ind. 161; Ward v. State, 2 Iowa 286, 65 N. W. 295.
Mo. 120, 22 Am. Dec. 449; People v. ⁸⁴ State v. Hart, 66 Mo. 208, 215;
Kelly, 24 N. Y. 74; People v. Fancher, State v. Desroches, 48 La. Ann. 428,
2 Hun (N. Y.) 226. A witness is not 19 So. 250.
in contempt who refuses to answer

CHAPTER IV.

VARIANCE AND PROOF OF THE VENUE.

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| <p>§ 31. Proving the substance of the offense—What variances are material.</p> <p>32. Proof of essential particulars of persons, time and place.</p> <p>33. Variance in names—<i>Idem sonans</i>.</p> <p>34. Variance in proving species or genus of animals.</p> | <p>35. Proving the venue—Judicial notice of general geographical facts.</p> <p>36. The venue may be proved by circumstantial evidence—Proof beyond a reasonable doubt not required.</p> <p>37. Proof of venue in forgery and crimes committed in retirement.</p> |
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§ 31. Proving the substance of the offense—What variances are material.—The strict technical rules formerly governing this subject have been greatly relaxed, if not altogether abrogated, by statutory enactment or by the liberal spirit of the modern courts of criminal jurisdiction. In determining whether a variance is material, the question to be decided is, does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense?¹ If this be not so, then the variance is material, and the state, having failed to prove the crime, in substance as it is alleged, the acquittal of the accused should be directed.

Whether a greater strictness of proof is required in criminal than is necessary in civil proceedings in favor of life and liberty is a question upon which the cases differ.² But though the general rule is that the crime which is laid in the indictment must be

¹ Harris v. People, 64 N. Y. 148, 153, 154. Variance in proof of substance of charge, Elliott Ev., § 2714; variance in prosecution for gambling, Elliott Ev., § 3007.

² Beech's Case, 1 Leach Cr. L. 158; United States v. Porter, 3 Day (Conn.) 283, 286. *Contra*, 2 Russ. on Cr., § 588; Rosc. Cr. Ev. 73; United States v. Britton, 2 Mason (U. S.) 464, 468, 24 Fed. Cas. 14650; Walker v. State, 91 Ala. 76, 9 So. 87.

proved substantially as alleged, no variance will be material if the allegations of the indictment are separable and the substance of the crime is proven, though some immaterial averments remain unproved.³

And as a general rule any allegation which is not descriptive of the identity of the offense itself, that is, which does not mark it out as a crime and distinguish it from other crimes, or from actions which are not criminal, and which therefore may be omitted without affecting the criminality of the charge and without detriment to the indictment, is mere surplusage and need not be proved.⁴

§ 32. Proof of essential particulars of persons, time or place.—“The general rule is that all averments necessary to constitute the substantive offense must be proved. If there is any exception, it is from necessity, or great difficulty amounting to such necessity, as where one could not show the negative and where the other with perfect ease can show the affirmative.”⁵ All circumstances of person, place or thing, which are described in the indictment with extreme or unnecessary particularity, must be proven strictly, if, by reason of such a mode of pleading, the details are essential to enable the jury to perceive the identity of the thing or person proved with that alleged.⁶ Thus where one is indicted for stealing an animal which is described either by color, age or brand, these details become material, and a variance is fatal.⁷ The time and

³ In *Bork v. People*, 91 N. Y. 5, 13, the court says: “Where an offense may be committed by doing one of several things, the indictment may, in a single count, group them together, and charge the defendant with having committed them all, and a conviction may be had on proof of the commission of any one of those things without proof of the commission of the others.” See, also, *People v. Davis*, 56 N. Y. 95, 101.

⁴ *Commonwealth v. Rowell*, 146 Mass. 128, 130, 15 N. E. 154.

⁵ *Shaw, J.*, in *Commonwealth v. Thurlow*, 24 Pick. (Mass.) 374, 381.

⁶ *Sweat v. State*, 4 Tex. App. 617, 621.

⁷ *Coleman v. State*, 21 Tex. App. 520, 528, 2 S. W. 859; *State v. Jackson*, 30 Me. 29, 30; *Wiley v. State*, 74 Ga. 840; *Groom v. State*, 23 Tex. App. 82, 86, 87, 3 S. W. 668. When by a statute animals are distinguished according to species, proof of one species is a variance, if another is alleged. *State v. Buckles*, 26 Kan. 237; *Rex v. Cook*, 1 Leach Cr. L. 123; *State v. Godet*, 7 Ired. (N. Car.) 210, 211; *State v. Turley*, 3 Humph. (Tenn.) 323, 325. An allegation of stealing an animal is not sustained

place of the crime should be stated with certainty in the indictment, though it is not necessary to prove them precisely as stated, unless they are necessary ingredients in the crime.⁸ But it must always be alleged and proved that the crime was committed prior to the date⁹ of the indictment, within the period of limitation,¹⁰ and within the jurisdiction of the court.¹¹ When, however, time and place are material, as in a prosecution for selling liquor between specified dates, or on forbidden days,¹² or for transporting liquor between given places,¹³ the details of time and place must be proved precisely as alleged.

§ 33. **Variance in names—Idem sonans.**—A variance between the name of a person as alleged and as it is proved, whether it be the name of a person assaulted or killed, or of the person who owned the property which was the subject of the crime, has often been held fatal.¹⁴ A mere error in spelling, or the use of a nickname, is no variance. If the names be *idem sonans*, or, if sufficient evi-

by proof of the theft of a carcass. *Hunt v. State*, 55 Ala. 138; *State v. Jenkins*, 6 Jones (N. Car.) 19, 20.

⁸ Arch. Cr. Pl. 40, 41; *Crass v. State*, 30 Tex. App. 480, 17 S. W. 1096; *Blackwell v. State*, 30 Tex. App. 416, 418, 17 S. W. 1061; *People v. Emerson*, 7 N. Y. Cr. 97, 105, 6 N. Y. S. 274; *Commonwealth v. Harrington*, 3 Pick. (Mass.) 26; *People v. Stocking*, 50 Barb. (N. Y.) 573, 586; *People v. Jackson*, 111 N. Y. 362, 19 N. E. 54, 6 N. Y. Cr. 393, 399 (variance in time); *United States v. Matthews*, 68 Fed. 880; *Smith v. State*, 108 Ala. 1, 19 So. 306, 54 Am. St. 140; *Johnson v. State*, 13 Ind. App. 299; *Hans v. State*, 50 Neb. 150, 69 N. W. 838.

⁹ *Turner v. State*, 89 Ga. 424, 15 S. E. 488; *Commonwealth v. Graves*, 112 Mass. 282; *State v. Hughes*, 82 Mo. 86; *Hardy v. State* (Tex.), 44 S. W. 173.

¹⁰ *Weinert v. State*, 35 Fla. 229, 17 So. 570; *State v. Anderson*, 51 La.

Ann. 1181, 25 So. 990; *State v. Schuerman*, 70 Mo. App. 518; *State v. Carpenter*, 74 N. Car. 230.

¹¹ *Arcia v. State*, 28 Tex. App. 198, 12 S. W. 599; *State v. Dorr*, 82 Me. 212, 214, 19 Atl. 171; *State v. Bain*, 43 Kan. 638, 640, 23 Pac. 1070.

¹² *Commonwealth v. Purdy*, 146 Mass. 138, 139, 15 N. E. 364.

¹³ *State v. Libby*, 84 Me. 461, 464, 24 Atl. 940.

¹⁴ *Washington v. State*, 72 Ala. 272, 276; *Johnson v. State*, 111 Ala. 66, 20 So. 590; *Sullivan v. People*, 6 Colo. App. 458, 41 Pac. 840; *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611; *People v. Main*, 114 Cal. 632, 46 Pac. 612; *Commonwealth v. Morningstar*, 12 Pa. Co. Ct. 34; *Clements v. State*, 21 Tex. App. 258, 17 S. W. 156; *McGary v. People*, 45 N. Y. 153, 157; *Sykes v. People*, 132 Ill. 32, 45, 23 N. E. 391; *King v. State*, 44 Ind. 285, 286; *People v. Hughes*, 41 Cal. 234, 237; *Underwood v. State*, 72 Ala. 220, 222; *State v. Bell*, 63 N. Car. 99n.

dence is introduced to identify the person intended, the variance of name is immaterial and will be disregarded.¹⁵

Whether names are *idem sonans* is never a question of spelling, but of pronunciation determined largely by usage. If the names, though spelled differently, sound alike, the court may determine that they are *idem sonans* and instruct the jury to disregard the variance in spelling.¹⁶ But if they are not necessarily pronounced alike, the question, whether, being spelled differently, they are *idem sonans*, is for the jury.¹⁷

§ 34. Variance in proving species or genus of animals.—An indictment for stealing a cow,¹⁸ chickens,¹⁹ a sheep,²⁰ a horse,²¹ or a hog,²² will be sustained by proof of the larceny of any variety or sex of those animals. The generic name ought and in common

¹⁵ *Williams v. United States*, 3 App. D. C. 335; *Barnes v. People*, 18 Ill. 52, 53, 65 Am. Dec. 699; *State v. Humble*, 34 Mo. App. 343, 345-348; *Weitzel v. State*, 28 Tex. App. 523, 13 S. W. 864, 19 Am. St. 855; *Smurr v. State*, 88 Ind. 504, 506; *State v. Gordon*, 56 Kan. 64, 42 Pac. 346; *People v. Mullen*, 7 Cal. App. 547, 94 Pac. 867. Evidence of the name by which a person is known is not the best evidence as to his true name set forth in an indictment; but it is not hearsay, within the rule excluding hearsay evidence. *People v. Way*, 119 App. Div. (N. Y.) 344, 104 N. Y. S. 277, affirmed in 191 N. Y. 533, 84 N. E. 1117. See, as to the admissibility of such evidence, *Carter v. State*, 39 Tex. Cr. App. 345, 46 S. W. 236, 48 S. W. 508.

¹⁶ *State v. Havelly*, 21 Mo. 498.

¹⁷ *Commonwealth v. Donovan*, 13 Allen (Mass.) 571, 572; *Commonwealth v. Mehan*, 11 Gray (Mass.) 321, 323; *Lawrence v. State*, 59 Ala. 61; *Underwood v. State*, 72 Ala. 220, 222; *Commonwealth v. Warren*, 143 Mass. 568, 10 N. E. 178. For illustra-

tions, see *Faust v. United States*, 163 U. S. 452, 41 L. ed. 224, 16 Sup. Ct. 1112; *People v. James*, 110 Cal. 155, 42 Pac. 479; *Bennett v. State*, 62 Ark. 516, 36 S. W. 947; *State v. Garvin*, 48 S. Car. 258, 26 S. E. 570; *Henderson v. State*, 37 Tex. Cr. App. 79, 38 S. W. 617. "It matters not how the names are spelled, what their orthography. They are *idem sonans* within the meaning of the books, if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long established usage has by corruption or abbreviation made them identical in pronunciation." *Robson v. Thomas*, 55 Mo. 581; app'd in *State v. Jones*, 55 Minn. 329, 332, 56 N. W. 1068; *State v. Griffie*, 118 Mo. 188, 197, 23 S. W. 878.

¹⁸ *Parker v. State*, 39 Ala. 365, 366.

¹⁹ *State v. Bassett*, 34 La. Ann. 1108, 1110.

²⁰ *M'Cully's Case*, 2 Lew. C. C. 272.

²¹ *Davis v. State*, 23 Tex. App. 210, 4 S. W. 590.

²² *State v. Godet*, 7 Ired. (N. Car.) 210, 211.

speech does include every variety of the animal, whether produced naturally, as by age and sex, or artificially by cultivation, or occupation. Hence, the above rule would seem based on reason and common sense. It is repudiated by the English courts,²³ and by those criminal tribunals of this country whose conservatism has deterred them from cutting loose from technical rules, or inquiring into the reasonableness, or propriety of such rules.²⁴

§ 35. Proving the venue—Judicial notice of general geographical facts.—The indictment is not good unless it shows upon its face the venue of the crime, and that it was committed within the jurisdiction of the court. The venue is a jurisdictional fact and must always be proved by the state as a part of its case. That is to say, the state must prove that the crime alleged in the indictment was committed within the territorial jurisdiction of the court.²⁵ And usually the precise venue must be proved affirmatively and substantially, and a failure to do so is ground for a new trial.²⁶

If, however, the crime is shown to have been committed in, or

²³ 2 East P. C. 617.

²⁴ Hooker v. State, 4 Ohio 348, 351; Turley v. State, 3 Humph. (Tenn.) 323, 325.

²⁵ State v. McGinniss, 74 Mo. 245, 247; State v. Wacker, 16 Mo. App. 417, 421; Barnes v. State, 134 Ala. 36, 32 So. 670; Dentler v. State, 112 Ala. 70, 20 So. 592; Dyer v. State, 74 Ind. 594, 595; Harlan v. State, 134 Ind. 339, 341, 33 N. E. 1102; Stazey v. State, 58 Ind. 514; State v. Mills, 33 W. Va. 455, 457, 10 S. E. 808; State v. Hobbs, 37 W. Va. 812, 814, 17 S. E. 380; Randolph v. State, 100 Ala. 139, 141, 14 So. 792; Jones v. State, 58 Ark. 390, 396, 24 S. W. 1073; Frazier v. State, 56 Ark. 242, 244, 19 S. W. 838; Berry v. State, 92 Ga. 47, 48, 17 S. E. 1006; Thornell v. People, 11 Colo. 305, 17 Pac. 904; State v. Tosney, 26 Minn. 262, 3 N. W. 345; Thompson v. State,

51 Miss. 353; Williams v. State, 21 Tex. App. 256, 257, 17 S. W. 624; Ryan v. State, 22 Tex. App. 699, 703, 3 S. W. 547; Larkin v. People, 61 Barb. (N. Y.) 226; Yates v. State, 10 Yerg. (Tenn.) 549; Boykin v. State, 148 Ala. 608, 42 So. 999; Wilson v. State (Ga. App.), 64 S. E. 112; State v. First Nat. Bank, 3 S. Dak. 52, 51 N. W. 780; Weinberg v. People, 208 Ill. 15, 69 N. E. 936; Wooten v. State, 119 Ga. 745, 47 S. E. 193.

²⁶ The objection that the venue is not proved must be taken at the trial. State v. Hopkins, 94 Iowa 86, 62 N. W. 656; but will be presumed to be included in an exception to the verdict that it is against the law and without sufficient evidence to support it. Berry v. State, 92 Ga. 47, 48, 17 S. E. 1006; Futch v. State, 90 Ga. 472, 16 S. E. 102.

very near, a certain town, village, or other minor territorial subdivision, it is not necessary to prove that this minor division is in the county. And if it is proved to have been committed anywhere in a county, the latter need not be proved to be in the state. The jury, as a part of the court, are bound to take notice of general geographical facts.²⁷

§ 36. The venue may be proved by circumstantial evidence—Proof beyond a reasonable doubt not required.—The venue need not be proved by direct and positive evidence. It is sufficient if it may be reasonably inferred from the facts and circumstances which are proven and are involved in the criminal transaction. It is enough if it may be inferred from the circumstances by the jury that the crime was committed in the county alleged in the indictment.²⁸

²⁷ *Luck v. State*, 96 Ind. 16, 20; *Leslie v. State*, 35 Fla. 184, 17 So. 559; *People v. Breese*, 7 Cow. (N. Y.) 429; *Pickrel v. Commonwealth* (Ky.), 30 S. W. 617, 17 Ky. L. 120; *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *Lewis v. State* (Tex. Cr. App.), 24 S. W. 903; *People v. Curley*, 99 Mich. 238, 58 N. W. 68; *State v. Farley*, 87 Iowa 22, 53 N. W. 1089; *Sullivan v. People*, 114 Ill. 24, 28 N. E. 381; *State v. Burns*, 48 Mo. 438; *People v. Waller*, 70 Mich. 237, 239, 38 N. W. 261; *Waller v. People*, 209 Ill. 284, 70 N. E. 681; *Boykin v. State*, 148 Ala. 608, 42 So. 999; *Dupree v. State*, 148 Ala. 620, 42 So. 1004; *Reed v. Territory* (Okla.), 98 Pac. 583. A failure by the state to prove the venue may be cured by evidence introduced by the defendant from which it may be inferred. *Scott v. State*, 42 Ark. 73.

²⁸ *Tinney v. State*, 111 Ala. 74, 20 So. 597; *People v. Kamaunu*, 110 Cal. 609, 42 Pac. 1090; *State v. Roach*, 2 Mo. App. 1114; *Thornell v. People*, 11 Colo. 305, 17 Pac. 904; *Commonwealth v. Costley*, 118 Mass. 1, 9, 26;

People v. Manning, 48 Cal. 335; *Bland v. People*, 4 Ill. 364; *State v. Snyder*, 44 Mo. App. 429, 430; *State v. Burns*, 48 Mo. 438, 440; *State v. McGinniss*, 74 Mo. 245, 246; *Beavers v. State*, 58 Ind. 530, 537; *Hoffman v. State*, 12 Tex. App. 406, 407; *Dumas v. State*, 62 Ga. 58, 65; *Weinecke v. State*, 34 Neb. 14, 51 N. W. 307; *Wallis v. State*, 54 Ark. 611, 620, 16 S. W. 821; *Robson v. State*, 83 Ga. 166, 9 S. E. 610, 611; *State v. Small*, 26 Kan. 209; *State v. West*, 69 Mo. 401, 33 Am. 506; *Brooke v. People*, 23 Colo. 375, 48 Pac. 502; *Edwards v. State* (Ga.), 51 S. E. 505; *Smith v. State*, 2 Ga. App. 413, 58 S. E. 549; *Little v. State*, 3 Ga. App. 441, 60 S. E. 113; *Mill v. State*, 1 Ga. App. 134, 57 S. E. 969; *Warford v. People*, 43 Colo. 107, 96 Pac. 556; *State v. Brinte*, 4 Penn. (Del.) 551, 58 Atl. 258; *State v. Gil-luly*, 50 Wash. 1, 96 Pac. 512; *State v. Meyer*, 135 Iowa 507, 113 N. W. 322, 124 Am. St. 291n; *State v. Har-graves*, 188 Mo. 337, 87 S. W. 491; *Murphree v. State* (Tex. Cr. App.), 115 S. W. 1189, 1191; *Fuller v.*

The venue need not be proved beyond a reasonable doubt.²⁹ If the only rational conclusion from the facts in evidence is that the crime was committed in the county alleged, the proof is sufficient.³⁰

The venue may be proved by circumstantial evidence. It is not necessary that a witness expressly testifies that the crime was committed in the county as charged in the indictment. Such direct and positive testimony may be dispensed with.³¹

Territory (Okla.), 99 Pac. 1098; Walker v. State, 153 Ala. 31, 45 So. 640.

²⁹ Keeler v. State, 73 Neb. 441, 103 N. W. 64; Wylie v. State, 53 Tex. Cr. App. 182, 109 S. W. 186; State v. Burns, 48 Mo. 438, 440; Boggs v. State (Tex. Cr. App.), 25 S. W. 770; State v. Benson, 22 Kan. 471; Warrace v. State, 27 Fla. 362, 8 So. 748; Hoffman v. State, 12 Tex. App. 406, 407; Achterberg v. State, 8 Tex. App. 463; Wilson v. State, 62 Ark. 497, 36 S. W. 842, 54 Am. St. 303.

³⁰ State v. Sanders, 106 Mo. 188, 190, 17 S. W. 223; Weinecke v. State, 34 Neb. 14, 24, 51 N. W. 307; Abrigo v. State, 29 Tex. App. 143, 15 S. W. 408; Andrews v. State, 21 Fla. 598, 611; Commonwealth v. Costley, 118 Mass. 1, 27; People v. Smith, 121 Cal. 355, 53 Pac. 802. "The jury has a right to infer from the testimony before them whether it was done in the county. They know all the facts and the maxim *vicini vicinorum præsumentur scire* applies." Bryant v. State, 80 Ga. 272, 275, 4 S. E. 853; Wilson v. State, 62 Ark. 497, 36 S. W. 842, 54 Am. St. 303; Lewis v. State, 129 Ga. 731, 59 S. E. 782; Wilson v. State (Ga. App.), 64 S. E. 112; Howard v. State, 3 Ga. App. 659, 60 S. E. 328; Cooper v. State, 2 Ga. App. 730, 59 S. E. 20; State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969, 122 Am.

St. 479; Davis v. State, 134 Wis. 632, 115 N. W. 150; People v. Monroe, 138 Cal. 97, 70 Pac. 1072; Tolston v. State (Tex. Cr. App.), 42 S. W. 988; Vernon v. United States, 146 Fed. 121, 76 C. C. A. 547; Moore v. State, 130 Ga. 322, 60 S. E. 544; Smith v. State, 29 Fla. 408, 10 So. 89; Williams v. State, 168 Ind. 87, 79 N. E. 1079; Springer v. State, 121 Ga. 155, 48 S. E. 907; Stringfield v. State, 4 Ga. App. 842, 62 S. E. 569.

³¹ Bloom v. State, 68 Ark. 336, 58 S. W. 41; Wallis v. State, 54 Ark. 611, 16 S. W. 821; Brooke v. People, 23 Colo. 375, 48 Pac. 502; Robson v. State, 83 Ga. 166, 9 S. E. 610; Wilson v. State (Ga. App.), 64 S. E. 112; Dumas v. State, 62 Ga. 58; Harlan v. State, 134 Ind. 339, 33 N. E. 1102; State v. Thomas, 58 Kan. 805, 51 Pac. 228; Moore v. State, 55 Miss. 432; State v. Sanders, 106 Mo. 188, 17 S. W. 223; State v. Chamberlain, 89 Mo. 129, 1 S. W. 145; Hawkins v. State, 60 Neb. 380, 83 N. W. 198; Weinecke v. State, 34 Neb. 14, 51 N. W. 307; Harvey v. Territory, 11 Okla. 156, 65 Pac. 837; State v. Chaney, 9 Rich. (S. Car.) 438; State v. Gossett, 9 Rich. (S. Car.) 428; Tolston v. State (Tex. Cr. App.), 42 S. W. 988; Abrigo v. State, 29 Tex. App. 143, 15 S. W. 408; State v. Michel, 20 Wash. 162, 54 Pac. 995; Douglas v. State (Ark., 1909), 121 S. W. 923.

For it has been repeatedly held where there is no direct testimony showing the venue that if there are references in the evidence to streets, public buildings or other landmarks at or near the scene of the crime, which are either known to the members of the jury or which may probably be familiar to them, the jury may safely presume that the venue has been proved. For as a general rule, the court will take judicial notice of streets, public buildings or public places which are known or which may probably be known to the residents of a certain locality and will also take notice that these streets or public buildings and places are within the county.³² So, if there is direct evidence that a crime was committed in a certain city, village or town, the judicial notice which the court will take of geographical facts will usually be sufficient and stand in place of actual proof that the place mentioned was in the county charged in the indictment.³³

§ 37. Proof of venue in forgery and crimes done in retirement.—

That the venue shall be proved by circumstantial evidence is necessarily the case in respect to forgery and similar crimes, which are secretly planned and committed, out of sight of all but the accomplices of the criminal. Hence the venue of the crime of forging bank-notes or of uttering forged instruments may be correctly inferred by the jury from evidence that forged and coun-

³² *People v. McGregor*, 88 Cal. 140, 26 Pac. 97; *Sullivan v. People*, 114 Ill. 24, 28 N. E. 381; *Cluck v. State*, 40 Ind. 263; *Commonwealth v. Ackland*, 107 Mass. 211.

³³ *Duncan v. State*, 29 Fla. 439, 451, 10 So. 815; *Andrews v. State*, 21 Fla. 598, 611; *McCune v. State*, 42 Fla. 192, 27 So. 867, 89 Am. St. 225; *State v. Ruth*, 14 Mo. App. 226; *People v. McGregor*, 88 Cal. 140, 143, 145, 26 Pac. 97; *Cluck v. State*, 40 Ind. 263, 273; *Commonwealth v. Ackland*, 107 Mass. 211; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *State v. Kelly*, 123 Mo. App. 680, 101 S. W. 155; *State v. Kline*, 50 Ore. 426, 93 Pac. 237; *State v. Wheaton (Kan.)*, 99 Pac. 1132.

Richardson v. Commonwealth, 80 Va. 124; *Cooper v. State*, 106 Ga. 119, 32 S. E. 23; *State v. King*, 111 Mo. 576, 20 S. W. 299; *United States v. Richards*, 149 Fed. 443. The evidence of one uncontradicted and credible witness to the venue is sufficient. *Speight v. State*, 80 Ga. 512, 5 S. E. 506; *Laydon v. State*, 52 Ind. 459. Some cases hold, however, that the jury can not assume that the street or public place in which the evidence shows the crime was committed is within a town, city or county within the jurisdiction, but that this fact must appear from the proof. *Evans v. State*, 17 Fla. 192; *Dougherty v. People*, 118 Ill. 160, 8 N. E. 673.

terfeit notes and implements for their manufacture were found in the possession of the accused in the county as alleged,³⁴ or that he had always resided in the county and confessed the forgery there.³⁵

Though proof of the finding of a dead body in the county alleged is not, taken alone, sufficient proof of the venue, it is a circumstance to go to the jury to be considered by them with other evidence.³⁶ If a corpse is found in a river with the marks of mortal injuries on it in such a situation that from the evidence it is clear that it was not borne there by the current, but that it was thrown in the stream by the hand of man, the jury may infer the homicide was committed in the county where the corpse is found.³⁷

³⁴ *Spencer v. Commonwealth*, 2 Leigh (Va.) 751, 756, 757; *State v. Poindexter*, 23 W. Va. 805. *Contra*, *Commonwealth v. Fagan*, 12 Pa. Co. Ct. 613.

³⁵ *Johnson v. State*, 62 Ga. 299, 301; *Murphree v. State* (Tex. Cr. App.), 115 S. W. 1189, 1191. The court by Story, J., in *United States v. Britton*, 2 Mason (U. S.) 464, 470, 24 Fed. Cas. 14650, said: "If its existence in a forged state is not proved in any other place, it must, from the necessity of the case, be presumed to have been forged where its existence in such state is first made known."

* * * If the law were otherwise it would be almost impossible to convict any person of a forgery, for such acts are done in retirement and concealment, far from the sight of all persons but confederates in guilt." As to the venue in conspiracy, see *Dawson v. State*, 38 Tex. Cr. App. 9, 40 S. W. 731.

³⁶ *Beavers v. State*, 58 Ind. 530, 537; *Marion v. State*, 20 Neb. 233, 245, 57 Am. 825; *Lancaster v. State*, 91 Tenn. 267, 18 S. W. 777.

³⁷ *Commonwealth v. Costley*, 118 Mass. 1, 2, 6.

CHAPTER V.

PRIMARY EVIDENCE.

- § 38. Definition of primary evidence.
- 39. Primariness of witnesses—Proof of handwriting.
- 40. Evidence which is required to be in writing.
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- 41a. The necessity for showing loss or destruction of the writing.
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- 43. Writings whose existence and contents are in issue—Impeachment by contradictory writings.
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- 45. Exception in case of proving general results.
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- 47. Physical condition of personal property.
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- 54. Compelling accused to submit to inspection or to stand for identification.
- 55. Mode and effect of identifying evidence.
- 56. Identification of the voice.

§ 38. **Definition of primary evidence.**—Primary evidence may be defined as the highest or best evidence which, from the abstract nature of the facts to be proved, is procurable, and which, under circumstances of the particular case, affords the greatest certainty of the fact, that is, renders the probability of its existence most evident to the understanding. It is that evidence which does not indicate the existence of other evidence nearer the facts to be proved.¹

The rule requiring primary evidence of a fact refers most frequently to offers of oral evidence, to prove the contents of a writing, where the writing itself ought to be produced. Hence, usually, unless it is shown that the party claiming under the writing is unable to produce it after a diligent search, oral, or in fact any

¹ Anderson's Law Dictionary.

other evidence of its contents, will be rejected.² So where a letter, if produced, would be primary evidence of a relevant fact, a press copy, even though an exact chirographical reproduction, is inadmissible, except as secondary evidence and after the loss or the destruction of the original is shown.³

If a writing has been executed by all parties in several parts, or copies, each is primary evidence of the contents of the writing.⁴

A letter press copy of a letter found in the possession of and proved to be in the handwriting of a defendant may be received as original evidence to show the writer's state of mind without proof that the original was sent to the person to whom it was addressed.⁵

If a writing was executed in counterpart—that is, in duplicate, either part, though substantially the same as the other, but signed by one party only, is primary evidence only when offered against the party who signed it. Each of a number of copies made by printing, lithography, photography, or by any process which will secure exact uniformity, is primary evidence to prove the contents of any or of all the others. Though all are from a common original, none is primary evidence of that original.⁶ And where the loss of the original and of a press copy of a letter is proved, a copy of the press copy is admissible, where its correctness as a reproduction of the original letter is vouched for upon the oath of a witness having competent knowledge.⁷

§ 39. Primariness of witnesses—Proof of handwriting.—As the production of witnesses who will give the strongest, most credit-

² Underhill on Evid., §§ 30, 31. "Whether evidence is primary or secondary has reference to the nature of the case in the abstract, and not to the circumstances under which the party, in the particular cause on trial, may be placed. It is a distinction of law and not of fact; referring only to the quality and not to the strength of the proof. Evidence which carries on its face no indication that better remains behind is not secondary but primary." 1 Greenl. on Evid., § 84.

³ A letter-press copy of a designa-

tion of a person to take an oath as deputy was admitted to prove his authority where the original was lost in a prosecution for taking a false oath. *People v. Ellenbogen*, 186 N. Y. 603, 79 N. E. 1112, affirming 114 App. Div. (N. Y.) 182, 99 N. Y. S. 897.

⁴ *State v. Gurnee*, 14 Kan. 111, 120.

⁵ *United States v. Greene*, 146 Fed. 784.

⁶ *People v. Williams*, 64 Cal. 87, 27 Pac. 939.

⁷ *Winn v. Patterson*, 9 Pet. (U. S.) 663, 9 L. ed. 266.

able and convincing testimony is not required, no principle of law is violated by the introduction of faint or weak evidence, and the withholding of that which is more strong, cogent and convincing, if both are equally original. But it is a very natural inference, partaking somewhat of the character of a legal presumption, at least in the absence of explanatory circumstances, that a party who is withholding the best evidence of any fact in issue is prompted by a wrong motive which would be defeated by its production. When, therefore, evidence is produced that presupposes or suggests the existence of other evidence of the same facts of a more original character, that is to say, which is more immediate, and which lies closer to the material facts, the evidence introduced will be regarded as substitutionary, and, as such, will be rejected.

The rule requiring the production of primary evidence does not compel a choice between or among several witnesses, nor does it necessitate the calling of any particular witness among several who have knowledge of a given fact.⁸

So the testimony of a witness, claiming to be a minor, to his own age is primary evidence, even if his parents are living,⁹ while the oral evidence of a parent to the age of his child is also primary, the entry in a family Bible not being of necessity the best evidence.¹⁰

An exception is recognized in the case of subscribing witnesses as regards the proof of instruments which are by statute invalid unless witnessed. If a subscription by witnesses is not required by statute, the execution of the instrument may be shown by the evidence of any person who saw it signed, or who is familiar with the handwriting of a person who signed it, or otherwise, though it is in fact subscribed by witnesses. Hence, generally, in proving handwriting, the testimony of a witness acquainted with it is not secondary to that of the writer himself,¹¹ nor should the testimony

⁸ Whart. Cr. Ev., § 360; Commonwealth v. Pratt, 137 Mass. 98, 107; New England Monument Co. v. Johnson (Pa.), 22 Atl. 974, 29 W. N. C. (Pa.) 117.

⁹ State v. Cain, 9 W. Va. 559, 570; State v. Miller, 71 Kan. 200, 80 Pac. 51.

¹⁰ State v. Woods, 49 Kan. 237, 30 Pac. 520, 521; Dobson v. Cothran, 34 S. Car. 518, 13 S. E. 679; Whart. Ev., § 77.

¹¹ Commonwealth v. Pratt, 137 Mass. 98, 107. In Lefferts v. State, 49 N. J. L. 26, 27, 6 Atl. 521, the court said: "The testimony of the

of the former be excluded when offered because the testimony of the latter can be obtained.

§ 40. Evidence which is required to be in writing.—Oral evidence is inadmissible if the law required primary evidence in writing, or if the party to substantiate his claims must produce a writing. Judicial records, other public records, deeds of conveyance and contracts not to be performed within a year are required by statute to be in writing. Hence the fact of another indictment pending,¹² a prior verdict of acquittal or conviction,¹³ the proceedings and the testimony taken at a coroner's inquest, or at the preliminary examination,¹⁴ or before the grand jury, or a justice of the peace,¹⁵ or any body keeping a record of its actions, must be shown by the record or by a properly authenticated copy.¹⁶

§ 41. Statutory requirement as regards evidence of certain facts.—Where by statute any fact or transaction must be evidenced in

man who signed the documents * * * was not of a higher grade of evidence than the testimony of a man who had seen him make such signature, or who was acquainted with his writing and deposed to his opinion." See, also, Underhill on Evid., §§ 132, 139-141.

¹² *Saxon v. State*, 96 Ga. 739, 23 S. E. 116; *State v. McFarlain*, 42 La. Ann. 803, 806, 8 So. 600; *State v. Grayson*, 38 La. Ann. 788; *Huff v. State*, 104 Ga. 521, 30 S. E. 808; *Elliot v. State*, 1 Ga. App. 113, 57 S. E. 972; *Leftridge v. United States*, 6 Ind. Ter. 305, 97 S. W. 1018. On a trial for murder, to prove that deceased had been tried for homicide, record must be introduced as evidence. *State v. Andrews*, 73 S. Car. 257, 53 S. E. 423.

¹³ *Miller v. Commonwealth*, — Ky. —, 113 S. W. 518; *Von Vetsera, Ex parte*, 7 Cal. App. 136, 93 Pac. 1036. See § 195.

¹⁴ *Bell v. State* (Miss.), 38 So. 795; *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132; *Robinson v. State*, 87 Ind. 292, 293; *Epps v. State*, 102 Ind. 539, 546, 1 N. E. 491; *Sage v. State*, 127 Ind. 15, 26, 26 N. E. 667; *Leggett v. State*, 97 Ga. 426, 24 S. E. 165; *State v. Branham*, 13 S. Car. 389; *Wright v. State*, 50 Miss. 332, 335; *Cicero v. State*, 54 Ga. 156; *Oliver v. State*, 94 Ga. 83, 84, 85, 21 S. E. 125; *State v. Barrington*, 198 Mo. 23, 95 S. W. 235; *Campbell v. State*, 123 Ga. 533, 51 S. E. 644. The fact that a preliminary examination was had may be shown orally. *People v. Coffman*, 59 Mich. 1, 26 N. W. 207. As to proof of judicial records, see Underhill on Evid., §§ 146-149.

¹⁵ *State v. Ireland*, 89 Miss. 763, 42 So. 797.

¹⁶ For mode of proving naturalization, see Underhill on Evid., § 31.

writing, it is usually necessary to consult the statute to understand its scope and effect, or to ascertain the correct mode of proof and when secondary evidence will be received. Generally, where the statute requires that written proof shall be made, oral evidence is secondary and inadmissible if the writing is procurable.

But where either the state or the prisoner can show to the satisfaction of the court that the writing was executed and has been destroyed, or cannot be found after a reasonable search, its contents may be proved by secondary evidence.¹⁷ Thus the contents of the warrant, on which the accused was arrested,¹⁸ or of the indictment against him,¹⁹ may be shown by parol where the loss of the writing is proved.²⁰

In many states statutes exist which allow an instrument, duly acknowledged and recorded or registered, to be proved by a certified copy of the record, if the original instrument is not obtainable.²¹ Such a provision is of great benefit to one who, not being a party or privy to the writing, may never have had it in his possession, and hence may not be able to account for its absence by showing its loss or destruction. But the instrument itself is not made secondary evidence by a statute requiring record and allowing proof by a certified copy,²² nor can a party be excused from producing it when he can do so. For, unless the statute makes the copy equal in evidentiary value to the original, the copy is secondary evidence, and the absence of the original must be accounted for before the copy will be received.²³

§ 41a. The necessity for showing loss or destruction of the writing.

—The general rule that, before secondary evidence of the contents

¹⁷ *United States v. Reyburn*, 6 Pet. (U. S.) 352, 365, 8 L. ed. 424.

¹⁸ *Commonwealth v. Roark*, 8 Cush. (Mass.) 210.

¹⁹ *State v. Whitney*, 38 La. Ann. 579. See *Underhill on Evid.* 343, *ante*, § 30.

²⁰ A witness may not testify orally as to an offense charged in a warrant which he had himself issued. The warrant itself is the best evidence. *State v. Talbert*, 41 S. Car. 526, 529, 19 S. E. 852; *State v. Barrington*, 198

Mo. 23, 95 S. W. 235; *Campbell v. State*, 123 Ga. 533, 51 S. E. 644.

²¹ *Commonwealth v. Emery*, 2 Gray (Mass.) 80; *Commonwealth v. Preece*, 140 Mass. 276, 278, 5 N. E. 494; *Underhill on Evid.*, §§ 134, 142c.

²² *Chapman v. Gates*, 54 N. Y. 132, 145; *Triplett v. Commonwealth*, 122 Ky. 35, 91 S. W. 281, 28 Ky. L. 974; *Lorenz v. United States*, 24 App. (D. C.) 337.

²³ *State v. Penny*, 70 Iowa 190, 30 N. W. 561.

of a writing shall be received, its loss or destruction must be shown is applicable to criminal cases.²⁴ A failure to observe this rule is error.²⁵ Proof of loss or destruction may be taken in the absence of the jury.²⁶ The question usually is whether the loss or destruction of the writing has been sufficiently proved. Proof beyond all reasonable doubt is not necessary to render secondary evidence competent. There must be proof of a diligent search made in places the writing is likely to be found.²⁷ An attorney or other person may testify that papers or books in his possession have been lost if he had made a search.²⁸ Generally the proof of a failure to find the paper should be given by some one who has actually made the search. A letter from a clerk of a foreign court stating that he had made a search and had failed to find any record of a certain judgment, is not a sufficient foundation to admit secondary evidence of it.²⁹

The fact that the instrument whose existence is in question and whose contents it is sought to prove by secondary evidence was last seen in the possession of the accused, together with evidence of a search for it by the witness is sufficient to admit secondary evidence.³⁰ Proof that a writing missing at the trial was used in evidence on a former trial, that it went out with the jury and it had not been seen since by any person, though a thorough search of the jury room and of the papers on file had been made is a sufficient predicate for secondary evidence.³¹ In all cases, the clerk or other official in whose custody the papers was last seen, may, and in fact ought to be produced and testimony of the search by him and of his inability to find the writing is usually sufficient.³² Where the evidence is that the deceased person destroyed certain

²⁴ *Commonwealth v. Johnson*, 199 Mass. 55, 85 N. E. 188; *Gould v. State*, 71 Neb. 651, 99 N. W. 541; *Donner v. State*, 69 Neb. 56, 95 N. W. 40; *People v. Nall*, 242 Ill. 284, 89 N. E. 1012; *State v. Foundstone* (Mo. App., 1909), 124 S. W. 79; *Skidmore v. State* (Tex. Cr. App.), 123 S. W. 1129.

²⁵ *Kerr v. State*, 105 Ga. 655, 31 S. E. 739.

²⁶ *Degg v. State*, 150 Ala. 3, 43 S. 484.

²⁷ *State v. Bennett*, 137 Iowa 427, 110 N. W. 150.

²⁸ *State v. Shour*, 196 Mo. 202, 95 S. W. 405.

²⁹ *Grabill v. State* (Tex. Cr. App.), 97 S. W. 1046.

³⁰ *State v. Leasia*, 45 Ore. 410, 78 Pac. 328.

³¹ *Andrews v. State*, 152 Ala. 16, 44 So. 696.

³² *Summerlin v. State*, 136 Ga. 791, 61 S. E. 849.

letters, the reason she gave for destroying them may be proved and secondary evidence may then be received.⁸³

§ 42. Notice to produce.—In a civil case if a writing is known to be in the possession of the opposite party, or if its whereabouts are absolutely unknown, he should have notice to produce it, before secondary evidence of its contents can be received. This rule is applicable to criminal prosecutions with the qualification that, as the state has no power to compel the production of a writing in the rightful possession of the defendant, the notice to him is nugatory and may, perhaps, under some circumstances, be dispensed with.⁸⁴

This is the case when the indictment, as in forgery, or larceny of a writing, alleges the existence of a writing, and by implication that it is in the possession of the accused.⁸⁵

Some effort should be shown on the part of the state to procure the papers which are in the possession of the accused.⁸⁶ This need not amount to a notice to produce at the trial.

Before secondary evidence of writings in the hands of the accused can be admitted, it must be shown by the prosecution or admitted by the accused that the papers are in his possession. Where the accused is possessed of relevant documentary evidence and does not voluntarily offer to produce it, secondary evidence is admitted.⁸⁷ The same rule applies if he denies having the docu-

⁸³ *State v. Ryder*, 80 Vt. 422, 68 Atl. 652.

⁸⁴ *State v. Hanscom*, 28 Ore. 427, 43 Pac. 167; *State v. Gurnee*, 14 Kan. 111, 121; *McGinnis v. State*, 24 Ind. 500; *Commonwealth v. Sinclair*, 195 Mass. 100, 80 N. E. 799; *State v. Mulloy*, 111 Mo. App. 679, 86 S. W. 569; *Sullivan v. People*, 108 Ill. App. 328; *State v. Walker*, 129 Mo. App. 371, 108 S. W. 615; *State v. Madeira*, 125 Mo. App. 508, 102 S. W. 1046; *Young v. People*, 221 Ill. 51, 77 N. E. 536; *People v. Dolan*, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. 521; *Moore v. State*, 130 Ga. 322, 60 S. E. 544.

⁸⁵ *State v. McCauley*, 17 Wash. 88,

49 Pac. 221, 55 Pac. 382; *State v. Constantine*, 48 Wash. 218, 93 Pac. 317. In criminal cases, parol evidence of the contents of a written instrument in the possession of the accused is admissible without notice to the defendant to produce such instrument. *O'Brien v. United States*, 27 App. D. C. 263.

⁸⁶ *State v. Lentz*, 184 Mo. 223, 83 S. W. 970.

⁸⁷ *Kinard v. State*, 1 Ga. App. 146, 58 S. E. 263; *Mahan v. State*, 1 Ga. App. 534, 58 S. E. 265; *Commonwealth v. Sinclair*, 195 Mass. 100, 80 N. E. 799.

ments. This rule is of general application to all writings in the possession of one or more accused persons indicted and tried jointly. Thus, where documentary evidence of an incriminating character was, at the request of one defendant delivered to the other, the defendants tried jointly are not prejudiced by the admission of proof of the contents of the document by secondary evidence.³⁸ So, the contents of a letter which was written from jail by the accused to his wife may be proved by secondary evidence for the reason that the law does not permit the prosecution to compel the wife to produce it in court. A jailor or other custodian of the prison, who, under the rules of the jail or with the knowledge of the accused, opened and read the letter may testify to its contents.³⁹ Documentary evidence which is proved to have been in the possession of the prosecution, before the trial, should be produced or its absence accounted for before the court should admit secondary evidence of its contents.⁴⁰

§ 43. Writings whose existence and contents are in issue—Impeachment by contradictory writings.—Where the existence or the contents of a writing which is material to the issue, or has an important bearing upon the credibility of a witness, are disputed, they cannot be shown orally, or by a copy, until the absence of the original is accounted for. So, where in a criminal prosecution based on a violation of a statute, or city ordinance, it is necessary to prove the existence, or contents, of the statute, or by-law, it cannot be done by oral evidence.⁴¹ It has been found, as matter of observation, that the memory is extremely unreliable. Aside from any temptation to commit perjury, to avoid which this rule has been adopted, but which would always be present if the language of disputed instruments were allowed to be shown by oral evidence, the court has a right to see the whole document, in its entirety.

Where a witness is cross-examined on the contents of a letter, which he is alleged to have written, for the purpose of impeaching

³⁸ State v. Marsh, 70 Vt. 288, 40 Atl. 836.

³⁹ DeLeon v. Territory, 9 Ariz. 161, 80 Pac. 348.

⁴⁰ Young v. People, 221 Ill. 51, 77 N. E. 536.

⁴¹ See Tiedeman on Municipal Corp., p. 264, note 5; Underhill on Evid., §§ 32, 143a, for mode of proving ordinances and statutes.

him, by proving prior contradictory statements therein, the letter itself must first be read to him, and he must be asked if he has written it.⁴² It is not proper to read a portion of it, or to incorporate a part, or all of it in a question, and to ask him if he wrote a letter to that effect. So, where a witness is examined under a commission, and, in reply to an interrogatory, gives the contents of a letter without producing it, the answer will be stricken out, if there is no method of obtaining the letter.⁴³

An allegation of forgery suggests by implication the existence of a forged paper which must be produced, as the best evidence of the fact of forgery, or accounted for, even where the forgery is collateral and is relevant solely for the purpose of showing a criminal intent.⁴⁴ Unless the accused has been connected the erroneous admission of parol evidence of the contents of a missing writing is cured by its subsequent production,⁴⁵ by the party claiming under it, or by his adversary.⁴⁶ A copy of a writing may be received to prove the original upon condition that its correctness shall subsequently be made to appear, and the impropriety, if any, of receiving such a copy is cured by showing that it is a true and correct copy.

§ 44. Primary evidence of collateral facts.—Wherever the facts in issue are not the reciprocal rights and duties of the parties under a writing, but some fact collateral to its contents, its production is not required as primary evidence of that collateral fact, The fact may be proved by parol, for, if oral evidence is as near the fact to be proved as the writing, both are primary evidence.⁴⁷

⁴² Underhill on Evid., § 350.

⁴³ Peck v. Parchen, 52 Iowa 46, 2 N. W. 597; State v. Matthews, 88 Mo. 121, 125, 126.

⁴⁴ State v. Breckenridge, 67 Iowa 204, 206, 25 N. W. 130. See *post*, §§ 423, 427.

⁴⁵ State v. King, 81 Iowa 587, 47 N. W. 775, 776.

⁴⁶ Glover v. Thomas, 75 Tex. 506, 12 S. W. 684; DeLoach v. Stewart, 86 Ga. 729, 12 S. E. 1067.

⁴⁷ The owner of real or personal property will not be required to pro-

duce a writing by which his title vested, but may testify orally to the fact of ownership where that fact is collateral. That a certain person was a tenant may be proved orally by showing he paid rent, though a written lease exists. Rex v. Holy Trinity, 7 B. & C. 611, 614, 1 Man. & Ry. 444; but the contents of the lease, the names of the parties and the terms of the tenancy can be proved only by the lease itself. Strother v. Barr, 5 Bing. 136, 139, 145, 152, 2 M. & P. 207; Doe v. Harvey, 8 Bing.

Accordingly the oral evidence of prison or jail officials is admissible to prove that prisoners, whom the accused had visited in jail, were imprisoned for crimes similar to that with which he is charged. The fact of their being in prison being collateral to the issue of the guilt of the accused may be proved orally.⁴⁸ The arrest of the accused on a charge other than that for which he is on trial may be proved by parol.⁴⁹ The testimony of an officer who made the arrest is primary evidence of that fact, though the loss of a book in which it was recorded is not shown.

Generally when the contents of a letter or telegram are essential to determine the rights of the parties, it must be produced.⁵⁰ But if the sole fact to be proved is that a letter or telegram was sent or received, the writing need not be produced.⁵¹

So payment may be shown by oral evidence of a tender and acceptance, though a receipt in writing has been given, while an oral demand may be proved though a written demand may have

239; *Rex v. Merthyr Tidvil*, 1 B. & Ad. 29, 31; *Wooldridge v. State*, 49 Fla. 137, 38 So. 3; *Kearney v. State*, 101 Ga. 803, 29 S. E. 127, 65 Am. St. 344.

⁴⁸ *Long v. State*, 10 Tex. App. 186, 198; *State v. McKinnon*, 99 Me. 166, 58 Atl. 1028.

⁴⁹ *State v. McFarlain*, 42 La. Ann. 803, 806, 8 So. 600. An oral statement by a witness that he had been divorced from the accused is competent where the divorce was merely collateral to the guilt of the accused. *Williams v. State*, 149 Ala. 4, 43 So. 720.

⁵⁰ The oral testimony of a jailer to the contents of letters sent or received by a prisoner while in jail is inadmissible until their non-production is accounted for. *McAfee v. State*, 85 Ga. 438, 11 S. E. 810; *Bell v. State* (Ala.), 47 So. 242.

⁵¹ *Conner v. State*, 23 Tex. App. 378, 385, 5 S. W. 189; *Holcombe v. State*, 28 Ga. 66, 67. The fact that the prosecutrix in a trial for seduc-

tion made an assignation by a letter may be proved orally though the letter is not forthcoming. *State v. Ferguson*, 107 N. Car. 841, 846, 847, 12 S. E. 574. The presence of a document during an interview may be shown orally without accounting for its absence. *Tatum v. State*, 82 Ala. 5, 8, 2 So. 531. The fact that the deceased was an officer is provable by parol on a trial for homicide of an officer. *Hardin v. State*, 40 Tex. Cr. App. 208, 49 S. W. 607. The existence of a corporation either foreign or domestic has been proved in a criminal case by parol. *Graff v. People*, 208 Ill. 312, 70 N. E. 299, aff'g 108 Ill. App. 168. As to necessity for the production of a doctor's diploma where its existence is material, see *McAllister v. State* (Ala.), 47 So. 161. As for example when the accused is on trial for practicing medicine without a license. The fact that a person is a physician when only collaterally involved may also be proved orally.

been made.⁵² Where the receiver of a telegraphic dispatch is the employer of the company, the writing delivered to the company's operator by the sender is the original.⁵³ But where the company is the agent, not of the receiver but of the sender of the dispatch, the written message which is delivered to the addressee is the original.⁵⁴

The tally sheets showing the count of the ballots cast at an election are primary evidence of the count of the ballots where the accused, an officer of elections, is charged with making a false count. The ballots themselves are evidence of the number of ballots cast but they are not the only evidence of that fact.⁵⁵

A certificate, parish register, transcript of a public record or other public writing is not necessarily primary evidence of the existence of the marriage relation, even when it has been declared by law to be presumptive evidence.⁵⁶ As a general rule, and though a certificate which is known to exist is not produced, the fact of a marriage having been solemnized may be proved by other evidence, even in criminal trials. The performance of a marriage ceremony may be shown by the evidence of witnesses who were present, and sometimes by the declarations or admissions of the accused. The evidence of such witnesses is not secondary to that furnished by the writing. But usually greater cogency of evidence to prove marriage is required in a criminal trial where marriage is directly in issue as in bigamy than will be demanded in a civil proceeding.⁵⁷

⁵² *Smith v. Young*, 1 Campb. N. P. 439.

⁵³ *State v. Gritzner*, 134 Mo. 512, 36 S. W. 39; *Utey v. Donaldson*, 94 U. S. 29, 24 L. ed. 54. See cases, *Underhill on Ev.*, § 34. A type-written copy of a telegram is admissible if the accused has admitted he sent the telegram without accounting for the absence of the original message. *Dunbar v. United States*, 156 U. S. 185, 195, 39 L. ed. 390, 15 Sup. Ct. 325.

⁵⁴ It is necessary, in order to bind the alleged sender of a telegram, to show either that he signed or sent it

or that he acted thereupon if the telegram had been received by the addressee. *Young v. People*, 221 Ill. 51, 77 N. E. 536.

⁵⁵ *Commonwealth v. Edgerton*, 200 Mass. 318, 86 N. E. 768. Parol proof may be made of the election of the officers of a corporation and any one present at the election may state who was elected. *State v. Farrier*, 114 La. 579, 38 So. 460.

⁵⁶ *Commonwealth v. Dill*, 156 Mass. 226, 228, 30 N. E. 1016.

⁵⁷ See *Underhill on Evid.*, §§ 114, 144, and *post*, §§ 383, 403-405.

Where a writing has no direct bearing upon a material point in issue, or relevancy to it, but is only evidence of a collateral fact, or so far as it is evidence of a collateral fact, no objection exists to oral evidence to prove a fact contained in it.⁵⁸

So, a written report of an incident made by a witness as a part of his duty need not be produced or accounted for to render his oral testimony admissible. Thus, a jailer may state orally that a prisoner admitted he was married, though this fact was also entered on the prison books,⁵⁹ as it should have been.

§ 45. Exceptions in the case of proving general results.—To prevent the time of the court from being unduly occupied in the examination of numerous and bulky books of account and other writings to prove a single fact, the production of the writings may be dispensed with and a witness, who has examined the documents, may state orally the result of the examination which he has made out of court. This rule is applicable only where the books are multifarious and voluminous, and the jury would find it difficult, if not impossible, to ascertain anything material from their inspection. If the general result is stated in writing, it must be verified by the party who abstracted it, and the adverse party must be given a fair opportunity to examine the originals.⁶⁰

In such cases, it should be remarked, the witness is not required to prove the contents of the writing. He is merely asked

⁵⁸ For example, a writing is not indispensable to prove the nationality of a ship, where that fact is collateral merely. *United States v. Pirates*, 5 Wheat. (U. S.) 184, 5 L. ed. 64; *State v. Hayes*, 138 N. Car. 660, 50 S. E. 623; *Cox v. State*, 3 Ga. App. 609, 60 S. E. 283.

⁵⁹ *Commonwealth v. Walker*, 163 Mass. 226, 39 N. E. 1014. If the writing is one that it is customarily destroyed as soon as used, it would not seem logical, or fair, to require its production if its contents could be proved orally. But it was held in *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90, that the admissions of a deaf mute, written on slips used by

him in conversing with others, could not be proved orally, when the slips used were missing and unaccounted for.

⁶⁰ *Boston, etc., R. Co. v. Dana*, 1 Gray (Mass.) 83, 104; *Bode v. State*, 80 Neb. 74, 113 N. W. 996; *People v. Miles*, 123 App. Div. (N. Y.) 862, 108 N. Y. S. 510. It has been held that a witness will not be permitted to state the result of his examination of books unless the books were kept by him, and the entries made by him, or in his presence. *Donner v. State*, 69 Neb. 56, 95 N. W. 40. This, however, is not the general rule. *Ruth v. State*, 140 Wis. 373, 122 N. W. 733.

to give primary evidence of a fact within his personal knowledge, which he has acquired through the employment of his own powers of observation. So, in a prosecution for embezzlement, an expert who has examined the books of account kept by the prisoner may testify that a certain balance is due from the accused.⁶¹

If the issue of insolvency is involved the general result of an examination of the debtor's accounts and securities may be stated without producing them.⁶² So one whose duty it is to keep a record of the names of a certain class of persons may state that he has examined the record and that the name of a particular person was not on the list.⁶³

So it has been held that a person may testify to the amount of money which has been stolen from his person or from his cash drawer, where his information as to the amount has been ascertained in a general way from his examination of his books.⁶⁴

A witness will not be allowed to testify to a single fact which is not in the nature of the general result of an examination by him if he has learned it solely from inspecting books, if they are not produced.⁶⁵

The oral testimony of one who has examined public records that he did not find a certain fact or name, which was by statute required to be recorded, is proof only that a search was made and that it was unsuccessful. It may go to the jury as primary evidence, that the name or fact was in fact not recorded.⁶⁶

The jury are entitled, particularly in a prosecution for crime,

⁶¹ See *post*, § 290.

⁶² *Culver v. Marks*, 122 Ind. 554, 566, 567, 23 N. E. 1086, 17 Am. St. 377, 7 L. R. A. 489n. That the rules of the text are applicable to criminal prosecutions, see *Hollingsworth v. State*, 111 Ind. 289, 297, 12 N. E. 490.

⁶³ *Jordan v. State*, 127 Ga. 278, 56 S. E. 422.

⁶⁴ *Hudson v. State*, 137 Ala. 60, 34 So. 854.

⁶⁵ *Hamilton Provident, etc., Soc. v. Northwood*, 86 Mich. 315, 49 N. W. 37. Officials who have examined books and accounts kept by the accused may testify to the balance

found against the defendant. *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102.

⁶⁶ *People v. Jones*, 106 N. Y. 523, 526, 13 N. E. 93. *Contra*, *Hepler v. State*, 58 Wis. 46, 53, 55, 16 N. W. 42; *Biddy v. State*, 52 Tex. Cr. App. 412, 107 S. W. 814. But as regards the weight of such evidence, a copy of a public record must prevail over the oral testimony of a person who, after examining the record, testifies that he cannot find the part certified. *Boyce v. Auditor-General*, 90 Mich. 314, 321, 51 N. W. 457.

to have all the light possible that can be thrown upon documentary evidence. From its nature and often from its great length, such evidence is hard to be comprehended by persons of the highest intelligence and trained in the investigation of the facts. Jurors are likely, in the hurry and confusion which so frequently attend criminal trials, to overlook the most important portions of the books of account, certified copies of legal proceedings, deeds, letters and other written proof which are placed before them. The report of one who has examined the written evidence either as to a single fact which he has or has not found or as to a general result, derived from his investigation, is of great evidential value and is properly received where the written evidence which is or has been inspected by the witness is before the jury.⁶⁷

So where an officer in a bank was being prosecuted for the crime of receiving deposits after he knew the bank was insolvent, it was competent to place expert accountants on the witness stand to explain to the jury the entries in the books of the bank which already were in evidence.⁶⁸

§ 46. Proof of records and official appointments.—Public records, because of their official character and the general inconvenience which would always ensue if their removal from the proper custody was permitted, may usually be proved by a duly authenticated copy or transcript, without accounting for the absence of the original records.⁶⁹

The later cases, under the influence of statutory legislation, have somewhat extended the rule. It is often applied to the books of private corporations when it is very inconvenient to produce them, but only after a reasonable effort to obtain possession of the original has been proved.⁷⁰

Where a statutory mode of proving a record by a certified copy is provided, the copy is the best evidence of the record, and the latter cannot be proved by parol. But where the records are shown to be lost, so that a certified copy is unobtainable, the loss

⁶⁷ *People v. Miles*, 192 N. Y. 541, 84 N. E. 1117, aff'g 123 App. Div. (N. Y.) 862, 108 N. Y. S. 510. *Kinard v. State*, 1 Ga. App. 146, 58 S. E. 263.

⁶⁸ *State v. Hoffman*, 120 La. 949, 45 So. 951. ⁶⁹ *Commonwealth v. Meehan*, 170 Mass. 362, 49 N. E. 648; *Brighton v. Miles*, 151 Ala. 479, 44 So. 394.

⁷⁰ *State v. Pigg* (Kan.), 97 Pac. 859;

and the contents of the records may be shown by the testimony of any person having actual knowledge.

Another exception to the rule requiring the production of a writing as the best evidence occurs where a party is called upon to prove the validity of the appointment of some public official and the official appointment is not directly in issue. The written appointment of the officer need not generally be produced. From proof that the public official has acted openly as such it will be presumed, that is, in collateral proceedings not involving his title to the office, that he was legally and properly appointed. Thus in a criminal prosecution for assaulting or resisting a police officer, written evidence of his appointment or of his authority to act is never necessary, nor need its absence be accounted for.⁷¹

§ 47. Physical condition of personal property.—The testimony of a witness who has personal knowledge of the physical condition or attributes of an article of personal property obtained by the employment of any of his senses is primary evidence of its character and condition. The article itself need not be produced. Thus a witness may state that he saw blood stains upon a person's clothing,⁷² or holes in clothing,⁷³ or that a certain liquor which he saw was intoxicating,⁷⁴ without producing the clothing or the liquor.

A witness may testify that oleomargarine which is alleged to have been illegally sold resembled butter without producing the article sold or explaining its non-production.⁷⁵

But an article of personal property, the relevancy of which has been shown by its identification with the subject-matter of the crime, may be exhibited to the jury in the court room, either

⁷¹ Gordon's Case, 2 Leach C. Law (1789) 581, 585; Martin v. State, 89 Ala. 115, 118, 119, 8 So. 23, 18 Am. St. 91; North v. People, 139 Ill. 81, 28 N. E. 966, 971; Commonwealth v. McCue, 16 Gray (Mass.) 226; State v. Row, 81 Iowa 138, 46 N. W. 872; State v. Smith, 38 La. Ann. 301; Commonwealth v. Kane, 108 Mass. 423, 11 Am. 373; State v. Surles, 117 N. Car. 720, 23 S. E. 324; Shely v. State, 35 Tex. Cr. App. 190, 32 S. W. 101. See *post*, § 446.

⁷² Commonwealth v. Pope, 103 Mass. 440; Campbell v. State, 23 Ala. 44, 69, 72; Walker v. State, 139 Ala. 56, 35 So. 1011.

⁷³ Underwood v. Commonwealth (Ky.), 84 S. W. 310, 27 Ky. L. 8.

⁷⁴ Commonwealth v. Welch, 142 Mass. 473, 8 N. E. 342; Commonwealth v. Moinehan, 140 Mass. 463, 5 N. E. 259.

⁷⁵ Commonwealth v. Caulfield, 27 Pa. Super. Ct. 279.

as direct evidence of a relevant fact, or to enable them to understand the evidence or to realize more completely its cogency and force.⁷⁶

The jury may inspect and smell the contents of a bottle properly identified and admitted in evidence.⁷⁷

Comparison of materials may also be made by the jury, aided by the evidence of expert witnesses. So in case the quality of an article, or its adaptability to a specific use or purpose, is in issue, a sample may be shown to the jury, together with a specimen of a like material which is shown to be of good quality or adapted to the required purpose, and the jury may then make a comparison to ascertain possible points of difference.⁷⁸

As a general rule, it seems essential that articles shown to the jury should be connected, at least *prima facie*, with the crime in issue.⁷⁹ Indeed, the propriety and justice of permitting articles and implements, such as deadly weapons, lanterns, masks, counterfeiters' tools, gambling apparatus and the like, used by criminals, but which are not shown to be connected with the accused, to be exhibited to the jury may well be doubted. Such a practice, under the pretext of illustrating or explaining the evidence, is well calculated to prejudice the jury against the accused.

§ 48. Incriminating articles—Weapons, clothing, etc.—A district attorney has been permitted to show the jury an instrument with

⁷⁶ The witness, it seems, need not identify the article positively. He may testify to his belief in its identity, based on the same principles that aid him in determining whether a knife or a hat is his own. *Mitchell v. State*, 94 Ala. 68, 10 So. 518, 520. So one witness may testify to the fact that another identified an article on a prior occasion. *State v. Brabham*, 108 N. Car. 793, 13 S. E. 217. In *Gindrat v. People*, 138 Ill. 103, 108-110, 27 N. E. 1085, which was an indictment for the larceny of a diamond ring by substituting an imitation ring in the place of one contained in a tray which the prisoner

had examined, the prosecution was allowed to put other imitation rings in evidence which had been found in a room occupied by the accused by an officer who had broken into the room and searched it without any warrant. *Moss v. State*, 152 Ala. 30, 44 So. 598.

⁷⁷ *Reed v. Territory (Okla.)*, 98 Pac. 583.

⁷⁸ *People v. Buddensieck*, 103 N. Y. 487, 9 N. E. 44, 57 Am. 766.

⁷⁹ But see *Underhill on Evid.*, § 39; *State v. Sherouk*, 61 Atl. 897, 78 Conn. 718, not reported in full. *People v. Muhly (Cal. App., 1909)*, 104 Pac. 466.

which an abortion had been procured,⁸⁰ or a pistol, or any weapon, article, or instrument with which a homicide, assault, or other crime has been committed. A witness will, also, be allowed to show how it could have been used.⁸¹ The clothing of the victim of a homicide, if properly identified, may be exhibited, on the principle that it is a part of the *res gestæ*, to illustrate to the jury the character and nature of the wounds,⁸² the motive of the crime, the manner and means of death,⁸³ or to show how near the accused was to him, when he was slain.⁸⁴

⁸⁰ *Commonwealth v. Brown*, 14 Gray (Mass.) 419.

⁸¹ *State v. Gallman*, 79 S. Car. 229, 60 S. E. 682; *Paulson v. State*, 118 Wis. 89, 94 N. W. 771; *Young v. State*, 49 Tex. Cr. App. 207, 92 S. W. 841. See generally, *State v. Roberts*, 63 Vt. 139, 142, 21 Atl. 424; *Siberry v. State*, 133 Ind. 677, 33 N. E. 681; *Rodriguez v. State*, 32 Tex. Cr. App. 259, 22 S. W. 978; *Hornsby v. State*, 94 Ala. 55, 64, 10 So. 522; *State v. Crow*, 107 Mo. 341, 17 S. W. 745, 747; *State v. Mordecai*, 68 N. Car. 207; *Gardiner v. People*, 6 Park Cr. (N. Y.) 155, 157. A watch charm taken from the person of a man who had been killed by the defendant while perpetrating a robbery was received in evidence in *Goldsby v. United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. 216; *State v. Wilson* (Mo. App., 1909), 122 S. W. 671; *People v. Morse*, 196 N. Y. 306, 89 N. E. 816; *Union v. State* (Ga. App., 1909), 66 S. E. 24.

⁸² *Dorsey v. State*, 110 Ala. 38, 20 So. 450; *People v. Knapp*, 71 Cal. 1, 3, 11 Pac. 793; *Seaborn v. Commonwealth* (Ky.), 80 S. W. 223, 25 Ky. L. 2203; *Bennefield v. United States* (Okla.), 100 Pac. 34; *State v. Long*, 209 Mo. 366, 108 S. W. 35; *Boyd v. State*, 50 Tex. Cr. App. 138, 94 S. W. 1053; *Ozark v. State*, 51 Tex. Cr. App. 106, 100 S. W. 927; *Adams v. State*, 48 Tex. Cr.

App. 452, 93 S. W. 116; *State v. Churchill* (Wash.), 100 Pac. 309. Clothing traced to accused may be received in evidence if they were shown to have been stolen. *Williams v. State*, 119 Ga. 564, 46 S. E. 837. Clothing of the victim proved to have been worn by him when he was killed will not be rejected because it has been washed. *Pate v. State*, 150 Ala. 10, 43 So. 343.

⁸³ *Story v. State*, 99 Ind. 413, 414; *McDonel v. State*, 90 Ind. 320; *State v. Craft*, 118 La. 117, 42 So. 718; *State v. Cadotte*, 17 Mont. 315, 42 Pac. 857; *Hart v. State*, 15 Tex. App. 202, 229, 230, 49 Am. 188n; *Clark v. State*, 51 Tex. Cr. App. 519, 102 S. W. 1136; *Sue v. State*, 52 Tex. Cr. App. 122, 105 S. W. 804; *State v. Landers*, 21 S. Dak. 606, 114 N. W. 717.

⁸⁴ *Lucas v. State*, 50 Tex. Cr. App. 219, 95 S. W. 1055; *Dobbs v. State* (Tex. Cr. App.), 113 S. W. 923; *State v. Brannan*, 206 Mo. 636, 105 S. W. 602; *People v. Wright*, 89 Mich. 70, 50 N. W. 792; *Watkins v. State*, 89 Ala. 82, 8 So. 134; *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751; *Levy v. State*, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. 826. The use of a dressmaker's frame in court for convenience in exhibiting to the jury the clothing of the deceased is permissible. So, where certain tools which were claimed by the

In a homicide trial, the skull, jawbone,⁸⁶ or vertebra of the deceased, if properly identified,⁸⁶ may be submitted to the inspection of the jury, to show the character and location of the wounds inflicted.⁸⁷ Such a course is not prejudicial to the accused upon the grounds that it is calculated to excite feelings of horror in the minds of the jurors.^{87a}

But it is usually wholly within the discretion of the court to order decedent's skull to be exhumed for the purpose of putting it in evidence.⁸⁸ If there are physicians accessible as witnesses who have dissected the skull and know as much of its condition as can be learned from an examination of it by the jurors it is not error to refuse to order the person having custody of decedent's skull to produce it.⁸⁹

The introduction in evidence of clothing belonging to the defendant or belonging to a witness or worn by deceased at the time of his death is a common occurrence in a homicide trial. The clothing of the accused may be exhibited to the jury to show that spots found thereon are blood-stains. The proper method is to prove first that the clothing offered belonged to the accused and that it had been worn by him at the date of the tragedy. This is usually done by exhibiting the clothing to the witness and having him identify it as the clothing belonging to or which was worn by the accused. The weight and sufficiency of the identified evidence are questions for the jury. It has been held that it need not be actually proved that the accused wore the clothing on the day of the homicide, if there is some evidence that the clothing belonged to him and was worn by him about that time. After

defendant to fit in marks on a door were introduced in evidence by him, the state was allowed to introduce the door to prove that the tools did not fit. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75. It was not reversible error to admit a partly burned block of wood taken from the pile of charcoal on which the body of deceased was found. *Paulson v. State*, 118 Wis. 89, 94 N. W. 771.

^a *People v. Way*, 191 N. Y. 533, 84

N. E. 1117, 119 App. Div. (N. Y.) 344, 104 N. Y. S. 277.

^b *State v. Moxley*, 102 Mo. 374, 388, 14 S. W. 969, 15 S. W. 556; *State v. Bailey*, 79 Conn. 589, 65 Atl. 951.

^c *State v. Lewis* (Iowa), 116 N. W. 606.

^a *Turner v. State*, 89 Tenn. 547, 564, 565, 15 S. W. 838.

^b *Moss v. State*, 152 Ala. 30, 44 So. 598.

^c *Moss v. State*, 152 Ala. 30, 44 So. 598. The jawbone of the victim of

being connected with accused, the clothing may itself be offered with the testimony that the spots on it are blood-stains.⁹⁰

The witness may point out the spots. So the clothing of the witness was properly admitted where the witness testified to contradict the statement made by the accused that no one was present when the deceased was shot, that she was there and that she held the deceased and that blood from his wounds flowed on her clothing. Having testified to these facts, she may show her clothing to the jury to corroborate and illustrate her evidence.⁹¹

§ 49. Inscriptions on bulky articles.—From the inconvenience which would ensue if their actual production in court were required, the rule has long been recognized that monuments, natural or artificial, used to mark the boundaries of land, sign-boards,⁹² mural tablets, gravestones, packages of merchandise and similar bulky articles, need not be produced for the purpose of proving inscriptions on them. The inscriptions may be proved by the evidence of a witness who has read them. So the oral testimony of a surveyor is admissible to describe the monuments which constitute and mark out a boundary line,⁹³ and, from necessity, to prove the marks which were blazed upon the trees near the same.⁹⁴ An invoice is competent to prove the marks upon cases of merchandise described in it.⁹⁵

Upon the same grounds and because of the general notoriety of the facts involved, oral evidence of the contents of resolutions passed at public meetings, and of inscriptions on flags or banners

an assault who died is competent to corroborate proof that a bullet was fired at his chin. *People v. Way*, 191 N. Y. 533, 84 N. E. 1117, aff'g 119 App. Div. (N. Y.) 344, 104 N. Y. S. 277. The skull of deceased in homicide was received to sustain the theory of the prosecution that he was struck by the accused with a pick in the head while leaning forward with his head down, against the claim of the accused that the killing was in self-defense. *State v. Lewis* (Iowa), 116 N. W. 606.

⁹⁰ *State v. Sherouk*, 61 Atl. 897, 78 Conn. 718, not reported in full; *State v. Whitbeck* (Iowa, 1909), 123 N. W. 982.

⁹¹ *Thomas v. State*, 45 Tex. Cr. App. 111, 74 S. W. 36.

⁹² *State v. Wilson*, 5 R. I. 291.

⁹³ *Borer v. Lange*, 44 Minn. 281, 286, 46 N. W. 358.

⁹⁴ *Ayers v. Watson*, 137 U. S. 584, 600, 34 L. ed. 803, 11 Sup. Ct. 201.

⁹⁵ *Taylor v. United States*, 3 How. (U. S.) 197, 208, 11 L. ed. 559.

carried in public parades, has always been admitted in criminal trials.⁹⁶

As regards unrecorded brands and marks upon cattle, one who has seen them may testify to their existence,⁹⁷ and may explain their character and meaning.⁹⁸ And in a prosecution for the unlawful sale of liquors, the names of the liquors marked on the bottles and other vessels may be proved without producing the vessels or labels.⁹⁹

The contents of a writing may be proved orally where the identity of an article to which it was attached is relevant. Thus, a witness may state orally what was on a tag,¹⁰⁰ or a label,¹⁰¹ which was affixed to a bag, or a package, without producing the writing.¹⁰²

Secondary evidence may be given of writing that cannot be produced in court, such as mural monuments, documents shown to be in a foreign country, books of a concern the removal of which would be very inconvenient and others, such as a license required by the federal statute which cannot be removed from the place of business of accused, and produced in court without violating the federal statute.¹⁰³

§ 50. Photographs as primary evidence—Personal identity.—

Photographs, whether originals or copies,¹⁰⁴ are admissible as primary evidence upon the same grounds and for the same purposes as are diagrams, maps¹⁰⁵ and drawings of objects or places. Photographs have been received for the purpose of describing

⁹⁶ *Sheridan's Case*, 31 How. St. Tr. 543, 672.

⁹⁷ *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433; *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799; *Brooke v. People*, 23 Colo. 375, 48 Pac. 502.

⁹⁸ *Boren v. State*, 23 Tex. App. 28, 33. 4 S. W. 463.

⁹⁹ *Commonwealth v. Blood*, 11 Gray (Mass.) 74.

¹⁰⁰ *Commonwealth v. Morrell*, 99 Mass. 542.

¹⁰¹ *Commonwealth v. Powers*, 116 Mass. 337, 338.

¹⁰² A witness may testify to certain marks which he saw upon the clothing worn by the accused. *Commonwealth v. Hills*, 10 Cush. (Mass.) 530, 533.

¹⁰³ *Wilcox v. Wilcox*, 46 Hun (N. Y.) 32.

¹⁰⁴ *Joliff v. State*, 53 Tex. Cr. App. 61, 109 S. W. 176.

¹⁰⁵ *Adams v. State*, 28 Fla. 511, 10 So. 106; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100; *Jarvis v. State*, 138 Ala. 17, 34 So. 1025.

and identifying premises which were the scene of a crime,¹⁰⁶ and they need not show all the premises if they show the material part.¹⁰⁷

Photographs of the scene, taken several months after the crime was committed, were properly admitted where it appeared that the condition of the premises had not materially changed in the meantime.¹⁰⁸

It is not allowable, however, for the prosecution to arrange a scene assumed to represent the *res gestæ* of the crime and then to photograph the scene represented. In a recent case, the chief witness for the prosecution very carefully reproduced by means of persons employed for the purpose, the situation of the parties to the homicide, and a reproduction of the occurrences which took place at the time of the killing. This reproduction was photographed but the court rejected the photograph.^{108a} So in a homicide case, a photograph of a man lying on a porch in the position in which the body of the victim of the homicide was found, was rejected.¹⁰⁹

Photographs are always admissible as primary evidence of the identity of persons alive or dead,¹¹⁰ and to present delineations of

¹⁰⁶ *People v. Pustolka*, 149 N. Y. 570, 43 N. E. 548; *State v. Kelley*, 46 S. Car. 55, 24 S. E. 60; *State v. O'Reilly*, 126 Mo. 597, 29 S. W. 577; *People v. Grill*, 151 Cal. 592, 91 Pac. 515; *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690.

¹⁰⁷ *Chestnut Hill, etc., Co. v. Piper, etc., Co.*, 15 Weekly Notes 55. "It (the photograph) exhibited the surface, condition and state of the wall, and it no doubt carried to the minds of the jurors a better image of the subject-matter concerning which negligence was charged, than any oral description by an eye-witness could have done. In such a case it must be deemed established that photographic scenes are admissible in evidence as appropriate aids to a jury in applying the evidence, whether it relates to persons, things or places." *People v.*

Buddensieck, 103 N. Y. 487, 500, 9 N. E. 44, 57 Am. 766.

¹⁰⁸ *Gibson v. State*, 53 Tex. Cr. App. 349, 110 S. W. 41.

^{108a} *Fore v. State*, 75 Miss. 727, 23 So. 710.

¹⁰⁹ *People v. Maughs*, 149 Cal. 253, 86 Pac. 187.

¹¹⁰ *Shaffer v. United States*, 24 App. D. C. 417; *Commonwealth v. Johnson*, 199 Mass. 55, 85 N. E. 188; *Young v. State*, 49 Tex. Cr. App. 207, 92 S. W. 841; *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Wilson v. United States*, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. 895; *People v. Smith*, 121 N. Y. 578, 582, 24 N. E. 852; *Udderzook v. Commonwealth*, 76 Pa. St. 340, 352, 353; *Ruloff v. People*, 45 N. Y. 213, 224; *Beavers v. State*, 58 Ind. 530; *Marion*

wounds or other physical injuries,¹¹¹ as, for example, to show that a child had been insufficiently fed or ill-treated.¹¹²

So photographs of the bodies of drowned persons have been received for purposes of identification even when the bodies had remained in the water for a very long time, and the likeness, because of this and of the disadvantageous circumstances under which it was made, was bad.¹¹³

Photographs are sometimes received to supply accurate *fac-similes* of public records which cannot be conveniently brought into court,¹¹⁴ and enlarged photographs of disputed writings emphasizing, illustrating and making prominent peculiarities of handwriting have been employed by experts as standards of comparison.¹¹⁵

X-ray photographs have been received in evidence and are of value to show the location of the bullet in the body of a deceased person. The same rules and principles which apply to ordinary photographs are applicable to them. It must first be shown that they were prepared by one who understood their preparation. An objection that there was no evidence before the jury that the object represented in the radiograph was a bullet and that the object was in the same position when the radiograph was taken

v. State, 20 Neb. 233, 240, 29 N. W. 911, 57 Am. 825; Luke v. Calhoun Co., 52 Ala. 115, 118, 119; State v. McCoy, 15 Utah 136, 49 Pac. 420; Morris v. Territory (Okla.), 99 Pac. 760; Commonwealth v. Keller, 191 Pa. St. 122, 43 Atl. 198 (of deceased standing beside a witness to show the size of deceased by comparison).

¹¹¹ State v. Miller, 43 Ore. 325, 74 Pac. 658; State v. Hasty, 121 Iowa 507, 96 Mo. 1115 (in adultery to identify the defendant's paramour); Franklin v. State, 69 Ga. 36, 42, 47 Am. 748.

¹¹² Cowley v. People, 83 N. Y. 464, 476-478, 38 Am. 464; State v. Mathe-son, 130 Iowa 440, 103 N. W. 137.

¹¹³ Ruloff v. People, 45 N. Y. 213,

224. A witness who found a mutilated body of a man whom he had never seen alive, which had been buried several days, was allowed to testify that the face, though swollen and discolored, resembled a photograph shown him. Udderzook v. Commonwealth, 76 Pa. St. 340.

¹¹⁴ Leathers v. Salvor Wrecking, etc., Co., 2 Woods (U. S.) 680, 682, 15 Fed. Cas. 8164; Luco v. United States, 23 How. (U. S.) 515, 541, 16 L. ed. 545.

¹¹⁵ Rowell v. Fuller, 59 Vt. 688, 10 Atl. 853; Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138; Marcy v. Barnes, 16 Gray (Mass.) 161; Johnson v. Commonwealth, 102 Va. 927, 46 S. E. 789.

as it was at the time of the shooting is not an objection to the competency of the photograph but goes to its credibility.¹¹⁶

§ 51. **Accuracy and relevancy of photographs.**—If the correctness of the photograph as a likeness is shown *prima facie*, either by the testimony of the person who made it or by other competent witnesses, to the effect that it faithfully represents the object portrayed, it should go to the jury subject to impeachment as to its accuracy.¹¹⁷ Whether the photograph is an accurate likeness is then a question for the jury.¹¹⁸

A conflict of evidence regarding the correctness of a photograph does not exclude it, if it is relevant. It should go to the jury, and the other side may be allowed to introduce one they deem to be correct.¹¹⁹ It may not always be necessary to show the correctness of the portrait by positive evidence. In the absence of any attack upon the correctness of the likeness, the court may assume it to be correct from the universal employment of the art, the general assent to the correctness of its delineations and the scientific principles on which they are based.¹²⁰

The photograph or picture must be relevant as well as correct. Its relevancy will depend on the relevancy of the scene or object it represents. If a photograph purports to represent a relevant scene or object, but portrays it in a grossly inaccurate manner, so that it practically represents something else, and the scene or object would scarcely be recognized thereby, the non-reliability of the photograph as a correct likeness may almost be considered as producing irrelevancy. But usually the question of relevancy is distinct from that of correctness, and is for the judge exclusively. It is to be determined upon the considerations which govern when the relevancy of any sort of evidence is concerned.¹²¹

If a photograph of the accused introduced to prove his identity contains writings or marks which have no bearing upon the ques-

¹¹⁶ State v. Matheson, 130 Iowa 440, 103 N. W. 137, 114 Am. St. 427n.

¹¹⁷ Mow v. People, 31 Colo. 351, 72 Pac. 1069; People v. Durrant, 116 Cal. 179, 48 Pac. 75; Commonwealth v. Switzer, 134 Pa. St. 383, 19 Atl. 681; Ming v. Foote, 9 Mont. 201, 23 Pac. 515. The question, "Is this photograph correct?" though leading,

may be put to the witness. Stuart v. Binsse, 10 Bosw. (N. Y. Super.) 436.

¹¹⁸ Morris v. Territory (Okla.), 99 Pac. 760.

¹¹⁹ Moon v. State, 68 Ga. 687, 695.

¹²⁰ Udderzook v. Commonwealth, 76 Pa. St. 340, 352, 353; Lake v. Calhoun Co., 52 Ala. 115, 119.

¹²¹ The photograph of the accused

tion of his identity, but which by their nature or meaning may injure the accused in the estimation of the jury, it should be rejected. Thus a witness may testify that he was acquainted with the accused, and he may identify him as having seen him in prison or in jail, and he may then state that in his opinion, a photograph exhibited to him is that of the accused. But where a witness by oral testimony has testified that he had seen the accused in prison it was error for the court to receive in evidence a photograph of the prisoner clothed in prison stripes and having a prison number upon his breast, though the witness swears that that is a picture of the prisoner as he saw him in jail.¹²²

Stationing men about the scene to be depicted to show the positions occupied by persons present when the crime was committed, and to aid the recollection of a witness,¹²³ or the fact that a change had been made in the edifice which was photographed, will not render the photograph irrelevant if the change is not too material.¹²⁴ If, however, the photograph was taken so long after the commission of the crime that material changes may have taken place it should be rejected, unless it is affirmatively shown that no material change had occurred.¹²⁵

The photograph to be received need not, as a rule, have been taken by a professional photographer.¹²⁶ But in one instance a photograph by an amateur was rejected, partly for the reason that he was utterly unfamiliar with the locality.¹²⁷

is especially valuable and relevant to identify him when it was taken immediately prior to or shortly after his arrest, if the other evidence of his personal appearance at that time is contradictory or unconvincing, or if he had intentionally changed his facial appearance, between his arrest and his trial, by growing or removing a beard or moustache. *State v. Ellwood*, 17 R. I. 763, 771, 24 Atl. 782; *Commonwealth v. Morgan*, 159 Mass. 375, 34 N. E. 458; *Commonwealth v. Campbell*, 155 Mass. 537, 30 N. E. 72.

¹²² *State v. Moran*, 131 Iowa 645, 109 N. W. 187.

¹²³ *People v. Jackson*, 111 N. Y. 362, 370, 19 N. E. 54.

¹²⁴ *Glazier v. Hebron*, 62 Hun (N. Y.) 137, 16 N. Y. S. 503; *Parshell v. New York, etc., R. Co.*, 66 Hun (N. Y.) 633, 21 N. Y. S. 354; *People v. Grill*, 151 Cal. 592, 91 Pac. 515.

¹²⁵ *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474, 483, 30 N. E. 869.

¹²⁶ *Duffin v. People*, 107 Ill. 113, 47 Am. 431; *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *Russell v. State (Ala.)*, 38 So. 291.

¹²⁷ *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474, 483, 30 N. E. 869.

§ 52. **Paintings and drawings.**—Pencil and pen-and-ink drawings have been received to identify or explain localities. Though they are received as primary evidence appealing to the eyes of the jury under the rule admitting photographs, they differ from the latter in that their accuracy as portraits or likenesses must be affirmatively shown by the testimony of the artist or other competent witness. There is no presumption of correctness founded on general use and employment, or on their being mechanical reproductions by a process which the court will judicially notice, as exists in the case of photographs. The witness called to prove their correctness must testify of his own knowledge that they faithfully represent the object depicted, and their accuracy, if disputed, is a question for the jury, turning upon the credibility of the witnesses.¹²⁸

The map of the *locus in quo* of the homicide or a plan of a house which was the scene of homicide or other crime, may be received in evidence. The main use of these is not as evidence but to enable the jury to better understand the oral testimony.¹²⁹ The draftsman of the map must testify as to its accuracy, but any other witnesses may refer to it while testifying.¹³⁰ It is not material by whom the map was prepared providing that he can testify that the map or diagram is accurate and is based upon knowledge derived from his own investigation. Thus a map prepared by the prosecuting attorney from his own observation intended to represent the route that the accused took in going to and returning from the place of the crime has been received.¹³¹

¹²⁸ *State v. Harrison* (N. Car.), 58 S. E. 754; *Hisler v. State*, 52 Fla. 30, 42 So. 692; *Carter v. State*, 39 Tex. Cr. App. 345, 46 S. W. 236, 48 S. W. 508; *Territory v. Emilio* (N. Mex.), 89 Pac. 239; *Territory v. Price* (N. Mex.), 91 Pac. 733; *Commonwealth v. Johnson*, 213 Pa. St. 432, 62 Atl. 1064; *People v. Johnson*, 140 N. Y. 350, 35 N. E. 604; *Burton v. State*, 107 Ala. 108, 18 So. 284. The question, what effect on the competency of photographs taken from a "rogue's gallery," and offered solely for the purpose of identifying the accused, certain indorsements stating

the persons portrayed were criminals, was raised, but not decided in *People v. Smith*, 121 N. Y. 578, 582, 24 N. E. 852. It would seem that the accusatory and derogatory indorsements, while not keeping out the photographs, ought to be excluded from the jury as hearsay, and as calculated to prejudice the prisoner.

¹²⁹ *West v. State*, 53 Fla. 77, 43 So. 445.

¹³⁰ *Burton v. State*, 115 Ala. 1, 22 So. 585.

¹³¹ *Burton v. State*, 115 Ala. 1, 22 So. 585.

§ 53. "Real evidence"—*Inspection by jurors.*—Real evidence means evidence which is obtained through the sight by the actual inspection of a person or thing by the judge or jury in open court.¹⁸² The subject of the production in court of articles to furnish visual proof of their condition is considered elsewhere in this volume.¹⁸³ It remains to consider only cases where a question of personal identity, resemblance or physical condition is concerned. The question is, when may the accused be compelled to submit to an examination by the jurors? Inspection and comparison of persons by the jury have been frequently allowed where race or color was in issue. This is wholly unobjectionable if the accused shall consent thereto, or if he desires to introduce the evidence in his own behalf.¹⁸⁴ Whether the accused can be compelled to exhibit a portion of his body to the jury, or be required to submit to a general physical examination by them, is a question upon which a diversity of opinion exists.

Under existing constitutional provisions, an accused person cannot be compelled to testify as a witness against himself. Hence it has been held that the accused, not being a witness, could not be compelled to stand up before a jury in order that they might ascertain from inspection to what race he belonged.¹⁸⁵ Whether compulsory inspection of the accused can be considered to infringe the constitutional prohibition that he shall not be compelled to testify against himself depends somewhat on circumstances. He waives it by going on the stand in his own behalf. If he does this, he must then submit to a cross-examination and

¹⁸² *Gaunt v. State*, 50 N. J. L. 490-495, 14 Atl. 600, citing cases.

¹⁸³ § 47, *ante*.

¹⁸⁴ It is error to refuse to permit the accused to place his physical appearance in evidence if the physical characteristics are such as cannot be manufactured for the occasion, as, for example, blindness, lack of members, or his color, size and height. *Lipes v. State*, 15 Lea (Tenn.) 125, 127, 54 Am. 402. On a prosecution for assault with intent to rape, it was not permissible for the state to require accused to place a cap on his

head for the purpose of identification by prosecutrix. *Turman v. State*, 50 Tex. Cr. App. 7, 95 S. W. 533.

¹⁸⁵ *State v. Jacobs*, 5 Jones (N. Car.) 259. In a prosecution against a negro for living in adultery with an alleged white woman, it was permissible for the state to make proffer of the woman to the jury, in order that they might determine whether or not she was a white woman. *Jones v. State* (Ala.), 47 So. 100.

may be compelled to exhibit a part of his person for the inspection of the jurors.

Even if he does not go upon the witness stand the majority of the cases hold that jurors can use their eyes as well as their ears, and, recognizing the difficulty of drawing any line of demarkation, maintain the rule that the accused may be required to submit his person or any part of it to the jury for examination.¹³⁶

Where the accused, on refusing to obey an order to arise in order to be identified, is forcibly compelled to stand up, it has been held that his constitutional rights were not violated nor was he compelled to give evidence against himself,¹³⁷ upon the theory that there was nothing in the mere act of arising or in his personal appearance which necessarily furnished evidence against him or connected him with the crime. The right of the accused to be present with the jury in court creates a reciprocal duty that he shall remain in their presence. The orderly conduct of a criminal trial requires that the court shall have full power to say what place the prisoner shall occupy, when he shall sit or stand, and that he shall remain within sight of the court and the witnesses. So it is universally admitted that if the prisoner shall appear in a mask, or veiled, or with his head covered, the court may order him to uncover his features, for without this exposure it would not be certain who the person really was who assumed to be the prisoner.¹³⁸

The information obtainable by inspection is of considerable value when the issue turns upon a question of race or color because of the marked racial characteristics which enable anyone of ordinary intelligence to distinguish between persons of different races. But evidence of identity, race or age thus obtained does not possess much probative force because of the unreliability of the untrained faculties of human observation. This objection

¹³⁶ *State v. Ah Chuey*, 14 Nev. 79, 89, 33 Am. 530n; *State v. Woodruff*, 67 N. Car. 89, 91; *State v. Hall*, 79 Iowa 674, 44 N. W. 914; *Garvin v. State*, 52 Miss. 207, 209; *State v. Wieners*, 66 Mo. 13. *Contra*, *Blackwell v. State*, 67 Ga. 76, 78, 79, 44 Am. 717. But he cannot be questioned while under visual examina-

tion, unless he is also a witness. *Garvin v. State*, 52 Miss. 207, 209.

¹³⁷ *People v. Gardner*, 144 N. Y. 119, 127-129, 38 N. E. 1003, 43 Am. St. 741, 28 L. R. A. 699n; *State v. Reasby*, 100 Iowa 231, 69 N. W. 451.

¹³⁸ *Rice v. Rice*, 47 N. J. Eq. 559, 21 Atl. 286, 11 L. R. A. 591n.

cannot be urged to its admissibility, if it is relevant, though doubtless affecting its credibility.¹³⁹

§ 54. Compelling the accused to submit to inspection by the jury or to stand up for identification.—The accused cannot object if he be identified in open court without being required to stand. A direction to a witness to look about the court and point out a person in court whom he thinks committed the crime is always proper.¹⁴⁰ The court or the prosecuting attorney may even point out the accused and ask a witness if that is the person who committed the crime.¹⁴¹

If the accused shall voluntarily stand up and so thus be identified by a witness pointing him out, he should not be granted a new trial upon the ground that he has been compelled to testify against himself.¹⁴² And it has been held that merely directing the accused to stand up for identification is not compelling him to be a witness against himself.¹⁴³ The accused may immediately on his arrest, if legally arrested, be subjected to a compulsory

¹³⁹ The question arises can the demeanor and conduct of the prisoner, his manifestation of emotion or the absence of it during the trial, but not while he is on the witness stand, and if he is not expressly under the inspection of the jurors, be considered by them as a legitimate source of evidence? The rule that the conduct of a witness may be regarded in estimating his credibility has no application here, for the credibility of the accused is not material if he is not a witness, and his demeanor then is only relevant, so far as it bears directly upon the crime, by showing that he is conscious of his guilt or the reverse. Practically it is impossible to prevent jurors from observing the appearance and behavior of the accused very closely while he is in court during the trial. They will naturally draw inferences therefrom either favorable or unfavorable to

him. The information thus obtained is evidence, and, doubtless, many a verdict has been determined thereby. While we countenance the modern jury system and insist upon the right of the prisoner to remain in court and to confront his accusers, we cannot close the eyes of the jurors. See article in 15 Cr. Law Mag., p. 339.

¹⁴⁰ State v. Johnson, 67 N. Car. 55.

¹⁴¹ State v. Hall, 79 Iowa 674, 44 N. W. 914; State v. Ruck, 194 Mo. 416, 92 S. W. 706.

¹⁴² Gallaher v. State, 28 Tex. App. 247, 12 S. W. 1087, Rex v. Watson, 2 Stark. 104, 116, 128; People v. Goldenson, 76 Cal. 328, 347, 19 Pac. 161.

¹⁴³ People v. Goldenson, 76 Cal. 328, 19 Pac. 161; State v. Reasby, 100 Iowa 231, 69 N. W. 451; People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. 741, 28 L. R. A. 699n.

physical examination to ascertain his identity.¹⁴⁴ His clothing may be removed so far as is necessary to procure evidence of identity and this may be done by a reasonable amount of force if he resists.¹⁴⁵

A witness may always testify to the physical condition of the prisoner when his condition is relevant. He may state what marks he saw on the prisoner's body, whether he was physically deformed in any way, and may describe his general personal appearance so far as he observed it. And this is the rule even where the clothing of the prisoner is forcibly removed without his consent by the police officers who arrested him, or who have him in charge, and his nude body is examined for purposes of identification. The witness may testify to what the prisoner wore and to what articles were found concealed upon him when he was searched. Permitting witnesses to testify to what they saw does not compel the accused to testify against himself, and such a case must clearly be distinguished from that in which the accused is placed upon the witness stand and compelled to answer questions.¹⁴⁶ Where the condition of the prisoner's hand at the date of the crime is relevant, it has been held that he may be compelled to exhibit it, devoid of covering; and a witness who saw it thus exhibited at the coroner's inquest may testify to its condition, though the exhibition was obtained by intimidation.¹⁴⁷

When a witness has forgotten the appearance of the accused, he has been allowed to testify that on a former trial he had identified the person then accused, and such evidence, if coupled with independent testimony that the present accused is the same person who previously had been identified, is sufficient evidence of identity to sustain a conviction.¹⁴⁸

¹⁴⁴ *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323n; *State v. Struble*, 71 Iowa 11, 32 N. W. 1.

¹⁴⁵ *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323n.

¹⁴⁶ *O'Brien v. State*, 125 Ind. 38, 45, 25 N. E. 137, 9 L. R. A. 323n; *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398; *State v. Jones*, 153 Mo. 457, 55 S. W. 80; *Fields v. State* 46 Fla. 84, 35 So. 185.

¹⁴⁷ *State v. Garrett*, 71 N. Car. 85, 87, 17 Am. 1.

¹⁴⁸ *Ruston v. State*, 4 Tex. App. 432, 434. Evidence of defendant's personal appearance two years before trial and one year subsequent to the crime is relevant. *Commonwealth v. Campbell*, 155 Mass. 537, 30 N. E. 72. A police officer ought not to be permitted to testify as an expert that he identified certain persons on some

The language constituting an identification by a third person not produced in court is hearsay, if coming from a person to whom it was related,¹⁴⁹ unless the extra-judicial identification is a part of the *res gestæ* of some relevant fact,¹⁵⁰ or unless it is contained in a dying declaration which is admissible as such. The objection that it is hearsay cannot then be urged against it.¹⁵¹

Under this rule a witness will not be allowed to state that a bystander pointed out a person to him and declared that he committed the crime.¹⁵²

§ 55. Mode and effect of identifying evidence.—The identity of the accused with the person who committed the crime is an important element. Its proof is always essential and in some cases difficult. The relevancy of evidence of identification depends upon the circumstances of the case. Generally speaking, any fact which would convince or tend to convince a person of ordinary judgment in carrying on his every-day affairs, as to the identity of a person will be received. The evidence will be permitted to take a wide range.¹⁵³ Usually evidence of identity comes from those present when the crime was committed and who state that they saw the accused commit it. This is direct evidence of identification, but circumstantial evidence may be received.¹⁵⁴ In an extreme case of this sort, the crime having been committed on a Thursday, the state was permitted to prove that the accused had a superstitious belief that Thursday was a lucky day for him,

prior occasions as robbers from a description of such persons given him by the person alleged to have been robbed. *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123.

¹⁴⁹ *Hopt v. People*, 110 U. S. 574, 581, 582, 28 L. ed. 262, 4 Sup. Ct. 202; *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *Rose v. State*, 13 Ohio C. C. 342, 7 Ohio Dec. 226; *Elsworth v. State*, 52 Tex. Cr. App. 1, 104 S. W. 903; *State v. Hoover*, 134 Iowa 17, 111 N. W. 323.

¹⁵⁰ *Jordan v. Commonwealth*, 25 Gratt. (Va.) 943, 945.

¹⁵¹ *Sylvester v. State*, 71 Ala. 17, 26;

People v. Gardner, 144 N. Y. 119, 128, 38 N. E. 1003, 43 Am. St. 741, 28 L. R. A. 699n.

¹⁵² *Felder v. State*, 23 Tex. App. 477, 485-488, 5 S. W. 145, 59 Am. 777n; *Reddick v. State*, 35 Tex. Cr. App. 463, 34 S. W. 274, 60 Am. St. 56; *State v. Hutchinson*, 95 Iowa 566, 64 N. W. 610; *Davis v. State*, 63 Ark. 470, 39 S. W. 356.

¹⁵³ *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; *State v. Witham*, 72 Me. 531; *State v. Martin*, 47 S. Car. 67, 25 S. E. 113.

¹⁵⁴ *Craig v. State*, — Ind. —, 86 N. E. 397.

and that he would be successful in anything he attempted on that day.¹⁵⁵ So it may be proved that the accused had been previously indicted under the assumed name alleged in the indictment.¹⁵⁶ A witness may testify that he identified the accused after his arrest as the person he saw commit the crime.¹⁵⁷ And a witness may testify that a photograph of the accused taken at the time of his arrest and exhibited to the witness on the stand resembled the person he saw commit the crime.¹⁵⁸ A witness testifying to identity may describe a person whom he saw in the vicinity of the crime at the date of its occurrence and he may testify to the actual color, height, weight and other appearances of this person and his description may be compared with that of the accused by the jury.¹⁵⁹ One who is present when the accused was brought before the complaining witness for identification cannot testify that the complainant identified the accused, as that is a conclusion of fact, but the witness may testify to whatever the complainant said to the accused in his presence or he may testify that the complainant was silent when he was asked if the accused was his assailant.¹⁶⁰

The identity of the name of the accused as given by him in court with the name of the person mentioned in the indictment, raises some presumption of identity of person.¹⁶¹ The names by which the defendant has been known may be proved to show his identity and also to prove that he had given a fictitious name, which under certain circumstances is suspicious.¹⁶² It is proper in order that the jury may determine the extent of the knowledge of a witness testifying to the identity of the accused to permit him to be asked how long he has known the accused and how long and how often he had visited him.¹⁶³ And where the evidence of identity is circumstantial, it may be permitted to take a wide

¹⁵⁵ *Davis v. State*, 51 Neb. 301, 70 N. W. 984.

¹⁵⁶ *Morse v. Commonwealth* (Ky.), 111 S. W. 714, 33 Ky. L. 831, 894.

¹⁵⁷ *Yarbrough v. State*, 105 Ala. 43, 16 So. 758; *Beavers v. State*, 103 Ala. 36, 15 So. 616.

¹⁵⁸ *People v. Carey*, 125 Mich. 535, 84 N. W. 1087. See photographs, *supra*, §§ 50, 51.

¹⁵⁹ *Andrews v. State* (Tex. Cr. App.), 83 S. W. 188.

¹⁶⁰ *Turman v. State*, 50 Tex. Cr. App. 7, 95 S. W. 533.

¹⁶¹ *Nelson v. State*, 151 Ala. 2, 43 So. 966.

¹⁶² *Commonwealth v. Johnson*, 199 Mass. 55, 85 N. E. 188.

¹⁶³ *Way v. State* (Ala.), 46 So. 273.

range. Any facts, which on their face, appear to relate to the accused and which are of a descriptive character which correspond in their details with a description of the accused, shown by other evidence, are admitted. Thus, a description of the accused, giving his name, age, nationality, place of birth and port of arrival contained in a report made by an officer of a vessel to the officers having charge of immigration matters was received, where, from the evidence it appears that the accused had been an immigrant and the descriptive statement tallied in its details with other facts brought out in the evidence.¹⁶⁴ If identity is the sole fact at issue and it is proved that a crime had been committed by some one, the jury should be expressly instructed to acquit unless they believe beyond a reasonable doubt that the accused has been identified as the party who committed the crime.¹⁶⁵

Whether a witness in identifying the accused as a person who committed the crime is expressing an opinion or stating a fact within his own knowledge is a question upon which a diversity of opinion exists. Some of the authorities regard identity as a fact and require the witness to identify the prisoner solely as a matter of his own knowledge and on personal recollection.

So the witness may be asked, "Do you know A.?" and, if he does, he may then state whether the accused is the individual mentioned. He cannot be permitted to state that he "thinks" the accused is A., or give his impression that a man whom he saw near the scene of the crime is identical with the accused. He should state facts, leaving the inference of identity with the jury.¹⁶⁶

According to another view a witness, in identifying the accused is expressing an opinion or impression, founded on his observation of numerous details, as his physical appearance, dress or other personal and peculiar incidents. He is accordingly permitted to frame his answer to a question touching the identity of the prisoner, in the form of an expression of opinion or belief or state it as his impression mainly because the facts constituting similarity, or the reverse, in personal appearance are so numerous and peculiar that they cannot be specifically narrated so as to

¹⁶⁴ *McInerney v. United States*, 143 Fed. 729, 74 C. C. A. 655.

¹⁶⁵ *Petty v. State*, 83 Miss. 260, 35 So. 213.

¹⁶⁶ *People v. Williams*, 29 Hun (N. Y.) 520, 523, 524; *People v. Wilson*, 3 Park. Cr. (N. Y.) 199, 206; *State v. Hyatt*, 179 Mo. 344, 78 S. W. 601.

bring out clearly their proper force and significance before the jury.¹⁶⁷ Hence a witness, after describing a person seen by him, may state that, in his opinion, it was the prisoner, or that he resembled the prisoner, under the rule permitting a non-expert witness to give his opinion where the jury would be unable, otherwise; to form an intelligent conception of identity.¹⁶⁸

The testimony of a witness that he believed he recognized the accused as the one he saw taking away stolen property, and that he saw and recognized other men who were with him, has been admitted.¹⁶⁹

Indeed, even if it be conceded that identity is a fact, the answer should hardly be rejected because the witness is not positive of the identity of the accused beyond all doubt; or, because, through excessive caution, he qualifies his answers by such expressions as "I think," or "I believe." Witnesses cannot be required to state all facts with equal positiveness.¹⁷⁰

Pointing out a person by a witness to the jury without naming him is a sufficient identification if his name is shown by independent evidence,¹⁷¹ nor will all the testimony of a witness be expunged merely because he failed to identify the accused when the latter would not arise for identification.

§ 56. Identification of the voice.—Evidence of identity consisting of the recognition of the voice of the accused by a witness who is familiar with it has been received. The witness may state that the accused was present on a certain occasion, and made a statement, and may then add that he knows it was the accused because he recognized his voice.¹⁷²

¹⁶⁷ See Underhill on Evid., § 186.

¹⁶⁸ *White v. Commonwealth*, 4 Ky. L. 373; *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. 401n; *State v. Powers*, 130 Mo. 475, 32 S. W. 984; *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737; *State v. Lytle*, 117 N. Car. 799, 23 S. E. 476; *Jordan v. State*, 50 Fla. 94, 39 So. 155; *Coffman v. State*, 51 Tex. Cr. App. 478, 103 S. W. 1128; *State v. James*, 194 Mo. 268, 92 S. W. 679 (as to identification of things); *People v. Rolfe*,

61 Cal. 540; *People v. Stanley*, 101 Mich. 93, 59 N. W. 498; *People v. Burt*, 170 N. Y. 560, 62 N. E. 1099; *Paulson v. State*, 118 Wis. 89, 94 N. W. 771.

¹⁶⁹ *State v. Welch*, 33 Ore. 33, 54 Pac. 213.

¹⁷⁰ *People v. Rolfe*, 61 Cal. 540, 543; Underhill on Evid., § 186.

¹⁷¹ *Commonwealth v. Whitman*, 121 Mass. 361, 362.

¹⁷² *People v. Willett*, 92 N. Y. 29, 32, 33; *State v. Kepper*, 65 Iowa 745,

So the witness may describe the tone of voice used, whether angry or otherwise, in a conversation overheard by him between the accused and the victim of a homicide.¹⁷³

This rule is particularly applicable in the case of nocturnal crimes, where it is physically impossible for the witness to have seen the accused, though he may have been in close proximity to him. The same rule would doubtless apply in the case of a blind witness.¹⁷⁴ The accused will not, unless he shall go upon the witness stand, be allowed to put his own voice in evidence in order to show his natural voice by speaking aloud in court. If permitted to speak, not being under oath at the time, he may simulate. The jury will not hear his natural and ordinary voice, but one which is manufactured for the occasion.

It has also been held that it is not material that the witness who had a conversation over the telephone with the accused, did not know at the time of the conversation who was talking. The conversation over the telephone may be proved if on subsequent acquaintance with the accused, the witness can identify the voice which he heard over the telephone as that of the accused.¹⁷⁵

The accused may prove to contradict a witness who states he recognized the voice of the accused on the occasion of the crime. that another person present had a similar voice and that this person's voice had on other occasions been mistaken for that of the accused.¹⁷⁶

749, 23 N. W. 304; *Givens v. State*, 35 Tex. Cr. App. 563, 34 S. W. 626; *Davis v. State*, 15 Tex. App. 594, 598; *Stepp v. State*, 31 Tex. Cr. App. 349, 20 S. W. 753; *Fussell v. State*, 93 Ga. 450, 21 S. E. 97; *Waggoner v. State* (Tex. Cr. App.), 98 S. W. 255; *Mack v. State*, 54 Fla. 55, 44 So. 706, 13 L. R. A. (N. S.) 373n. A witness may be allowed to state that he heard a person say something and that it was his opinion it was the voice of the accused. *Way v. State* (Ala.), 46 So. 273.

¹⁷³ *Campos v. State*, 50 Tex. Cr. App. 289, 97 S. W. 100.

¹⁷⁴ See also admissions and commu-

nications sent and received by telephone. *Underhill on Ev.*, § 85, and *People v. Ward*, 3 N. Y. Cr. 483, 511, where a witness was permitted to state a conversation with the prisoner had over a telephone. The witness testified he had talked with him hundreds of times before over it, knew his voice well and recognized it on this occasion. *State v. Usher*, 136 Iowa 606, 111 N. W. 811.

¹⁷⁵ *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573; *Commonwealth v. Scott*, 123 Mass. 222, 234, 25 Am. 81.

¹⁷⁶ *Mahoney v. State* (Tex. Cr. App.), 98 S. W. 854.

CHAPTER VI.

THE ACCUSED AS A WITNESS.

- § 57. Statutory competency of the accused.
- 58. The accused is not compellable to testify against himself—His credibility
- 58a. Evidence obtained by searches legal and illegal.
- 59. Mode of examining the accused.
- 60. Cross-examination — Incriminating and disgracing questions.
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- 69. Definition of accomplice.
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- 73. Credibility and corroboration of accomplices.
- 74. Extent of corroboration required—It must be of material facts.
- 75. The nature of the crime as a test of corroboration—Sufficiency of corroboration.

§ 57. **Statutory competency of the accused.**—Because of the common-law rule rendering parties to the record incompetent as witnesses, the defendant, in a criminal trial, was incapable at common law of testifying in his own behalf. It was considered certain that his fear of punishment, whether he were conscious of guilt, or of innocence, would cause him to testify untruthfully; and, to avoid this, his testimony was wholly excluded.

At the present time, in most states, the accused may, as a matter of statutory right, if he so elect, testify for himself. These statutes do not, of course, violate a constitutional provision that a prisoner shall not be compelled to testify against himself.¹ But as they are

¹ State v. Bartlett, 55 Me. 200, 217.

derogatory of the common law, they should receive a strict construction, though not such a construction as will nullify the legislative intention, and deprive the accused of his right to speak.

These enactments leave the exercise of the right to testify wholly optional with the accused, and many of them in terms provide that his failure or his neglect to exercise it, cannot be used as an argument against him.²

In the federal courts the competency of witnesses is regulated by a statute which provides that the laws of the state within whose limits the federal court is located shall be its rules of decision as to competency in trials at common law, in equity and admiralty. As the criminal jurisdiction of the federal courts is purely statutory, the competency of witnesses in criminal trials in those courts is not regulated by the statute of the state in which the court is located, but by the common law of the state, modified by the federal statutes defining crimes and regulating criminal proceedings and the competency of witnesses.³

² See *post*, § 58. Note on compelling accused to cover or uncover his face or head, 94 Am. St. 339; note on compelling accused to try on a shoe, 94 Am. St. 344; note on compelling accused to exhibit marks on his person, 94 Am. St. 340; note on compelling accused to make footprints, 94 Am. St. 343; note on compelling accused to give specimen of his handwriting, 94 Am. St. 344, 345; note on compelling accused to utter certain words or sounds to show his voice, 94 Am. St. 341; note on right of party to testify as to his intent or motive, 21 Am. St. 314; note on cross-examination of defendant in criminal prosecution, 38 Am. St. 895-897.

³ *United States v. Hawthorn*, 1 Dill. (U. S.) 422, 26 Fed. Cas. 15332; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. 617. This matter is now regulated by the act of March 16, 1878, to be found in 20 U. S. Stat. L. 30, p. 312, ch. 37. The

statutory provisions of the various states differ in detail, but their central idea is to give the accused the fullest opportunity to testify, while permitting no inference of his guilt to arise from his total silence. The statute of Michigan which reads: "No person shall be disqualified as a witness in any criminal case, or proceeding, by reason of his interest in the event of the same being a party, or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that the defendant in any criminal case shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him," nor shall the court permit any reference or comment to be made upon such neglect," may be taken as an example.

§ 58. The accused is not compellable to testify against himself—His credibility.—Though the accused is now a competent witness for himself, he cannot, under existing constitutional provisions, federal and state, “be compelled in any criminal case to be a witness against himself.”⁴ These provisions should be applied in a broad and liberal spirit, in order to secure to the citizen that immunity from every species of self-accusation implied in the language in which they are expressed.⁵ They are meant to protect the accused not only from being compelled to answer questions calling for an express confession of guilt, but from those calling for collateral circumstances also.⁶

Most of the statutes conferring competency upon the accused expressly provide that he can be called as a witness at his own request only. The purpose of these statutes is to confer a privilege upon him, not to impose an obligation upon the state to call him as its witness. Hence, such a statute does not entitle him to demand that he shall be called as a witness for the prosecution, even to prove his own handwriting.⁷

If the accused goes on the witness stand in his own behalf the credibility of his evidence is for the jury alone.⁸

⁴ U. S. Const., Fifth Amend. These provisions have been held applicable to accused persons and witnesses summoned to appear before the interstate commerce commission, *Counselman v. Hitchcock*, 142 U. S. 547, 562, 35 L. ed. 1110, 12 Sup. Ct. 195, to legislative investigations, *Emery's Case*, 107 Mass. 172, 179, 9 Am. 22, and to proceedings to punish for contempt, *In re McKenna*, 47 Kan. 738, 28 Pac. 1078.

⁵ *People v. Reardon*, 109 N. Y. S. 504.

⁶ *Emery's Case*, 107 Mass. 172, 179, 9 Am. 22; *Rogers v. State*, 4 Ga. App. 691, 62 S. E. 96; *Pitts v. State*, 140 Ala. 70, 37 So. 101; *Eaker v. State*, 4 Ga. App. 649, 62 S. E. 99; *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917; *Cooper v. State*, 86 Ala. 610, 6 So. 110, 11 Am. St. 84, 4 L. R. A. 766;

State v. Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. 711.

⁷ *Commonwealth v. Pratt*, 137 Mass. 98, 107.

⁸ *Miller v. State*, 15 Fla. 577; *State v. Napper*, 141 Mo. 401, 42 S. W. 957; *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465; *Wilson v. State*, 69 Ga. 224. The court may instruct the jury that they are not to accept the evidence of the accused blindly, or any further than it is corroborated by other evidence, but may consider whether it is true, and is given in good faith, or merely to prevent a conviction. *State v. Mecum*, 95 Iowa 433, 64 N. W. 286. But a charge reminding the jury that the accused is the only surviving witness of a homicide, for which he is on trial, while at the same time emphasizing his interest in the outcome of the trial and

But the court must (without, however, giving too much prominence to this fact) instruct them that they should,⁹ or that they may,¹⁰ consider the facts that he is interested in the outcome of the trial, and is testifying in his own behalf, in determining his credibility.

The jury should regard, among other things, the inherent probability or improbability of his statements, his intelligence or want of intelligence, his opportunities for knowledge or business methods, and to what extent he has been corroborated by other evidence.¹¹

Speaking generally the jury must determine the credibility of

pointing out the force and cogency of the incriminating circumstances, is very objectionable. *Hickory v. United States*, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. 327. A charge that while the law says defendant is a competent witness and may testify in his own behalf, and the jury should not capriciously disregard it, this does not mean that they should believe it, but only that they should consider it, and ascertain to the best of their judgment whether it is true, and, if true, they should act on it as on truth from any other source, and, if they should not believe it, they should reject it, they being the sole judges of the truth of the evidence, is not erroneous. *Harrison v. State*, 144 Ala. 20, 40 So. 568.

⁹ *State v. Renfrow*, 111 Mo. 589, 598, 20 S. W. 299; *People v. Cronin*, 34 Cal. 191, 203; *People v. Hitchcock*, 104 Cal. 482, 38 Pac. 198; *People v. Crowley*, 102 N. Y. 234, 238, 6 N. E. 384; *Anderson v. State*, 104 Ind. 467, 472, 4 N. E. 63, 5 N. E. 711; *Wilkins v. State*, 98 Ala. 1, 13 So. 312; *Commonwealth v. Harlow*, 110 Mass. 411; *State v. Moelchen*, 53 Iowa 310, 316, 317, 5 N. W. 186; *State v. Slingerland*, 19 Nev. 135, 141, 7 Pac. 280; *State v. Melvern*,

32 Wash. 7, 72 Pac. 489; *Burkett v. State*, 154 Ala. 19, 45 So. 682; *Wright v. State*, 148 Ala. 596, 42 So. 745; *Sykes v. State*, 151 Ala. 80, 44 So. 398; *Thomas v. State (Ala.)*, 47 So. 257; *Davis v. State*, 152 Ala. 25, 44 So. 561; *Greer v. State (Ala.)*, 47 So. 300.

¹⁰ *State v. Maguire*, 113 Mo. 670, 21 S. W. 212; *State v. Bryant*, 134 Mo. 246, 35 S. W. 597; *State v. Ihrig*, 106 Mo. 267, 270, 17 S. W. 300; *Panton v. People*, 114 Ill. 505, 507, 2 N. E. 411; *Chambers v. People*, 105 Ill. 409, 413, 414; *Bird v. State*, 107 Ind. 154, 156, 8 N. E. 14; *Hartford v. State*, 96 Ind. 461, 469, 49 Am. 185; *Smith v. State*, 108 Ala. 1, 19 So. 306, 54 Am. St. 140; *People v. Resh*, 107 Mich. 251, 65 N. W. 99; *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182; *State v. Holloway*, 117 N. Car. 730, 23 S. E. 168; *Newport v. State*, 140 Ind. 299, 39 N. E. 926; *Wrye v. State*, 95 Ga. 466, 22 S. E. 273; *State v. Tarter*, 26 Ore. 38, 37 Pac. 53; *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054. The cases are not harmonious upon the proper language of the instruction. Its form is usually prescribed by statute.

¹¹ *United States v. Kenney*, 90 Fed. 257.

the testimony of the accused under the same rules and principles as with any witness.¹²

So an instruction that the credibility and weight of defendant's testimony were for the jury, and that they might consider his manner of testifying, the reasonableness of his account of the transaction, and his interest in the case, and should consider his testimony and determine whether it was true or not, was not open to the objection of telling the jury that they were not bound to treat defendant's testimony the same as that of other witnesses.¹³

The jury should not permit the fact that the accused, while testifying, is burdened with an imputation of crime to influence them to such an extent that they will disregard his evidence, if they believe it is true. They should remember that, though accused, he is presumed to be innocent, until they are convinced he is guilty, and their verdict must be based upon the whole evidence, including his own.¹⁴ Hence, the jury may not, at pleasure and without regard to the elements of credibility which the evidence of the accused may possess, reject it because of his interest, or because they are not satisfied that it has been corroborated.^{14a} They must always fairly consider his evidence together with all the evidence in the case.

§ 58a. Evidence obtained by searches legal and illegal.—By the constitution of the United States and the constitutions of the sev-

¹² *Ferguson v. State*, 72 Neb. 350, 100 N. W. 800.

¹³ *Waller v. People*, 209 Ill. 284, 70 N. E. 681. In a prosecution for embezzlement, a charge specifically pointing out accused, and calling attention to his testimony, and stating that, if he had willfully and corruptly testified falsely to any fact material to the issue, the jury had the right to entirely disregard his testimony, was not error. *McCracken v. People*, 209 Ill. 215, 70 N. E. 749.

¹⁴ *Bird v. State*, 107 Ind. 154, 156, 8 N. E. 14; *Randall v. State*, 132 Ind. 539, 32 N. E. 305; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Wells*, 111 Mo. 533, 20 S. W. 232;

Sullivan v. People, 114 Ill. 24, 27, 28 N. E. 381; *State v. Sanders*, 106 Mo. 188, 17 S. W. 223. See *Underhill on Evid.*, § 234.

^{14a} *Owens v. State*, 63 Miss. 450, 452; *State v. Melvern*, 32 Wash. 7, 72 Pac. 489. It is error to instruct the jury that they must regard the evidence of the accused with great caution because of his interest, *State v. Holloway*, 117 N. Car. 730, 23 S. E. 168; *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; or that the jurors should bear in mind the tendency on the part of the guilty accused person to fabricate a story which may bring about their acquittal. *State v. Hoy*, 83 Minn. 286, 86 N. W. 98.

eral states, it has been provided that no one shall be compelled on a criminal trial, to give evidence against himself and that the rights of the people against unreasonable searches, shall not be violated. The mere fact that papers are produced by the execution of a search-warrant is no objection to their admission in evidence. In the supreme court of the United States, it has been held that the accused was not compelled to incriminate himself, where his private papers in the possession of the prosecution were introduced against him. This is the rule particularly where the witness who testifies says nothing concerning the papers produced.¹⁵

And it has been often held in the state courts that the above constitutional provisions are not violated merely by the reception in evidence of papers or articles of personal property taken from the person or premises of the accused while he is under arrest, and it does not appear in these cases, that it is material whether the search is made by virtue of a legal search warrant or not.¹⁶

On the other hand, it has been held that the articles obtained by search of the house of the accused under an illegal search warrant is not admissible under constitutional provisions.¹⁷ A distinction is made between articles or documents procured by a search of the person of the accused after he has been arrested and the same sort of evidence procured by an illegal search of the premises occupied by the accused.

In Georgia it has been repeatedly held that evidence either direct or indirect which has been secured by the prosecution by an unlawful search, either of the house or of the person of the accused, as, for example, where the accused has been illegally arrested and searched by police officers should be excluded.^{17a}

¹⁵ *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. 372, aff'g *People v. Adams*, 176 N. Y. 351, 68 N. E. 636, 98 Am. St. 675n, 63 L. R. A. 406.

¹⁶ *Lawrence v. State*, 103 Md. 17, 63 Atl. 96; *Commonwealth v. Carbin*, 143 Mass. 124, 8 N. E. 896; *State v. Sharpless*, 212 Mo. 176, 111 S. W. 69; *State v. Strait*, 94 Minn. 384, 102 N. W. 913; *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614; *People v. Coombs*,

158 N. Y. 532, 53 N. E. 527, aff'g 36 App. Div. (N. Y.) 284, 55 N. Y. S. 276; *Drake v. State*, 75 Ga. 413, 415; *State v. Ah Chuey*, 14 Nev. 79, 83, 33 Am. 530n; *Roszczyńska v. State*, 125 Wis. 414, 104 N. W. 113; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

¹⁷ *State v. Sheridan*, 121 Iowa 164, 96 N. W. 730.

^{17a} *Croy v. State*, 4 Ga. App. 456, 61 S. E. 848; *Hughes v. State*, 2 Ga. App. 29, 58 S. E. 390; *Gainer v. State*,

Elsewhere it has been held to be the general rule that the courts will not inquire at all into the mode by which the evidence is obtained if it is relevant and otherwise admissible and that the illegal seizure of papers does not in itself constitute any obstacle to their admissibility if they are relevant.¹⁸

So a pistol found on the person of the accused,^{18a} or documents taken from him at the time of his arrest,¹⁹ or articles of personal property which are relevant taken from the premises of the accused²⁰ have been received in evidence.

The production in court of vouchers taken from the possession of the accused by a witness who produces them under subpoena, does not violate the constitutional right of the accused to be exempt from giving evidence which would incriminate him.^{20a} So documents consisting of the letters of a private character which were taken from among the personal papers of the accused by his employes or other persons without his knowledge or consent and by them voluntarily turned over to the district attorney are receivable in evidence if relevant.²¹ And in New York, it has been expressly held that the police may search the person of one

2 Ga. App. 126, 58 S. E. 295; *Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66; *Sherman v. State*, 2 Ga. App. 148, 58 S. E. 393; *Davis v. State*, 4 Ga. App. 318, 61 S. E. 404; *Sherman v. State*, 2 Ga. App. 686, 58 S. E. 1122. (Concealed weapons.)

¹⁸ *State v. Flynn*, 36 N. H. 64; *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227; *Siebert v. People*, 143 Ill. 571, 582, 32 N. E. 431; *Commonwealth v. Smith*, 166 Mass. 370, 44 N. E. 503. Cf. *People v. Gardner*, 144 N. Y. 119, 128, 38 N. E. 1003, 43 Am. St. 741, 28 L. R. A. 699n; *Younger v. State*, 80 Neb. 201, 114 N. W. 170; *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573; *Imboden v. People*, 40 Colo. 142, 90 Pac. 608; *Hardesty v. United States*, 164 Fed. 420; *People v. Adams*, 85 App. Div. (N. Y.) 390, 83 N. Y. S. 481; *Rogers v. State*, 4 Ga. App.

691, 62 S. E. 96; *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917; *Taylor v. State* (Ga. App. 1908), 62 S. E. 1048; *Jones v. State* (Ga. App.), 62 S. E. 482; *Eaker v. State*, 4 Ga. App. 649, 62 S. E. 99.

^{18a} *Springer v. State*, 121 Ga. 155, 48 S. E. 907.

¹⁹ *State v. Royce*, 38 Wash. 111, 80 Pac. 268; *Waggoner v. State* (Tex. Cr. App.), 98 S. W. 255.

²⁰ *State v. Schmidt*, 71 Kan. 862, 80 Pac. 948 (bottles of liquor found in defendant's possession).

^{20a} *People v. Coombs*, 158 N. Y. 532, 53 N. E. 527.

²¹ *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227; *State v. Van Tassel*, 103 Iowa 6, 72 N. W. 497; *State v. Atkinson*, 40 S. Car. 363, 18 S. E. 1021, 42 Am. St. 877; *Imboden v. People*, 40 Colo. 142, 90 Pac. 608.

who is lawfully under arrest. They may also search the room in which he was arrested and any other place to which they can secure lawful access. Writings or articles which are procured by this search are not incompetent,²² because of the manner in which they were obtained.

§ 59. **Mode of examining the accused.**—As the accused is a competent witness, he has a constitutional right to demand that he shall, when testifying, be questioned by his own counsel in the same manner as other witnesses.²³ The court cannot, therefore, silence his counsel and compel the accused to give a general account of the whole transaction, nor is his counsel precluded from objecting to irrelevant questions put to him on his cross-examination.²⁴ He must be permitted on his direct examination to explain his conduct and declarations as he has testified to them, or as they have been described by other witnesses. He must be permitted fully to unfold and explain his actions, and to state the motives which he claims prompted them. It is, within certain limits, relevant for him to state what intention was present in his mind when he participated in a transaction which is in issue.²⁵

And the jury are the sole judges to determine whether the defendant's statement is false. They should not ignore his state-

²² *Smith v. Jerome*, 47 Misc. (N. Y.) 22, 93 N. Y. S. 202.

²³ *Clark v. State*, 50 Ind. 514, 515; *Fletcher v. State*, 49 Ind. 124, 132, 19 Am. 673.

²⁴ *People v. Brown*, 72 N. Y. 571, 573, 28 Am. 183; *Hanoff v. State*, 37 Ohio St. 178, 180, 41 Am. 496.

²⁵ In *People v. Quick*, 51 Mich. 547, 18 N. W. 375, it was held error to exclude the question "Why did you do that?" *State v. Montgomery*, 65 Iowa 483, 22 N. W. 639. "The object of the recent changes was not merely to enable parties to *disclose facts* wholly within their knowledge, but to do what had heretofore been impossible, to explain the motives with which they were performed, and to explain, if need be, what they meant, or intended to be understood as mean-

ing, by what they may have said in regard to any material fact. If parties are to be kept in harness and not allowed to explain their actions and words when they admit of explanation and when it is needed, but half the evil which was felt under the old rule has been removed." *People v. Farrell*, 31 Cal. 576, 584. Cf. *Ross v. State*, 116 Ind. 495, 497, 19 N. E. 451. "When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent, which imparts to it the character of an offense, and no one who violates the law, which he is conclusively presumed to know, can be heard to say that he had no criminal intent in doing the forbidden act. A party cannot excuse himself for an act intentionally done, and which is a violation

ment of intention, unless they believe it wholly false; and an instruction which requires the jury to do so is error. They must consider it in connection with all the evidence. The inference which they draw from it may be strong enough to overcome any conclusion of guilty intention which they may draw from his other acts or declarations.²⁶

One of several defendants jointly tried who becomes a witness for himself is a witness for all purposes; and his testimony while a witness in his own behalf is in no way incompetent merely because it may be injurious or beneficial to a co-defendant. The fact that, as usually happens, he tries to exonerate himself by casting the guilt upon his associates, while it may bear upon his credibility, is otherwise immaterial.²⁷

§ 60. Cross-examination—Incriminating and disgracing questions.—The accused, when testifying in his own behalf, waives many of the peculiar constitutional privileges which belong to him as one accused of crime. It is usually provided by statute that he may be examined and cross-examined "as any other witness," and where such is the case, he will not be permitted to claim any privilege while he is a witness that is not enjoyed by other witnesses.²⁸ In other words, the rule then is that he cannot claim as a witness the privileges which belong to him solely as the ac-

of the law, by saying he did not so intend. But where acts are equivocal and become criminal only by reason of the intent with which they are done, both must unite to constitute the offense, and both facts must be proved. In such cases, unless the intent is proved, the offense is not proved. As the criminal intent may be and usually is inferred from the declarations and conduct of the accused, he is permitted to disavow the imputed purpose and repel the presumption." Smith, C. J., in *State v. King*, 86 N. Car. 603; *Jackson v. Commonwealth*, 96 Va. 107, 30 S. E. 452; *Wohlford v. People*, 148 Ill. 296, 36 N. E. 107; *Crawford v. United States*, 30 App. D. C. 1; *State v. Barber*, 13 Idaho 65,

88 Pac. 418; *State v. Palmer*, 88 Mo. 568; *Dunbar v. Armstrong*, 115 Ill. App. 549; *Filkins v. People*, 69 N. Y. 101, 25 Am. 143; *State v. Tough*, 12 N. Dak. 425, 96 N. W. 1025; *White v. State*, 53 Ind. 595; *Lynch v. People*, 137 Ill. App. 444; *Ryan v. Territory (Ariz.)*, 100 Pac. 770; *People v. Quick*, 51 Mich. 547, 18 N. W. 375.

²⁶ *Commonwealth v. Thomas (Ky.)*, 104 S. W. 326, 31 Ky. L. 899.

²⁷ *Richards v. State*, 91 Tenn. 723, 725, 20 S. W. 533, 30 Am. St. 907.

²⁸ Since a witness can not be required to give evidence against himself, or to testify to facts showing his commission of a public offense, accused can not be required to disclose the commission of public offenses

cused.²⁹ He cannot complain if considerable latitude is allowed on his cross-examination, and, generally, he may be asked on his cross-examination the same questions as any witness.

In states where the cross-examination of the accused is not by statute expressly limited to matters brought out on his direct examination, he may be cross-examined, not only upon matters strictly relevant to the issue, but upon those which are collateral and apparently irrelevant, and which are calculated only to test the credibility and weight of his testimony.³⁰

other than that for which he is on trial. *Welch v. Commonwealth* (Ky.), 108 S. W. 863, 33 Ky. L. 57. Note on right to cross-examine accused who has taken witness stand as to confession which is not admissible in evidence, 10 L. R. A. (N. S.) 604.

²⁹ *State v. Simmons* (Kan.), 98 Pac. 277; *People v. Owen* (Mich.), 118 N. W. 590, 15 Det. Leg. N. 881.

³⁰ *Maloy v. State*, 52 Fla. 101, 41 So. 791; *Stalcup v. State*, 146 Ind. 270, 45 N. E. 334; *People v. Foo*, 112 Cal. 17, 44 Pac. 453; *State v. Harvey*, 131 Mo. 339, 32 S. W. 1110; *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12; *People v. Roemer*, 114 Cal. 51, 45 Pac. 1003; *Frank v. State*, 94 Wis. 211, 68 N. W. 657; *Commonwealth v. Nichols*, 114 Mass. 285, 287, 19 Am. 346n; *State v. Pfefferle*, 36 Kan. 90, 96, 12 Pac. 406; *Newman v. Commonwealth* (Ky.), 88 S. W. 1089, 28 Ky. L. 81; *Commonwealth v. Lannan*, 13 Allen (Mass.) 563; *Thomas v. State*, 103 Ind. 419, 438, 2 N. E. 808; *People v. Reinhart*, 39 Cal. 449, 450; *Hanoff v. State*, 37 Ohio St. 178, 180, 181, 41 Am. 496; *Okey, J.*, dissenting, pp. 184-187; *People v. Tice*, 131 N. Y. 651, 657, 30 N. E. 494, 15 L. R. A. 669n; *Connors v. People*, 50 N. Y. 240, 242; *Commonwealth v. Morgan*, 107 Mass. 199, 204; *State v. Witham*, 72 Me. 531; *State v. Ober*, 52 N. H.

459, 462, 13 Am. 88; *State v. Cohn*, 9 Nev. 179, 189; *Keyes v. State*, 122 Ind. 527, 531, 23 N. E. 1097; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; *State v. Wentworth*, 65 Me. 234, 240, 20 Am. 688; *Boyle v. State*, 105 Ind. 469, 474, 5 N. E. 203, 55 Am. 218; *Mitchell v. State*, 94 Ala. 68, 73, 10 So. 518; *McKeone v. People*, 6 Colo. 346, 348; *State v. Nelson*, 98 Mo. 414, 11 S. W. 997; *Yanke v. State*, 51 Wis. 464, 468, 8 N. W. 276; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *People v. Conroy*, 153 N. Y. 74, 47 N. E. 258. Commenting on this rule the court says, in *People v. Crapo*, 76 N. Y. 288, 290, 32 Am. 302: "He goes upon the stand under a cloud. He stands charged with a crime, and is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if, in addition, he may be submitted to cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which has no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict on insufficient evidence." See, also, *State v. Teasdale*, 120 Mo. App. 692, 97 S. W. 995; *Ross*

And the accused who testifies voluntarily in his own behalf is presumed to have done so with knowledge that he accepts the usual responsibilities of every witness and that anything he may say of an incriminating character may be subsequently used against him.³¹

The testimony of the accused voluntarily given at a coroner's inquest may be subsequently employed against him to contradict his testimony at the trial.^{31a}

So where the accused having been committed as an insane person immediately after the crime voluntarily testified in his own behalf on a hearing to secure his discharge as a sane person the reception in evidence on his subsequent trial of his testimony thus given is proper, though under the constitution he is protected from criminating himself.³²

§ 61. **Examination as to prior imprisonment, etc.**—He may be questioned as to specific facts calculated to discredit him. Thus his previous arrest,³³ or indictment,³⁴ or his conviction of a felony may be shown.³⁵

v. State, 139 Ala. 144, 36 So. 718; *State v. Heffernan*, 28 R. I. 20, 65 Atl. 284; *State v. Zdanowicz*, 69 N. J. L. 619, 55 Atl. 743; *Clinton v. State*, 53 Fla. 98, 43 So. 312; *Justice v. Commonwealth* (Ky.), 46 S. W. 499, 20 Ky. L. 386; *Williams v. State*, 66 Ark. 264, 50 S. W. 517; *Southworth v. State*, 52 Tex. Cr. App. 532, 109 S. W. 133.

³¹ *Collins v. State*, 39 Tex. Cr. App. 441, 46 S. W. 933.

^{31a} *Jones v. State*, 120 Ala. 303, 25 So. 204; *Steele v. State*, 76 Miss. 387, 24 So. 910. (Testimony before examining magistrate.)

³² *People v. Willard*, 150 Cal. 543, 89 Pac. 124.

³³ *State v. Murphy*, 45 La. Ann. 958, 13 So. 229; *People v. Foote*, 93 Mich. 38, 40, 52 N. W. 1036; *Hanoff v. State*, 37 Ohio St. 178, 180, 41 Am. 496; *State v. Bacon*, 13 Ore. 143, 147, 9 Pac. 393, 57 Am. 8n; *People v. Ogle*, 104 N. Y. 511, 514, 11 N. E. 53;

Brandon v. People, 42 N. Y. 265. Some cases hold that the question, "Have you ever been, or how many times have you been, arrested?" can not be asked, as an arrest, involving only an unproved charge of crime, of which innocence is presumed, throws no light upon his veracity. *People v. Brown*, 72 N. Y. 571, 573, 28 Am. 183; *People v. Crapo*, 76 N. Y. 288, 293, 32 Am. 302; *Ryan v. People*, 79 N. Y. 593, 601; *State v. Huff*, 11 Nev. 17, 26-28; *People v. Hamblin*, 68 Cal. 101, 102, 8 Pac. 687; *People v. Buckley*, 143 Cal. 375, 77 Pac. 169.

³⁴ *People v. Clark*, 102 N. Y. 735, 8 N. E. 38; *Wroe v. State*, 20 Ohio St. 460; *People v. Gale*, 50 Mich. 237, 15 N. W. 99; *Bruce v. State*, 39 Tex. Cr. App. 26, 44 S. W. 852; *Sexton v. State*, 48 Tex. Cr. App. 497, 88 S. W. 348. *Contra*, *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287; *Smith v. State*, 79 Ala. 21.

³⁵ N. Y. Code Civ. Pro., § 832; *Peo-*

A statute which provides that where the accused pleads not guilty and admits a prior conviction such connection must not be referred to on the trial does not prevent the accused from being accused on cross-examination if he has been convicted of a felony.³⁶

The accused may be asked on cross-examination if he had not heard that one of his witnesses and associates was an ex-convict.³⁷ So, a previous imprisonment in a penitentiary,³⁸ or house of correction,³⁹ his prior contradictory statements,⁴⁰ disorderly ac-

ple v. Johnson, 57 Cal. 571, 574; State v. Minor, 117 Mo. 302, 306, 22 S. W. 1085; State v. McGuire, 15 R. I. 23, 22 Atl. 1118; State v. Farmer, 84 Me. 436, 440, 24 Atl. 985; Prior v. State, 99 Ala. 196, 13 So. 681; People v. Arnold, 116 Cal. 682, 48 Pac. 803; Farmer v. Commonwealth (Ky.), 91 S. W. 682, 28 Ky. L. 1168; State v. Heusack, 189 Mo. 295, 88 S. W. 21; State v. Plomondon, 75 Kan. 853, 90 Pac. 254; People v. Cascone, 185 N. Y. 317, 78 N. E. 287 (holding that mere indictment is irrelevant); State v. Clark, 117 La. 920, 42 So. 425. (Need not be a conviction of similar crime.) A prior conviction of an infamous crime does not deprive the accused of the absolute and arbitrary statutory right to testify in his own behalf. Williams v. State, 28 Tex. App. 301, 303, 12 S. W. 1103; Newman v. People, 63 Barb. (N. Y.) 630. It is error to permit a question to accused calling for an admission that he has been convicted in another prosecution of a similar crime where it appears he had been granted a new trial and the incriminating evidence is weak. Thompson v. United States, 30 App. D. C. 352; People v. DeCamp, 146 Mich. 533, 109 N. W. 1047, 13 Det. Leg. N. 862; People v. Soeder,

150 Cal. 12, 87 Pac. 1016; State v. Babcock, 25 R. I. 224, 55 Atl. 685; State v. Benjamin (R. I.), 71 Atl. 65.

³⁶ People v. Oliver (Cal.), 95 Pac. 172.

³⁷ Long v. State, 72 Ark. 427, 81 S. W. 387.

³⁸ Turpin v. Commonwealth (Ky.), 74 S. W. 734, 25 Ky. L. 90; Davis v. State, 52 Tex. Cr. App. 629, 108 S. W. 667; People v. Courtney, 31 Hun (N. Y.) 199. The testimony of the jailer and of persons who saw him in jail and the commitment are usually competent and sufficient proof of his identity with the man who was in prison. State v. Howard, 30 Mont. 518, 77 Pac. 50.

³⁹ Commonwealth v. Bonner, 97 Mass. 587, 589.

⁴⁰ State v. Boyles, 80 S. Car. 352, 60 S. E. 233; State v. Hill, 45 Wash. 694, 89 Pac. 160; State v. Helm, 97 Iowa 378, 66 N. W. 751; Hicks v. State, 99 Ala. 169, 13 So. 375; Commonwealth v. Tolliver, 119 Mass. 312, 315; May v. State, 33 Tex. Cr. App. 74, 24 S. W. 910; State v. Avery, 113 Mo. 475, 21 S. W. 193; Huffman v. State, 28 Tex. App. 174, 178, 12 S. W. 588; Chambers v. People, 105 Ill. 409; Angling v. State, 137 Ala. 17, 34 So. 846.

tions,⁴¹ or the commission of offenses similar to that charged,⁴² as for example, where they are contemporaneous and a part of the *res gestæ*,⁴³ attempts to bribe witnesses,⁴⁴ or simulation of insanity,⁴⁵ may all be brought out by questions put to him on his cross-examination, to show what credit his evidence should receive.⁴⁶

The accused may also properly be asked upon his cross-examination questions relating to and intending to show his intoxica-

⁴¹ *People v. McCormick*, 135 N. Y. 663, 664, 32 N. E. 26; *Bow v. People*, 160 Ill. 438, 43 N. E. 593; *Commonwealth v. Barry*, 8 Pa. Co. Ct. 216; *Lahue v. State*, 51 Tex. Cr. App. 159, 101 S. W. 1008.

⁴² *State v. Vandiver*, 149 Mo. 502, 50 S. W. 892; *State v. Barrett*, 117 La. 1086, 42 So. 513; *People v. Casey*, 72 N. Y. 393, 399; *People v. Noelke*, 94 N. Y. 137, 144; 46 Am. 128; *People v. Hooghkerk*, 96 N. Y. 149, 164; *Fassinow v. State*, 89 Ind. 235, 237. *Contra*, *Welch v. Commonwealth (Ky.)*, 108 S. W. 863, 33 Ky. L. 51; *Ball v. Commonwealth (Ky.)*, 99 S. W. 326, 30 Ky. L. 600.

⁴³ *Pate v. State*, 150 Ala. 10, 43 So. 343.

⁴⁴ *Bates v. Holladay*, 31 Mo. App. 162, 169; *State v. Downs*, 91 Mo. 19, 3 S. W. 219; *Carothers v. State*, 75 Ark. 574, 88 S. W. 585; *State v. Deal*, — Ore. —, 98 Pac. 165.

⁴⁵ *State v. Pritchett*, 106 N. Car. 667, 11 S. E. 357.

⁴⁶ *Newman v. Commonwealth (Ky.)*, 88 S. W. 1089, 28 Ky. L. 81; *Benton v. State*, 78 Ark. 284, 94 S. W. 688; *Tally v. State*, 48 Tex. Cr. App. 474, 88 S. W. 339; *Charba v. State*, 48 Tex. Cr. App. 316, 87 S. W. 829; *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *State v. Mills*, 79 S. Car. 187, 60 S. E. 664. See also, *Bell v. State*, 31 Tex. Cr. App. 276, 277, 20

S. W. 549; *McDaniel v. State*, 97 Ala. 14, 12 So. 241; *State v. Farmer*, 84 Me. 436, 440, 24 Atl. 985; *State v. Walsh*, 44 La. Ann. 1122, 11 So. 811; *Parker v. State*, 135 Ind. 534, 35 N. E. 179, 23 L. R. A. 859; *United States v. Brown*, 40 Fed. 457; *Commonwealth v. Lannan*, 155 Mass. 168, 29 N. E. 467; *State v. Bulla*, 89 Mo. 595, 1 S. W. 764; *People v. Eckert*, 2 N. Y. Cr. 470, 481, and other cases cited; *Underhill on Evid.*, § 346a. "While occupying the witness stand he was entitled to the same rights and privileges, and was subject to the same rules of evidence, as any other witness. The fact that he was also a party accused of a crime clothed him with no greater rights or privileges as a witness, nor subjected him to any different rule of cross-examination. The same latitude and the same limitations apply to his cross-examination as if he had not been a party." *Hanoff v. State*, 37 Ohio St. 178, 180, 41 Am. 496; *People v. Oliver (Cal.)*, 95 Pac. 172. The accused may be asked on cross-examination if he had not tried to evade arrest, *Ryan v. People*, 79 N. Y. 593; and if he had not deserted his home and family and become a tramp. *Yanke v. State*, 51 Wis. 464, 8 N. W. 276. Compare *State v. Barnett*, 203 Mo. 640, 102 S. W. 506, as to bad reputa-

tion before he committed the crime charged against him,⁴⁷ or whether he had or had not at one time been criminally intimate with a woman, whose name is stated; and whether he had not threatened to kill any one who visited her.⁴⁸ He may be questioned on cross-examination exhaustively and in detail as to his conduct prior to the crime⁴⁹ as to his residence and business occupation before or at the date of the crime,⁵⁰ and in particular as to his movements or whereabouts after the commission of the crime for the purpose of showing that he had fled or attempted to flee to escape arrest.⁵¹ Questions on cross-examination directed to bring out his immoral conduct in his past life,⁵² his lack of good faith,⁵³ and his movements or particular acts if impeaching are generally competent.⁵⁴ So the prosecution may cross-examine the accused, who was an attorney, with the object of proving that he has been disbarred, to impeach his credit as a witness, but the prosecution will not be permitted to bring out the details of the professional or other misconduct of the accused which resulted in his disbarment.⁵⁵ The accused may generally be cross-examined for the purpose of showing that he made statements out of court which contradict what he testifies to on his direct examination.⁵⁶ And where the testimony of the accused on his direct examination, differs materially from prior statements made by him to the prosecuting attorney, or to other persons, it is proper to permit him to be asked whether he has not altered his testimony for the purpose of making it correspond with or corroborate the testimony of his own witnesses.⁵⁷ If the accused, on the direct examination voluntarily testifies as to his conduct, he may, on cross-examination, be

⁴⁷ *State v. Rowell*, 75 S. Car. 494, 56 S. E. 23.

⁴⁸ *Carr v. State*, 81 Ark. 589, 99 S. W. 831.

⁴⁹ *Barden v. State*, 145 Ala. 1, 40 So. 948.

⁵⁰ *Viberg v. State*, 138 Ala. 100, 35 So. 53, 100 Am. St. 22.

⁵¹ *State v. Cornelius*, 118 La. 146, 42 So. 754; *Untreinor v. State*, 146 Ala. 26, 41 So. 285.

⁵² *Dungan v. State*, 135 Wis. 151, 115 N. W. 350.

⁵³ *State v. Stukes*, 73 S. Car. 386, 53 S. E. 643.

⁵⁴ *Thompson v. United States*, 75 C. A. 172, 144 Fed. 14; *Linnehan v. State*, 120 Ala. 293, 25 So. 6.

⁵⁵ *People v. Dorthy*, 156 N. Y. 237, 50 N. E. 800.

⁵⁶ *Morris v. State*, 146 Ala. 66, 41 So. 274.

⁵⁷ *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

questioned as to the details of this conduct and the evidence on these details will be permitted to take a wide range.⁵⁸ The rule that the conviction of the accused may be shown on his cross-examination as impeachment does not permit the prosecution to bring out on cross-examination, the evidence or details of the criminal offense of which he was convicted. The admission of this evidence is error justifying a reversal.⁵⁹

§ 62. Statutory limitation of cross-examination to relevant matters.

—If, however, the question calls for an answer, which, though ostensibly invoked solely to aid the jury in estimating the credibility of the accused, may, by showing him guilty of other similar crimes, indirectly lead them to infer that he is guilty of the crime charged, the court may interfere in its discretion. To compel the accused to answer indiscriminately all questions respecting past criminal transactions, which, though similar, are separate and distinct from that for which he is on trial, would not only be treating him more harshly than other witnesses, but would be a serious infringement of his constitutional privileges. Hence, even in those states where no statute exists confining the cross-examination within the limits of the direct, it is generally held that any disgracing question which is put to the accused upon his cross-examination must be one that will affect his credibility as a witness alone, either directly or by its tendency to show a bad moral character.⁶⁰

In some states it is expressly provided by statute that the prosecution shall be allowed to cross-examine the accused only upon matters to which he has already testified, or which are legitimately connected therewith, or which were inquired of or referred to on the direct examination.⁶¹ These statutes should be strictly con-

⁵⁸ *State v. Zdanowicz*, 69 N. J. L. 619, 55 Atl. 743. *Mo.* 339, 32 S. W. 1110; *State v. Chamberlain*, 89 Mo. 129, 133, 1 S. W. 145; *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. 655, 31 L. R. A. 294; *State v. Underwood*, 44 La. Ann. 852, 854, 11 So. 277; *Gale v. People*, 26 Mich. 157, 160, 161; *Elliott v. State*, 34 Neb. 48, 50, 51 N. W. 315; *State v. Turner*, 110 Mo. 196, 201, 19

⁵⁹ *State v. Mount*, 73 N. J. L. 582, 64 Atl. 124, aff'g 72 N. J. L. 365, 61 Atl. 259.

⁶⁰ *People v. Brown*, 72 N. Y. 571, 573, 28 Am. 183.

⁶¹ *State v. Saunders*, 14 Ore. 300, 309, 12 Pac. 441; *State v. Harvey*, 131

strued with the view of protecting the rights of the accused and giving him a fair and impartial trial. Hence, in those states it is reversible error for the court to permit the cross-examination to extend beyond the limits of the direct, both as regards questions directly relevant and questions affecting the credibility of the accused only. And this is the rule where the court has the discretion to compel other witnesses to answer disgracing questions on their cross-examination.⁶²

§ 63. Mode of cross-examination.—The cross-examination of the accused ought to be carried on in a regular and orderly manner. He cannot be interrogated by the prosecution until he is properly turned over for cross-examination at the close of his direct examination. But where the defendant, on taking his seat after the direct examination, declares to the jury that he is a peaceable, law abiding citizen, and that he never had any idea of committing a crime, it is not reversible error to permit the district attorney to ask him if he had had trouble with many other persons.⁶³ It has been held that the court may permit the accused to be recalled for further cross-examination after his cross-examination has been completed.⁶⁴

S. W. 645; *State v. Cook*, 132 Mo. App. 167, 112 S. W. 710; *People v. Morton*, 139 Cal. 719, 73 Pac. 609.

⁶² *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *State v. Saunders*, 14 Ore. 300, 316, 12 Pac. 441; *State v. McLaughlin*, 76 Mo. 320, 321; *People v. McGungill*, 41 Cal. 429, 436; *State v. Patterson*, 88 Mo. 88, 91, 57 Am. 374. "The humane provision of the law that a party shall not be compelled to be a witness against himself remains in full force, and is as effectually violated when the cross-examination of the accused is extended beyond the facts to which he has testified as it would be if he were to be called and made to testify at the instance of the state." *State v. Lurch*, 12 Ore. 99, 103, 6 Pac. 408.

⁶³ *Taylor v. Commonwealth (Ky.)*, 18 S. W. 852, 13 Ky. L. 860.

⁶⁴ *State v. Horne*, 9 Kan. 119, 128; *State v. Johnson*, 72 Iowa 393, 396, 397, 34 N. W. 177; *State v. Cohn*, 9 Nev. 179; *Commonwealth v. Eisenhower*, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. 670; *State v. Favre*, 51 La. Ann. 434, 25 So. 93. Where the accused has denied on the direct examination that he wrote an instrument, he may be compelled on cross-examination to write the words on paper. *United States v. Mullaney*, 32 Fed. 370, 371. The accused is not compelled to furnish evidence against himself if he does this voluntarily. *Sprouse v. Commonwealth*, 81 Va. 374.

§ 64. Privileged communications on the cross-examination.—The accused does not, merely by going upon the witness stand, waive the protection which the statute affords his confidential statements made to an attorney, physician or priest. He cannot, therefore, be made to divulge communications made by him to his counsel, or advice received during the existence of the relation of attorney and client.⁶⁵ The privilege is for the protection of the client and may be waived by him,⁶⁶ but the waiver must be express and unequivocal.⁶⁷

It cannot be waived by third persons because they are in privity with him.⁶⁸ The fact that the accused denies upon the witness stand that he made a certain statement to his attorney will not authorize proof of it by the latter's testimony.⁶⁹

§ 65. Conclusiveness of answers—Impeachment by other witnesses.—The rule forbidding the contradiction of the answers to irrelevant questions on cross-examination applies to the answers of the accused.⁷⁰ So where on cross-examination the accused testifies to the commission of other crimes by way of impeachment the state cannot contradict it.⁷¹ This rule, however, does not preclude the contradiction of answers to relevant questions put on the cross-examination, merely because contradiction tends indirectly to impeach the credibility of the witness. The accused may be asked if he did not, at a particular time and place, give a contradictory account of relevant facts. If he denies he has done so, he may be contradicted by the evidence of some one who heard him, though

⁶⁵ *Duttenhofer v. State*, 34 Ohio St. 91, 95, 32 Am. St. 362.

⁶⁶ The privilege is waived if the witness voluntarily discloses, during the direct examination, the facts in the communication. *State v. Tall*, 43 Minn. 273, 276, 45 N. W. 449; *People v. Gallagher*, 75 Mich. 512, 515, 42 N. W. 1063.

⁶⁷ *State v. James*, 34 S. Car. 49, 58, 12 S. E. 657; *Wharton on Cr. Ev.*, 500. See also, §§ 175, 176, 178.

⁶⁸ *State v. James*, 13 S. E. 325, 34 S. Car. 579, not reported in full.

⁶⁹ *State v. James*, 34 S. Car. 49, 58,

12 S. E. 657. "The true view seems to be that communications which the lawyer is precluded from disclosing the client can not be compelled to discover." *State v. White*, 19 Kan. 445, 447, 27 Am. 137n.

⁷⁰ *Marx v. People*, 63 Barb. (N. Y.) 618, 619; *People v. Ware*, 29 Hun (N. Y.) 473, 475, 92 N. Y. 653; *George v. State*, 16 Neb. 318, 320, 321, 20 N. W. 311; *McKeone v. People*, 6 Colo. 346, 348.

⁷¹ *People v. De Garmo*, 179 N. Y. 130, 71 N. E. 736, rev'g 73 App. Div. (N. Y.) 46, 76 N. Y. S. 477.

the probable result of this is not so much to prove relevant facts as to show the accused has contradicted himself. So the state may prove contradictory statements voluntarily made by the accused before the coroner,⁷² or on the preliminary examination, or upon a former trial for the same offense.⁷³

§ 66. The bad character of the accused—When admissible to impeach him.—Whether the accused may be impeached by proving bad character to the same extent as other witnesses depends largely upon the statutes rendering him competent as a witness. Where he may be impeached as any other witness his bad character or general reputation for veracity alone may always be shown to impeach him.⁷⁴

But here a difficult question suggests itself. Can the general bad character of the accused be shown solely for the purpose of impeaching him as a witness, in case he has not, as the accused, first offered evidence of good character?⁷⁵ Where the statute expressly provides that the accused, when testifying as a witness, subjects himself to the same rules of examination as any witness, the weight of the cases maintains the affirmative, at least in those states where the general bad character of a witness may be shown.⁷⁶ If, however, the statute does not expressly provide that

⁷² Woods v. State, 63 Ind. 353, 358; Lovett v. State, 60 Ga. 257, 260; People v. Kelley, 47 Cal. 125; State v. Mullins, 101 Mo. 514, 519, 14 S. W. 625; State v. Gilman, 51 Me. 206, 218-226.

⁷³ Dumas v. State, 63 Ga. 600, 601, 604; State v. Dyer, 139 Mo. 199, 40 S. W. 768.

⁷⁴ Adams v. People, 9 Hun (N. Y.) 89, 97; Fletcher v. State, 49 Ind. 124, 130, 131, 19 Am. 673; State v. Beal, 68 Ind. 345, 346, 34 Am. 263; State v. Baker, 209 Mo. 444, 108 S. W. 6; Malloy v. State, 52 Fla. 101, 41 So. 791. Code Cr. Proc., § 393, providing that defendant may testify as a witness in his own behalf, not expressly provid-

ing that when so testifying he may be examined or impeached the same as other witnesses, his general character is protected from attack, unless he puts it in issue by himself introducing evidence relating to it. People v. Hinksman, 192 N. Y. 421, 85 N. E. 676.

⁷⁵ See § 76 *et seq.*

⁷⁶ State v. Kirkpatrick, 63 Iowa 554, 559, 19 N. W. 660; Drew v. State, 124 Ind. 9, 13, 23 N. E. 1098; Peck v. State, 86 Tenn. 259, 266, 6 S. W. 389; State v. Cohn, 9 Nev. 179; Connors v. People, 50 N. Y. 240; State v. McGuire, 15 R. I. 23, 22 Atl. 1118; Fields v. State, 121 Ala. 16, 25 So. 726; Sweatt v. State (Ala.), 47 So. 194.

the accused may be examined or impeached as other witnesses, his general character is protected from attack.

Logically a defendant, who elects to testify, occupies the double position of accused and witness. He combines in his person the rights and privileges of each; for it is inconceivable that the statute, which made him a witness, was intended to deprive him of any of the constitutional or other privileges which he enjoyed as the accused before its passage.⁷⁷

Hence, even where the general character of a witness can be attacked, his character, when he has not first put it in issue, cannot be impeached merely because he testifies.⁷⁸ Sometimes it is provided that his prior conviction of felony may be proved,⁷⁹ when he testifies, but not his plea of guilty without sentence.⁸⁰

§ 67. Commenting on the failure of the accused to testify.—It is usually provided by statute that the failure of the accused to testify in his own behalf must not be considered by the jury as a circumstance against him, nor can it be alluded to, or commented on, by counsel. Under such a statute, the court should promptly interrupt a prosecuting counsel who shall, in his argument, attempt to make use of the fact that the prisoner has not taken the witness stand; and should charge that the prisoner's silence creates no presumption of his guilt,⁸¹ and that it is the duty of the jury to exclude his silence entirely from their consideration.

⁷⁷ *State v. Beal*, 68 Ind. 345, 346, 34 Am. 263.

⁷⁸ *Fletcher v. State*, 49 Ind. 124, 131-133, 19 Am. 673; *State v. Kirkpatrick*, 63 Iowa 554, 559, 19 N. W. 660.

⁷⁹ *State v. McGuire*, 15 R. I. 23, 22 Atl. 1118.

⁸⁰ *Marion v. State*, 16 Neb. 349, 361, 20 N. W. 289.

⁸¹ *State v. Mitchell*, 32 Wash. 64, 72 Pac. 707; *McCoy v. State* (Tex. Cr. App.), 81 S. W. 46; *State v. Weaver*, 165 Mo. 1, 65 S. W. 308, 88 Am. St. 406; *Staples v. State*, 89 Tenn. 231, 14 S. W. 603; *Wilson v. United States*, 149 U. S. 60, 37 L. ed. 650, 13 Sup. Ct. 765; *Roberts v. State*, 122 Ala. 47,

25 So. 238; *Showalter v. State*, 84 Ind. 562, 566; *Staples v. State*, 89 Tenn. 231, 14 S. W. 603; *People v. Brown*, 53 Cal. 66; *People v. Doyle*, 58 Hun (N. Y.) 535, 536, 12 N. Y. S. 836; *State v. Mosley*, 31 Kan. 355, 357, 2 Pac. 782; *Gray v. State*, 42 Fla. 174, 28 So. 53; *State v. Mathews*, 98 Mo. 125, 131, 10 S. W. 144, 11 S. W. 1135; *State v. Tennison*, 42 Kan. 330, 332, 22 Pac. 429; *Quinn v. People*, 123 Ill. 333, 347, 15 N. E. 46; *Parrott v. Commonwealth* (Ky.), 47 S. W. 452, 20 Ky. L. 761; *State v. Banks*, 78 Me. 490, 7 Atl. 269. In *Ruloff v. People*, 45 N. Y. 213, 222, and *Commonwealth v. Hanley*, 140 Mass. 457, 5 N. E. 468,

But, in order that a verdict of guilty should be set aside, because comment has been permitted upon the failure of the accused to testify, an objection must be promptly made, the attention of the court obtained, and a ruling had thereon.⁸²

Strict compliance with the statute is usually required.⁸³

The prosecuting attorney must not be allowed to evade it by indirect and covert allusions, as by calling the jury's attention to the fact that none of the neighbors of a person on trial for the murder of his wife were informed by him how she came to her death,⁸⁴ or by stating to the jury that, if the accused shall fail to testify, the law precludes the state from commenting upon his failure.⁸⁵

But not every reference to the law is prohibited. The true test is, was the reference calculated or intended to direct the attention of the jury to the defendant's neglect to avail himself of his right?⁸⁶

it was held that any allusion by the court in its charge to the fact that the defendant has not testified was error.

⁸² *Matthews v. People*, 6 Colo. App. 456, 41 Pac. 839; *Metz v. State*, 46 Neb. 547, 65 N. W. 190; *Martin v. State*, 79 Wis. 165, 175, 48 N. W. 119, 122.

⁸³ *Austin v. People*, 102 Ill. 261; *Baker v. State*, 122 Ala. 1, 26 So. 194; *Lamb v. State*, 69 Neb. 212, 95 N. W. 1050; *State v. Wisniewski*, 13 N. Dak. 649, 102 N. W. 883; *Martinez v. State*, 48 Tex. Cr. App. 33, 85 S. W. 1066; *Davis v. State*, 138 Ind. 11, 37 N. E. 797; *State v. Baldoser*, 88 Iowa 55, 55 N. W. 97; *Tudor v. Commonwealth (Ky.)*, 43 S. W. 187, 19 Ky. L. 1039.

⁸⁴ *State v. Moxley*, 102 Mo. 374, 393, 14 S. W. 969, 15 S. W. 556.

⁸⁵ *Jordan v. State*, 29 Tex. App. 595, 16 S. W. 543. A remark by a prosecuting attorney in discussing the question of night session that "the defendant had not testified" is error. *State v. Bennett*, 21 S. Dak. 396, 113 N. W. 78. Permitting the prosecuting

attorney to say, in response to the quotation by the defendant "that rape is a crime easily charged, hard to be proved and difficult to be defended," that, "since the legislature passed a statute giving the defendant the right to testify in his own behalf, it can no longer be said as a maxim of law that 'rape is a crime hard to be defended'" is reversible error. *Austin v. People*, 102 Ill. 261, 263. So it was error for the district attorney to say to counsel for defendant, "You know the laws of this state permit the defendant to remain silent, and it would be improper and cowardly for me to comment upon it, and it is not my intention to evade the spirit or letter of the law." *State v. Holmes*, 65 Minn. 230, 68 N. W. 11. It is error for the prosecuting attorney to say in closing to the jury that "nobody on earth denies" that defendant had written a certain letter, and that "no living soul has denied that defendant seduced this little girl." *Hoff v. State*, 83 Miss. 488, 35 So. 950.

⁸⁶ *Watt v. People*, 126 Ill. 9, 32, 18

Where such comment is made and the court, though rebuking the speaker, refuses, or even omits to charge that it should be disregarded, a new trial must be had.⁸⁷

The accused is entitled by the statutes to have the prosecuting attorney remain absolutely silent during all the trial as to the failure of the accused to testify, and not only is he entitled to have this, but he is also entitled to have the court remain silent as well and the mere charge to the jury that they should not comment on the failure of the accused to testify nor should they draw any presumption of guilt from it, though intended to favor the accused, has been held reversible error.⁸⁸

§ 68. Exclusion or withdrawal of comments on failure to testify—Failure to call other witnesses, or to testify to incriminating facts.—Upon the question whether a new trial should be granted for a comment upon the failure of the accused to testify when the district attorney withdraws his remarks, or the court excludes them and also instructs the jury that the silence of the accused is not a circumstance against him, the authorities are divided. Many cases hold that under these circumstances the error is cured,⁸⁹ though others hold that a new trial should be had though the prosecuting attorney is rebuked and the jurors are positively instructed to dismiss the comments from their minds.⁹⁰

N. E. 340, 1 L. R. A. 403; State v. Mosley, 31 Kan. 355, 357, 2 Pac. 782.

⁸⁷ State v. Banks, 78 Me. 490, 492, 7 Atl. 269; People v. Brown, 53 Cal. 66, 67; State v. Chisnell, 36 W. Va. 659, 667, 15 S. E. 412; Commonwealth v. Harlow, 110 Mass. 411, 412; Hunt v. State, 28 Tex. App. 149, 12 S. W. 737, 19 Am. St. 815; State v. Moxley, 102 Mo. 374, 393, 14 S. W. 969, 15 S. W. 556; People v. Rose, 52 Hun (N. Y.) 33, 36, 4 N. Y. S. 787; State v. Currie, 13 N. Dak. 655, 102 N. W. 875, 112 Am. St. 687, 69 L. R. A. 405; State v. Taylor, 57 W. Va. 228, 50 S. E. 247; Barnard v. State, 48 Tex. Cr. App. 111, 86 S. W. 760, 122 Am. St. 736; State v. Levy, 9 Idaho 483, 75 Pac. 227.

⁸⁸ Tines v. Commonwealth (Ky.), 77 S. W. 363, 25 Ky. L. 1233.

⁸⁹ People v. Hess, 85 Mich. 128, 48 N. W. 181; State v. Chisnell, 36 W. Va. 659, 667, 671, 15 S. E. 412, 414, 416; Crandall v. People, 2 Lans. (N. Y.) 309; Calkins v. State, 18 Ohio St. 366, 373; Commonwealth v. Worcester, 141 Mass. 58, 61, 6 N. E. 700; State v. Cameron, 40 Vt. 555, 565; Ruloff v. People, 45 N. Y. 213, 222; Staples v. State, 89 Tenn. 231, 14 S. W. 603; Commonwealth v. Harlow, 110 Mass. 411, 412; Herndon v. State, 50 Tex. Cr. App. 552, 99 S. W. 558; Clinton v. State (Fla.), 47 So. 389.

⁹⁰ State v. Holmes, 65 Minn. 230, 68 N. W. 11; Sanders v. State, 73 Miss.

The latter view would seem most consistent with reason and common sense. Mere silence under an accusation of crime, where an opportunity for denial is afforded, is sure to create an inference of guilt in the mind of any one, though no oral comment is made thereon. It is absurd therefore to suppose that any judicial declaration will remove the effect of language which has found a lodgment in the minds of the jurors, spent its force and subserved its purpose of creating a prejudice against the accused.⁹¹

The exemption from unfavorable comment is applicable only when the accused wholly refrains from testifying. If he voluntarily goes upon the stand he waives this exemption, and the state may comment upon his testimony as fully as on that of any other witness, and may call attention to his silence and demeanor while there, or at the preliminary examination,⁹² to his refusal to answer incriminating questions; or to deny prominent and damaging facts of which he must have some personal knowledge.⁹⁴

The prosecution may always freely comment on the failure of the accused to call particular witnesses, or witnesses for a particular purpose, as, for example, to account for his whereabouts

444, 18 So. 541; *Reddick v. State*, 72 Miss. 1008, 16 So. 490; *Angelo v. People*, 96 Ill. 209, 36 Am. 132; *Quinn v. People*, 123 Ill. 333, 346, 15 N. E. 46; *Long v. State*, 56 Ind. 182, 26 Am. 19; *Showalter v. State*, 84 Ind. 562, 566; *Hunt v. State*, 28 Tex. App. 149, 150, 12 S. W. 737; *State v. Brownfield*, 15 Mo. App. 593.

⁹¹ "As well try to brush out with the hand a stain of ink on white linen." *Quinn v. People*, 123 Ill. 333, 347, 15 N. E. 46; *State v. Cameron*, 40 Vt. 555, 565.

⁹² *Taylor v. Commonwealth (Ky.)*, 34 S. W. 227, 17 Ky. L. 1214.

⁹⁴ *Russell v. State*, 77 Neb. 519, 110 N. W. 380; *Comstock v. State*, 14 Neb. 205, 209, 15 N. W. 355; *Solander v. People*, 2 Colo. 48; *State v. Anderson*, 89 Mo. 312, 320, 1 S. W. 135; *Cotton v. State*, 87 Ala. 103, 107, 6 So. 372; *State v. Glave*, 51 Kan. 330, 33

Pac. 8; *Lee v. State*, 56 Ark. 4, 19 S. W. 16; *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State v. Anderson*, 89 Mo. 312, 1 S. W. 135; *State v. Tatman*, 59 Iowa 471, 475, 13 N. W. 632; *State v. Ober*, 52 N. H. 459, 463, 13 Am. 88; *Brashears v. State*, 58 Md. 563, 568; *Toops v. State*, 92 Ind. 13, 16; *Stover v. People*, 56 N. Y. 315, 320, 321; *Commonwealth v. Mullen*, 97 Mass. 545; *Commonwealth v. McConnell*, 162 Mass. 499, 39 N. E. 107; *McFadden v. State*, 28 Tex. App. 241, 245, 14 S. W. 128; *Heldt v. State*, 20 Neb. 492, 30 N. W. 626, 57 Am. 835n; *State v. Ulsemer*, 24 Wash. 657, 64 Pac. 800. *Contra*, where it is expressly provided by statute that the cross-examination of the accused must be limited to matters brought out on the direct. *State v. Graves*, 95 Mo. 510, 516, 8 S. W. 739.

on the day of the crime.⁹⁵ Hence, if the wife of the accused is competent, the state may comment upon the failure of the accused to call her.⁹⁶

§ 69. Definition of accomplice.—An accomplice, as the word is used in this and in the following paragraphs, is a person who is in some way concerned in the commission of a crime for which the accused is on trial. This includes principals and accessories whether before or after the fact. A person against whom there is sufficient evidence to indict for the crime upon which the accused is standing trial is his accomplice.⁹⁷ Mere knowledge or belief that a crime is to be committed or has been committed and the

⁹⁵ *Sutton v. Commonwealth*, 85 Va. 128, 135, 7 S. E. 323; *State v. Costner*, 127 N. Car. 566, 37 S. E. 326, 80 Am. St. 809. Cf. *Commonwealth v. Harlow*, 110 Mass. 411, 412; *State v. Shipley*, 174 Mo. 512, 74 S. W. 612; *Porch v. State*, 50 Tex. Cr. App. 335, 99 S. W. 102.

⁹⁶ *State v. Millmeier*, 102 Iowa 692, 72 N. W. 275, 63 Am. St. 479; *Hall v. State* (Tex. Cr. App.), 22 S. W. 141; *Taylor v. Commonwealth*, 90 Va. 109, 17 S. E. 812, 816; *Mercer v. State*, 17 Tex. App. 452, 457; *Commonwealth v. Weber*, 167 Pa. St. 153, 31 Atl. 481. But if she is not competent, the state should not be allowed to comment on her absence. *State v. Hatcher*, 29 Ore. 309, 44 Pac. 584; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *Johnson v. State*, 63 Miss. 313; *Graves v. United States*, 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. 40. Where evidence is equally accessible and material to the state and to the accused, its non-production by the accused, even though it may affirmatively appear that he made no attempt to procure it, creates no presumption against him. The omission cannot be considered by the jury. *State v.*

Rosier, 55 Iowa 517, 8 N. W. 345; *Brock v. State*, 123 Ala. 24, 26 So. 329; *State v. Fitzgerald*, 68 Vt. 125, 34 Atl. 429. But where evidence which, if produced, would controvert or explain some incriminating facts proved against him, and which is also clearly within his knowledge and his power to obtain, is not produced by the accused, the jury may consider the fact in determining the credibility of the evidence against him. *State v. Grebe*, 17 Kan. 458; *People v. McWhorter*, 4 Barb. (N. Y.) 438, 440; *Rice v. Commonwealth*, 102 Pa. St. 408; *People v. Smith*, 114 App. Div. (N. Y.) 513, 100 N. Y. S. 259.

⁹⁷ *Redd v. State*, 63 Ark. 457, 40 S. W. 374; *People v. Collum*, 122 Cal. 186, 54 Pac. 589; *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *State v. Ean*, 90 Iowa 534, 58 N. W. 898; *State v. Jones*, 115 Iowa 113, 88 N. W. 196; *Territory v. Baker*, 4 Gild. (N. Mex.) 236, 13 Pac. 30; *People v. McGuire*, 32 N. E. 146, 135 N. Y. 639 (not reported in full); *State v. Roberts*, 15 Ore. 187, 13 Pac. 896; *Harris v. State*, 7 Lea (Tenn.) 124; *Smith v. State*, 37 Tex. Cr. App. 488, 36 S. W. 586; *State v. Duff* (Iowa, 1909), 122 N. W. 829.

concealment of such knowledge does not render a witness an accomplice unless he aided or participated in the commission of the crime.⁹⁸

Under the rule that participation in the crime is required to constitute an accomplice, the mere concealment of knowledge that a crime has been committed does not make the person concealing his knowledge an accomplice. This is the general rule and is sustained by the majority of the cases.⁹⁹ However this may be in the case of an accessory after the fact, it is well settled that all accessories before the fact if they actually participate at all in the preparation for the crime are accomplices within the rule, but if their participation is limited to the knowledge that a crime is to be committed, they are not accomplices.¹⁰⁰

A person who, as a detective, associates with criminals or communicates with or aids them solely for the purpose of discovering commission of crime and procuring the punishment of the criminals is not an accomplice.¹⁰¹

⁹⁸ *Green v. State*, 51 Ark. 189, 10 S. W. 266; *Allen v. State*, 74 Ga. 769; *Bradley v. State*, 2 Ga. App. 622, 58 S. E. 1064; *Springer v. State*, 102 Ga. 447, 30 S. E. 971; *Ochsner v. Commonwealth* (Ky.), 109 S. W. 326, 33 Ky. L. 119; *People v. Ricker*, 51 Hun (N. Y.) 643, 4 N. Y. S. 70, 7 N. Y. Cr. 19; *Greathouse v. State*, 53 Tex. Cr. App. 218, 109 S. W. 165; *Martin v. State*, 47 Tex. Cr. App. 29, 83 S. W. 390; *Wilson v. State*, 49 Tex. Cr. App. 496, 93 S. W. 547.

⁹⁹ *Polk v. State*, 36 Ark. 117; *Gatlin v. State*, 40 Tex. Cr. App. 116, 49 S. W. 87; *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. 330, but there are other cases which hold to the contrary. *State v. Umble*, 115 Mo. 452, 22 S. W. 378; *People v. Chadwick*, 7 Utah 134, 25 Pac. 737.

¹⁰⁰ *Watson v. State*, 9 Tex. App. 237; *Edwards v. Territory*, 1 Wash. 195.

¹⁰¹ *Harrington v. State*, 36 Ala. 236; *People v. Bolanger*, 71 Cal. 17, 11

Pac. 799; *State v. Brownlee*, 84 Iowa 473, 51 N. W. 25; *State v. McKean*, 36 Iowa 343, 14 Am. 530; *Commonwealth v. Baker*, 155 Mass. 287, 29 N. E. 512; *State v. Beauleigh*, 92 Mo. 490, 4 S. W. 666; *State v. Douglas*, 26 Nev. 196, 65 Pac. 802, 99 Am. St. 688; *People v. Noelke*, 94 N. Y. 137, 46 Am. 128; *Campbell v. Commonwealth*, 84 Pa. St. 187; *Commonwealth v. Downing*, 4 Gray (Mass.) 29; *Commonwealth v. Willard*, 22 Pick. (Mass.) 476. When the accused was decoyed into crime by a police detective, *Cooley, J.*, in permitting the accused to make a full explanation, said: "The officer was apparently assisting or conniving in the crime charged, and though he may have done this, as he says, not by way of enticement, but only by allowing him the opportunity he sought and requested, yet it placed him in an equivocal position, and the jury ought to have all the light the former dealings of the parties would throw upon

A voluntary participation in the commission of the crime is required to constitute an accomplice. One who either by threats or coercion inciting in him a fear that he is in danger of losing his life or liberty under and by reason of such coercion and fear participates in a crime is not an accomplice.¹⁰²

So one who is given money by the prosecuting attorney to make a purchase of intoxicating liquors in order to obtain evidence of a violation of the law is not an accomplice.^{102a}

Whether a person is an accomplice depends upon the facts in each particular case considered in connection with the nature of the crime. This is usually determined by the court as a question of law. Parties to be accomplices must participate in the commission of the same crime. Thus a person who receives stolen goods, knowing them to be stolen, is not an accomplice of the thief where the receiver did not participate in the commission of the larceny. The receiving and the larceny are distinct crimes.¹⁰³

In perjury, all persons who with knowledge of the falsity of the statement aid in the commission of the crime have been held as accomplices.¹⁰⁴ A person who gives or tenders a bribe to an of-

the transactions." An accessory after the fact is not an accomplice. *State v. Umble*, 115 Mo. 452, 22 S. W. 378, 380.

¹⁰² *Cook v. State*, 80 Ark. 495, 97 S. W. 683; *Green v. State*, 51 Ark. 189, 10 S. W. 266; *People v. Miller*, 66 Cal. 468, 6 Pac. 99; *Burns v. State*, 89 Ga. 527, 15 S. E. 748; *Beal v. State*, 72 Ga. 200. The word "accomplice," in Code Cr. Proc., art. 781, requiring a corroboration of the testimony of an accomplice in order to convict, means a person who, either as a principal, accomplice, or accessory, is connected with a crime by unlawful act or omission transpiring either before, at the time, or after the commission of the offense, whether he was present and participated in the crime or not; and while, in misdemeanor cases, all parties are princi-

pals, a witness in a misdemeanor case may be an accomplice. *Williams v. State*, 53 Tex. Cr. App. 396, 110 S. W. 63.

^{102a} *State v. O'Brien*, 35 Mont. 482, 90 Pac. 514.

¹⁰³ *State v. Shapiro* (Mo.), 115 S. W. 1022; *People v. Barric*, 49 Cal. 342; *Roberts v. State*, 55 Ga. 220; *People v. Holden*, 127 App. Div. (N. Y.) 758, 111 N. Y. S. 1019; *Springer v. State*, 102 Ga. 447, 30 S. E. 971; *Young v. State* (Tex. Cr. App.), 44 S. W. 835; *Walker v. State* (Tex. Cr. App.), 37 S. W. 423; *Crutchfield v. State*, 7 Tex. App. 65.

¹⁰⁴ *Smith v. State*, 37 Tex. Cr. App. 488, 36 S. W. 586; *Anderson v. State*, 20 Tex. App. 312. An officer before whom one makes a false affidavit is not an accomplice merely because he knows the affidavit is false, and does

ficer is an accomplice if the bribe is accepted by the officer.¹⁰⁵ And this is the rule in some states where the statute makes the giving or offering of a bribe a distinct offense from the taking of one.¹⁰⁶

The jury is not called on to determine the guilt of a witness who, it is alleged, is an accomplice. The rule that the evidence of an accomplice must be corroborated does not require that his guilt as a participant shall first be established as an independent conclusion and beyond a reasonable doubt. If a criminal connection with the crime is admitted by the witness, the court may charge that the witness is an accomplice. If the evidence is conflicting on this point, *i. e.*, the participation of the witness in the commission of the crime, the matter should be left to the jury under proper instructions as to intent and participation.¹⁰⁷

§ 70. Accomplices when jointly indicted—Witnesses for each other.—Accomplices were always, even in the absence of statute, competent witnesses for each other if separately indicted.¹⁰⁸ Where accomplices are jointly indicted, a different rule is recognized.

not refuse to administer the oath. *Wilson v. State*, 49 Tex. Cr. App. 496, 93 S. W. 547.

¹⁰⁵ *People v. Bissert*, 72 App. Div. (N. Y.) 620, 76 N. Y. S. 1022, *aff'd* in 172 N. Y. 643, 65 N. E. 1120; *Ruffin v. State*, 36 Tex. Cr. App. 565, 38 S. W. 169.

¹⁰⁶ *People v. Winant*, 24 Misc. (N. Y.) 361, 53 N. Y. S. 695.

¹⁰⁷ *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Bolanger*, 71 Cal. 17, 20, 11 Pac. 799; *Williams v. State*, 33 Tex. Cr. App. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. 21; *Zollicoffer v. State*, 16 Tex. App. 312, 317; *White v. State*, 30 Tex. App. 652, 657, 18 S. W. 462; *Childress v. State*, 86 Ala. 77, 5 So. 775; *State v. Lucas*, 57 Iowa 501, 10 N. W. 868; *Territory v. West* (N. Mex.), 99 Pac. 343; *Lightfoot v. State* (Tex. Cr. App.), 78 S. W. 1075; *Common-*

wealth v. Glover, 111 Mass. 395; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026; *State v. Kellar*, 8 N. Dak. 563, 80 N. W. 476, 73 Am. St. 775.

¹⁰⁸ *United States v. Henry*, 4 Wash. C. C. (U. S.) 428, 429, 26 Fed. Cas. 15351; *United States v. Hunter*, 1 Cranch C. C. (U. S.) 446, 26 Fed. Cas. 15425; *United States v. Hanway*, 2 Wall. Jr. (U. S.) 139, 26 Fed. Cas. 15299; *State v. Umble*, 115 Mo. 452, 22 S. W. 378; *State v. Riney*, 137 Mo. 102, 38 S. W. 718; *Lucre v. State*, 7 Baxt. (Tenn.) 148, 150; *People v. Donnelly*, 2 Park Cr. (N. Y.) 182; *State v. Walker*, 98 Mo. 95, 102, 9 S. W. 646, 11 S. W. 1133; *Rhodes v. State*, 141 Ala. 66, 37 So. 365; *State v. Black*, 143 Mo. 166, 44 S. W. 340; *McKenzie v. State*, 24 Ark. 636, 638. *Contra*, by statute, *Crutchfield v. State*, 7 Tex. App. 65, 67.

The fact that they are tried separately does not, in the absence of a permissive statute, render one competent as a witness for the others, though, if jointly indicted, any one of them may testify against the others.¹⁰⁹

An accomplice cannot testify in favor of one jointly indicted while the indictment is pending over him. The criminal charge against him must be finally disposed of before he can testify for a co-defendant.¹¹⁰

If the state, on the trial of a joint indictment, closes its case without producing evidence of the guilt of any defendant sufficient to go to the jury, the court must direct his acquittal. He is then a competent witness for a co-defendant.¹¹¹ Where the evidence against a defendant is slight, the court may, in its discretion, submit it to the jury separately, and on his acquittal he is competent as a witness for a co-defendant.¹¹²

But a defendant has no absolute right to insist that the court shall submit the case of any co-defendant jointly tried to the jury, with the view of using him as a witness if acquitted.¹¹³

¹⁰⁹ *State v. Jones*, 51 Me. 125, 126; *Commonwealth v. Marsh*, 10 Pick. (Mass.) 57; *Lewis v. State*, 85 Miss. 35, 37 So. 497; *State v. Franks*, 51 S. Car. 259, 28 S. E. 908; *Davis v. State*, 122 Ga. 564, 50 S. E. 376. "A distinction is made between the competency of a co-defendant, jointly indicted, as a witness for the state and for his fellow-prisoners. The exclusion of his evidence when he is called for a co-defendant is based largely on consideration of public policy, for each would try to swear the other innocent." *Benson v. United States*, 146 U. S. 325, 335, 36 L. ed. 991, 13 Sup. Ct. 60.

¹¹⁰ *Collier v. State*, 20 Ark. 36; *State v. Dunlop*, 65 N. Car. 288; *Ballard v. State*, 31 Fla. 266, 12 So. 865, 870; *Moss v. State*, 17 Ark. 327, 330, 65 Am. Dec. 433; *United States v. Reid*, 12 How. (U. S.) 361, 13 L. ed. 1023; *Wixson v. People*, 5 Park Cr. (N.

Y.) 119; *Commonwealth v. Marsh*, 10 Pick. (Mass.) 57; *People v. Williams*, 19 Wend. (N. Y.) 377, 378; *State v. Jones*, 51 Me. 125, 126. In *People v. Bill*, 10 Johns. (N. Y.) 95, the court says: "It appears to be a well-settled though technical rule that a party to the same indictment cannot be a witness for his co-defendant until he has been first acquitted, or at least convicted. Whether they be tried jointly or separately does not vary the rule."

¹¹¹ *State v. Jones*, 51 Me. 125, 126; *People v. Bill*, 10 Johns. (N. Y.) 95; *Bacon v. State*, 22 Fla. 51, 85; *McKenzie v. State*, 24 Ark. 636, 638.

¹¹² *People v. Vermilyea*, 7 Cow. (N. Y.) 369, 382.

¹¹³ *State v. Hunt*, 91 Mo. 491, 3 S. W. 868; *Ferry v. State* (Tex. Cr. App.), 34 S. W. 618; *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 218, 48 Am. Dec. 596, 31 Ky. L. 769;

An accomplice who pleads guilty, or who is convicted, becomes, either before or after sentence, a competent witness for a co-defendant jointly indicted.¹¹⁴

§ 71. Accomplices as witnesses for the state.—The general common-law rule is that accomplices are competent witnesses against their criminal associates. This rule is always applicable where accomplices are separately indicted and receive separate trials.¹¹⁵

Persons jointly indicted are competent witnesses for the prosecution against their associates, though jointly indicted, if they are granted separate trials. It is enough that the trial of the accomplice has been postponed, for he may testify for the state, though the charge against him has not been disposed of.¹¹⁶ Where

State v. White, 48 Ore. 416, 87 P.c. 137; State v. Jones, 51 Me. 125, 126; Reg. v. Ford, 1 C. & Marsh. 111.

¹¹⁴ Simpson v. Commonwealth, 126 Ky. 441, 103 S. W. 332; State v. Jones, 51 Me. 125, 126, 48 Am. Dec. 596, 31 Ky. L. 769; South v. State, 86 Ala. 617, 6 So. 52; Strawhern v. State, 37 Miss. 422; State v. Loney, 82 Mo. 82; Commonwealth v. Marsh, 10 Pick. (Mass.) 57, 58; State v. Stotts, 26 Mo. 307; Wixson v. State, 5 Park Cr. (N. Y.) 119. In Wixson v. People, 5 Park Cr. (N. Y.) 119, on p. 126, the court, by Knox, J., thus summarizes the law: "When the persons indicted are all put on trial together, neither can be a witness for or against the other, but when they are tried separately, though jointly indicted, the people may call those not on trial, though not convicted or acquitted or otherwise discharged, with the permission of the court, but they cannot be called as witness for each other, though separately tried, while the indictment is pending against them. If acquitted they may be examined, and even if convicted, unless it be for a crime which disqualifies, and then sentence must have followed

the conviction. When all are tried together, if the people desire to swear an accomplice, he must in some way be first discharged from the record."

¹¹⁵ Allison v. State, 14 Tex. App. 402; Benson v. United States, 146 U. S. 325, 327, 36 L. ed. 991, 13 Sup. Ct. 60; United States v. Henry, 4 Wash. C. C. (U. S.) 428, 26 Fed. Cas. 15351.
¹¹⁶ State v. Barrows, 76 Me. 401, 407, 49 Am. 629; Marler v. State, 67 Ala. 55, 42 Am. 95; Benson v. United States, 146 U. S. 325, 333, 337, 36 L. ed. 991, 13 Sup. Ct. 60; Wixson v. People, 5 Park Cr. (N. Y.) 119; Carroll v. State, 5 Neb. 31, 35; Barr v. People, 30 Colo. 522, 71 Pac. 392; Jones v. State, 1 Ga. 610, 617; State v. Brien, 32 N. J. L. 414, 416, 417; Noyes v. State, 41 N. J. L. 418, 429; Sparks v. Commonwealth, 89 Ky. 644, 20 S. W. 167; Allen v. State, 10 Ohio St. 287; Brown v. State, 18 Ohio St. 496, 509; State v. Thaden, 43 Minn. 325, 327, 45 N. W. 614; Conway v. State, 118 Ind. 482, 485, 21 N. E. 285; Commonwealth v. Brown, 130 Mass. 279; Evans v. State, 61 Miss. 157; Noyes v. State, 41 N. J. L. 418; State v. Shelton (Mo., 1909), 122 S. W. 732.

the disability of convicts to testify has been removed by statute, no valid reason exists for excluding the evidence of an accomplice who has been convicted, or who has pleaded guilty, against one jointly indicted, but tried separately.¹¹⁷

Accomplices jointly indicted and also jointly tried are not competent witnesses against each other. But the court may always order a *nolle prosequi* upon the application of the district attorney,¹¹⁸ or accept a plea of guilty with the express or implied promise of immunity.¹¹⁹

The admission of the testimony of an accomplice who is still under indictment against one who is jointly indicted is largely in the judicial discretion.¹²⁰ The court exercising this discretion should bear in mind that the evidence is receivable mainly because of necessity and public policy and in furtherance of justice. The question to be considered is not only whether it is possible to convict without the testimony of the accomplice, but whether it is possible to convict if he does testify. If sufficient evidence has been received to sustain a conviction without that of the accomplice, or if, on the other hand, the evidence already in is so weak,

Contra, State v. Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135; Day v. State, 27 Tex. App. 143, 11 S. W. 36; State v. Chyo Chiagk, 92 Mo. 395, 4 S. W. 704, and *cf.* 2 Hawk. P. C., ch. 46; 1 Hale P. C. 305; Rose Cr. Ev. 130, 140; 2 Russ. Cr. 957; Whart. Cr. Ev., § 439.

¹¹⁷ People v. Whipple, 9 Cow. (N. Y.) 707, 709; South v. State, 86 Ala. 617, 620, 6 So. 52; Woodley v. State, 103 Ala. 23, 15 So. 820; Taylor v. People, 12 Hun (N. Y.) 212; Loehr v. People, 132 Ill. 504, 24 N. E. 68; State v. Jackson, 106 Mo. 174, 17 S. W. 301; State v. Minor, 117 Mo. 302, 305, 22 S. W. 1085; State v. Young, 153 Mo. 445, 55 S. W. 82; Rex v. Westbeer, 1 Leach C. L. 14; Wisdom v. People, 11 Colo. 170, 17 Pac. 519; State v. Magone, 32 Ore. 206, 51 Pac. 452.

¹¹⁸ State v. Walker, 98 Mo. 95, 9 S.

W. 646, 11 S. W. 1133; Reg. v. Owen, 9 Carr. & P. 83; State v. Phipps, 76 N. Car. 203; Lindsay v. People, 63 N. Y. 143, 154; State v. Graham, 41 N. J. L. 15, 19, 32 Am. 174; Underwood v. State, 38 Tex. Cr. App. 193, 41 S. W. 618; People v. Bruzzo, 24 Cal. 41; Love v. People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139; State v. Steifel, 106 Mo. 129, 17 S. W. 227.

¹¹⁹ State v. Lyon, 81 N. Car. 600, 31 Am. 518n; United States v. Ford, 99 U. S. 594, 25 L. ed. 399; State v. Jackson, 106 Mo. 174, 177, 17 S. W. 301.

¹²⁰ Lindsay v. People, 63 N. Y. 143, 153; Commonwealth v. Brown, 130 Mass. 279. The judicial consent, if given, need not be embodied in an order, or indeed in any particular form. Lindsay v. People, 63 N. Y. 143, 153.

conflicting and lacking in corroborative force that, even with his testimony, no reasonable probability arises that a conviction will result, the court should reject his evidence.¹²¹

§ 72. Immunity of accomplice when testifying for the state.—An accomplice who, confessing his own guilt, offers to testify against an associate has no legal right, in the absence of statute, to demand exemption from a prosecution for the crime he has confessed.¹²² But an accomplice whose evidence, while placing him where he could be easily convicted, has contributed to the conviction of another, certainly has a strong moral and equitable claim to clemency, and if he be subsequently convicted of that crime, his moral claim should be recognized by the pardoning power.

If his testimony was procured by an express promise of immunity, or during interviews with the prosecuting attorney, principles of justice would demand, and the prevalent practice would sanction, the judicial recommendation of his case to the executive that his pardon may be obtained.¹²³

¹²¹ State v. Pratt, 98 Mo. 482, 11 S. W. 977; Ray v. State, 1 Greene (Iowa) 316, 48 Am. Dec. 379; Reg. v. Sparks, 1 Fost. & Fin. 388.

¹²² Runnels v. State, 28 Ark. 121, 123; United States v. Ford, 99 U. S. 594, 605, 25 L. ed. 399; United States v. Hinz, 35 Fed. 272, 279, 280; State v. Guild, 149 Mo. 370, 50 S. W. 909, 73 Am. St. 395.

¹²³ Long v. State, 86 Ala. 36, 44, 5 So. 443; State v. Graham, 41 N. J. L. 15, 16, 20, 32 Am. 174; State v. Lyon, 81 N. Car. 600, 602, 31 Am. 518n. "Accomplices, not convicted of an infamous crime, when separately tried are competent witnesses for or against each other. The universal usage is that such a party, if called and examined by the state on the trial of his associate in guilt, will not be prosecuted for the same offense, provided it appears that he acted in good faith and that he testified fully

and fairly. But it is equally clear that he cannot plead such fact in bar of an indictment against him, nor avail himself of it upon his trial; for it is merely an equitable title to the mercy of the executive, subject to the conditions stated, and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the executive for that purpose." United States v. Ford, 99 U. S. 594, 25 L. ed. 399, and Irvine, *Ex parte*, 74 Fed. 954. The defense may show that an accomplice testifying for the state does so with the expectation of gain or immunity, and it is immaterial whether there has been any actual agreement to that effect with the public prosecuting officer or not. Allen v. State, 10 Ohio St. 287; People v. Langtree, 64 Cal. 256, 30 Pac. 813; Tullis v. State, 39 Ohio St. 200.

The accomplice may be asked, in order to test and bring out his motives and feelings towards the accused, whether he has not confessed his guilt, and has said he would not be punished alone.¹²⁴

An accomplice, who, with a full knowledge of his privilege from answering incriminating questions, voluntarily answers such questions, cannot withhold further evidence as to the same matters under a claim of privilege.¹²⁵ So he may be compelled to answer incriminating questions even though he shall claim the privilege, if, by statute, the use against the witness of testimony given under such circumstances is prohibited.¹²⁶ And the voluntary confession of an accomplice made in expectation of testifying against an associate may always be used against the accomplice, on his trial for the crime confessed, if he has refused to testify.¹²⁷

§ 73. **Credibility and corroboration of accomplices.**—No presumption of law exists against the credibility of the evidence of an accomplice, so that at common law, *i. e.*, in the absence of statute, a conviction may be had on his evidence alone.¹²⁸

¹²⁴ *Hamilton v. People*, 29 Mich. 195, 197.

¹²⁵ *Alderman v. State*, 4 Mich. 414, 422, 423, 69 Am. Dec. 321; *Commonwealth v. Price*, 10 Gray (Mass.) 472, 476, 71 Am. Dec. 668n.

¹²⁶ *State v. Quarles*, 13 Ark. 307; *Bedgood v. State*, 115 Ind. 275, 17 N. E. 621, 623.

¹²⁷ *United States v. Hinz*, 35 Fed. 272, 277.

¹²⁸ 1 Hale P. C. 303, 304; *Charnock's Case*, 12 How. St. Tr. 1377, 1454; *Rex v. Rudd*, Cowp. 331; *Rex v. Atwood*, 2 Leach C. L. 521; *Durham's Case*, 2 Leach C. L. 538; *State v. Thompson*, 47 La. Ann. 1597, 18 So. 621; *State v. Donnelly*, 130 Mo. 642, 32 S. W. 1124; *Lawhead v. State*, 46 Neb. 607, 65 N. W. 779; *Bacon v. State*, 22 Fla. 51, 79; *State v. Harkins*, 100 Mo. 666, 13 S. W. 830; *People v. Dyle*, 21 N. Y. 578, 579;

Wisdom v. People, 11 Colo. 170, 174, 17 Pac. 519; *Rountree v. State*, 88 Ga. 457, 458; *Wixson v. People*, 5 Park. Cr. (N. Y.) 119, 128; *People v. O'Brien*, 60 Mich. 8, 14, 26 N. W. 795; *Lindsay v. People*, 63 N. Y. 143, 154; *State v. Miller*, 97 N. Car. 484, 487, 2 S. E. 363; *Olive v. State*, 11 Neb. 1, 30, 7 N. W. 444; *Commonwealth v. Holmes*, 127 Mass. 424, 429, 435, 34 Am. 391n; *People v. Costello*, 1 Denio (N. Y.) 83; *Commonwealth v. Bosworth*, 22 Pick. (Mass.) 397; *Ayers v. State*, 88 Ind. 275; *Collins v. People*, 98 Ill. 584, 38 Am. 105; *State v. Russell*, 33 La. Ann. 135; *Jurelich v. People*, 223 Ill. 484, 79 N. E. 181; *State v. Kelliher*, 49 Ore. 77, 88 Pac. 867; *State v. Firmatura*, 121 La. 676, 46 So. 691; *Powell v. State*, 50 Tex. Cr. App. 592, 99 S. W. 1005; *Criner v. State*, 53 Tex. Cr. App. 174, 109 S. W. 128; *State v. Horner*,

And his testimony is to be weighed by considering his connection with the crime and with the accused, his interest in the case, his appearance on the stand, the reasonableness of his testimony and its consistency with other facts proved in the case.

But the jury is usually warned by the court against hasty credence of the testimony of an accomplice, and instructed that great caution must be employed in the reception and consideration of accomplice evidence, and that it should be submitted to the strictest scrutiny.¹²⁹ So, too, juries are generally advised that they may acquit the accused if the evidence of the accomplice is not corroborated, though a failure or refusal to instruct to acquit, if his guilt is sustained solely by the uncorroborated evidence, is not error.¹³⁰

The credibility of witnesses, whether accomplices or not, is for the jury exclusively.¹³¹

1 Marv. (Del.) 504, 2 Hardesty 178, 26 Atl. 73, 41 Atl. 139; Ahearn v. United States, 158 Fed. 606, 85 C. C. A. 428; Caldwell v. State, 50 Fla. 4, 39 So. 188; Stone v. State, 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145n; Crenshaw v. State, 48 Tex. Cr. App. 77, 85 S. W. 1147; State v. Wigger, 196 Mo. 90, 93 S. W. 390; State v. Simon, 71 N. J. L. 142, 58 Atl. 107; State v. Carey, 76 Conn. 342, 56 Atl. 632; People v. Feinberg, 237 Ill. 348, 86 N. E. 584; State v. Stewart (Del.), 67 Atl. 786; Commonwealth v. Brennor, 194 Mass. 17, 79 N. E. 799; State v. Hauser, 112 La. 313, 36 So. 396.

¹²⁹ The earliest case where corroboration was hinted at as necessary was Smith's Case, 1 Leach C. L. 323, where, the prosecution being unable to identify the criminal, the court thought it dangerous to let the case go to the jury on accomplice evidence alone. See also, Wisdom v. People, 11 Colo. 170, 174, 17 Pac. 519; State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223; Earll v. People, 73 Ill. 329; United States v. Sacia, 2 Fed. 754, 758; United States v. Ybanez, 53 Fed. 536, 540; State v. Sprague, 149 Mo. 409, 50 S. W. 901; United States v. Richards, 149 Fed. 443; State v. Stewart (Del.), 67 Atl. 786; Walker v. State, 118 Ga. 757, 45 S. E. 608; Stone v. State, 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145n; Jahnke v. State (Neb.), 104 N. W. 154.

¹³⁰ Archer v. State, 106 Ind. 426, 434, 7 N. E. 225; State v. Michel, 111 La. 434, 35 So. 629; State v. Potter, 42 Vt. 495, 506; State v. Litchfield, 58 Me. 267, 270; Ingalls v. State, 48 Wis. 647, 653, 4 N. W. 785; State v. Miller, 97 N. Car. 484, 2 S. E. 363; Carroll v. Commonwealth, 84 Pa. St. 107, 121; Wisdom v. People, 11 Colo. 170, 174, 17 Pac. 519; Allen v. State, 10 Ohio St. 287, 306; Rice v. State, 50 Tex. Cr. App. 648, 100 S. W. 771.

¹³¹ While the degree of credit to be given to the testimony of an accomplice in a criminal case is a matter within the exclusive province of the jury, who may as matter of law convict on such testimony alone, yet to warrant a conviction such testimony

The subject of the credibility of the testimony of an accomplice and the necessity for corroboration in order to sustain a conviction are involved in some confusion. The propositions that an accused person may be convicted on the evidence of an accomplice alone, and that the testimony of an accomplice must be corroborated, are both sound, though they involve a seeming inconsistency. The proposition that an accomplice must be corroborated does not mean that there must be cumulative or independent testimony to the same facts to which he has testified. So, evidence in a murder case that a coat, belonging to deceased, was found in defendant's possession is proper corroboration, though the accomplice testified only to the killing and not to the taking of the coat.¹³²

"If the testimony of the accomplice, his manner of testifying, his appearance upon the witness stand, impress the jury with the truth of his statement, there is no inflexible rule of law which prevents a conviction."¹³³

§ 74. Extent of corroboration required—It must be of material facts.—From early times it has been the rule¹³⁴ that the corroboration need not include every material fact testified to by the accomplice, for, if he is confirmed in some material particulars, the jury may believe him in others.¹³⁵

should usually be corroborated in some material part, although the corroboration need not extend to all matters testified to by the accomplice, and the jury should also consider whether he has been successfully contradicted with respect to any material portion of his testimony. *United States v. Giuliani*, 147 Fed. 594.

¹³² *Malachi v. State*, 89 Ala. 134, 8 So. 104.

¹³³ *Cox v. Commonwealth*, 125 Pa. St. 94, 103, 17 Atl. 227; *Collins v. People*, 98 Ill. 584, 38 Am. 105; *United States v. Ybanez*, 53 Fed. 536, 540. An instruction that the jury must carefully consider the testimony of a certain witness as he stood before the jury as an accomplice is proper. It is not error to refuse to

charge that it was dangerous to act exclusively on the testimony of an accomplice, and that the jury should require confirmatory testimony, or to charge that the unsupported testimony of an accomplice must produce entire belief; when the court did charge on reasonable doubt, telling the jury that, while they might convict on the testimony of the accomplice, they should be cautious in so doing. *State v. Register*, 133 N. Car. 746, 46 S. E. 21.

¹³⁴ *Rex v. Swallow*, 31 How. St. Tr. 971.

¹³⁵ *State v. Allen*, 57 Iowa 431, 10 N. W. 805; *United States v. Howell*, 56 Fed. 21; *United States v. Ybanez*, 53 Fed. 536, 538, 541; *People v. Elliott*, 106 N. Y. 288, 12 N. E. 602; *Com-*

The jury are not limited to believing the evidence of the accomplice only upon those facts which are actually proved by other evidence. Such an absurd construction of the rule requiring corroboration would be, in effect, to receive the evidence and let it go to the jury, while practically forbidding them to believe it. If independent corroboration is required from other witnesses, it must refer to that portion of the testimony which is material to the prisoner's guilt. It is not necessary that the corroboration should be sufficient to prove the crime or to connect the defendant with it.¹⁸⁶ Nor need the corroboration be wholly inconsistent with the theory of the defense.¹⁸⁷

But the corroborative evidence, whether consisting of acts or admissions, in itself and without that of the accomplice, must at least *tend to prove* the guilt of the accused by connecting him with the crime; for it is a matter of no importance to corroborate the accomplice on irrelevant or immaterial details, or to show that he has not perjured himself in stating matters not pertinent to the issue, and upon which he had no interest to testify falsely.¹⁸⁸

The corroborative evidence is sufficient, though it may not bear directly upon any particular fact which has been stated in the evidence of the accomplice.¹⁸⁹

monwealth v. Holmes, 127 Mass. 424, 431, 34 Am. 391n; Rex v. Addis, 6 C. & P. 388; Commonwealth v. Brooks, 9 Gray (Mass.) 299; People v. Balkwell, 143 Cal. 259, 76 Pac. 1017; Cook v. State, 75 Ark. 540, 87 S. W. 1176; State v. Black, 143 Mo. 166, 44 S. W. 340; McCrory v. State, 101 Ga. 779, 28 S. E. 921; Hargrove v. State, 125 Ga. 270, 54 S. E. 164; Lanasa v. State (Md.), 71 Atl. 1058.

¹⁸⁶ People v. Badgley, 16 Wend. (N. Y.) 53; Celender v. State (Ark.), 109 S. W. 1024.

¹⁸⁷ People v. Ogle, 104 N. Y. 511, 515, 11 N. E. 53; Porter v. State, 76 Ga. 658.

¹⁸⁸ Altman v. State (Ga. App.), 63 S. E. 928; Chambers v. State (Tex. Cr. App.), 44 S. W. 495; People v.

Bunkers, 2 Cal. App. 197, 84 Pac. 364, 370; Commonwealth v. Holmes, 127 Mass. 424, 439, 34 Am. 391n.

¹⁸⁹ Commonwealth v. Holmes, 127 Mass. 424, 441, 34 Am. 391n; Scott v. State, 63 Ark. 310, 38 S. W. 339; Mann v. Commonwealth (Ky.), 79 S. W. 230, 25 Ky. L. 1964; United States v. Lancaster, 44 Fed. 896, 922, 10 L. R. A. 333; Commonwealth v. Savory, 10 Cush. (Mass.) 535; Rex v. Wilkes, 7 C. & P. 272; Reg. v. Birkett, 8 C. & P. 732; Reg. v. Mullins, 3 Cox Cr. Cas. 526, 531. Defendant's failing to call a material witness was held sufficient corroboration in Commonwealth v. Brooks, 9 Gray (Mass.) 299. So, too, a declaration by the defendant on his arrest that the accomplice had nothing to do with the crim-

The corroborative evidence is not necessarily required to show a commission of the crime, either is it necessary that the whole case should be proved outside of an accomplice, and an instruction that the corroborative must be wholly inconsistent with the innocence of the accused is not proper if the corroboration intends to connect the accused with the commission of the crime. It comes from an independent source and bears upon material facts tending to show not only that a crime was committed, but that defendant was concerned in it, it is sufficient.^{139a} The corroboration or intent to prove the connection of the accused with the crime for evidence that merely excites suspicion or that intimates that accused may be guilty of the crime because he had an opportunity to commit it is not corroboration.¹⁴⁰

But the corroboration must bear directly or indirectly, not upon the general character of the accomplice for truthfulness, but upon the question whether, in this particular case and upon the facts involved, his testimony is reliable and worthy of credit by the jury in determining the guilt of the accused.¹⁴¹ The rule of the common law requiring the testimony of an accomplice to be corroborated has been confirmed by statutes in some states. In New York "a conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect defendant with the commission of the crime."¹⁴²

indicating that defendant knew all about it. *Commonwealth v. O'Brien*, 12 Allen (Mass.) 183.

^{139a} *People v. Acritelli*, 57 Misc. Rep. 574, 110 N. Y. Sup. 430.

¹⁴⁰ *People v. Sciaroni*, 4 Cal. App. 698, 89 Pac. 133; *Smith v. State* (Ga. App.), 63 S. E. 917.

¹⁴¹ *Celender v. State* (Ark.), 109 S. W. 1024; *People v. Barker*, 114 Cal. 617, 46 Pac. 601; *People v. Mayhew*, 150 N. Y. 346, 44 N. E. 971; *State v. Turner*, 119 N. Car. 841, 25 S. E. 810; *Blois v. State*, 92 Ga. 584, 20 S. E. 12; *Schoenfeldt v. State*, 30 Tex. App. 695, 18 S. W. 640; *Simpson v. Commonwealth*, 126 Ky. 441, 103 S. W. 332, 31 Ky. L. 769; *State v. Ozias*, 136 Iowa 175, 113 N. W.

761; *People v. Patrick*, 182 N. Y. 131, 74 N. E. 843; *State v. Jackson*, 106 Mo. 174, 17 S. W. 301; *Crawford v. State* (Tex. Cr. App.), 34 S. W. 927; *Marler v. State*, 67 Ala. 55, 42 Am. 95; *Commonwealth v. Bosworth*, 22 Pick. (Mass.) 397; *Commonwealth v. O'Brien*, 12 Allen (Mass.) 183; *State v. Allen*, 57 Iowa 431, 10 N. W. 805; *United States v. Ybanez*, 53 Fed. 536; *People v. Clough*, 73 Cal. 348, 352, 15 Pac. 5; *State v. Banks*, 40 La. Ann. 736, 5 So. 18; *State v. Miller*, 97 N. Car. 484, 488, 2 S. E. 363; *Smith v. State* (Tex. Cr. App.), 38 S. W. 200. And see other cases fully cited in Underhill on Evidence, p. 464.

¹⁴² *People v. Ellenbogen*, 114 App.

Such a statute, it seems, prohibits a conviction on the uncorroborated evidence of an accomplice, even though the jury believe it and are convinced by it of the guilt of the accused beyond a reasonable doubt.¹⁴³

The evidence which the statutes require in corroboration and which tends to connect the defendant with the commission of the crime, must be such evidence as will independently of the evidence of the accomplice tend to connect the accused with the offense.^{143a} And it is not usually necessary or proper to direct a jury to disregard all the evidence of the accomplice which has not been corroborated according to the statute. If, upon all the facts, the connection of the accused with the crime is proven without the aid of the evidence of the accomplice it may be sufficient, though all the independent evidence does not strictly corroborate with what the accomplice has testified to.¹⁴⁴

The admission by the accused that he was connected with the commission of the crime is usually sufficient corroboration under the statute.¹⁴⁵

§ 75. The nature of the crime as a test of corroboration—Sufficiency of corroboration.—The character and degree of corroboration which are required may, to a certain extent, be measured by the enormity of the crime, the moral perversity involved in its commission and the punishment. Hence conviction of a misdemeanor might be sustained without the introduction of much in-

Div. (N. Y.) 182, 99 N. Y. S. 897, 76 S. W. 476; Hall v. State, 52 Tex. 1 N. Y. St. —; Robertson v. State, 46 Cr. App. 250, 106 S. W. 379; Shilling v. State, 52 Tex. Cr. App. 326, 106 Tex. Cr. App. 441, 80 S. W. 1000; S. W. 357; State v. McCarthy, 36 People v. Strauss, 94 App. Div. (N. Y.) 453, 88 N. Y. S. 40; People v. Mont. 226, 92 Pac. 521; State v. Ortega, 7 Cal. App. 480, 94 Pac. 869; Bond, 12 Idaho 424, 86 Pac. 43; People v. Ogle, 104 N. Y. 511, 515, 11 Cooper v. Territory, 19 Okla. 496, N. E. 53; People v. Elliott, 106 N. Y. 91 Pac. 1032; State v. Carr, 28 Ore. 288, 292, 12 N. E. 602; People v. 389, 42 Pac. 215; State v. Spencer, White, 62 Hun (N. Y.) 114; People 15 Utah 149, 49 Pac. 302. v. Mayhew, 150 N. Y. 346, 44 N. E. 971; People v. Barry, 196 N. Y. 507, 89 403, 56 Pac. 44. N. E. 1107.

¹⁴³ Conant v. State, 51 Tex. Cr. App. 71 N. E. 1135, judgment, 92 App. Div. 610, 103 S. W. 897; McDaniel v. (N. Y.) 205, 87 N. Y. S. 358. State, 48 Tex. Cr. App. 342, 87 S. W. ¹⁴⁴ People v. Eaton, 122 App. Div. 1044; Custer v. State (Tex. Cr. App.). (N. Y.) 706, 107 N. Y. S. 849.

dependent and corroborative evidence where such evidence would be required in the case of a felony.¹⁴⁶

It would be illogical to place accomplices in every character of crime upon the same footing. Evidently the nature of the crime in which the accomplice is involved must vary the weight that a jury will accord to his testimony; while the reasonableness of his story and his manner of testifying, are considerations affecting his credibility and tending to shape the advice of the judge. If the crime be free from moral turpitude, the story which he tells reasonable, and the manner of its relation evincive of truthfulness, the jury might, even under the influence of the strongest caution, feel bound to believe and convict. To deny a conviction legal support under such circumstances would be to take from the jury their right of judgment upon the weight of the testimony, and to compel them to find against their conviction of truth.¹⁴⁷ The evidence of the accomplice may be corroborated by the confession of the accused,¹⁴⁸ but not by the accomplice testifying that the accused had stated to him that he intended to commit other distinct crimes.¹⁴⁹

Whether the evidence of the accomplice shall go to the jury is a question for the judge, and, before submitting it to them, he should be satisfied that there is some corroboration. If corroborative circumstances are proved from which, with the evidence of the accomplice, reasonable men may infer the existence of the guilt of the accused, the court may submit the evidence of the accomplice to the jury. But whether the testimony of the accomplice is corroborated so that the prisoner's guilt is shown beyond a reasonable doubt is a question for them to determine.¹⁵⁰ Corroboration by independent evidence is not dispensed with where

¹⁴⁶ *Bell v. State*, 73 Ga. 572, 574; 896, 921, 10 L. R. A. 333; *Schoenfeldt Rex v. Jarvis*, 2 Moo. & R. 40; Reg. v. State, 30 Tex. App. 695, 18 S. W. v. Young, 10 Cox Cr. Cas. 371; 640.

United States v. Kessler, Bald. (U. S.) 15, 22, 26 Fed. Cas. 15528; *Underhill on Evidence*, p. 463, note 4. ¹⁴⁷ *Kinchelow v. State*, 5 Humph. (Tenn.) 9, 12.

¹⁴⁸ *Commonwealth v. Holmes*, 127 Mass. 424, 437, 34 Am. 391n; *People v. Everhardt*, 104 N. Y. 591, 594, 11

¹⁴⁹ *Partee v. State*, 67 Ga. 570, 572; N. E. 62.
United States v. Lancaster, 44 Fed.

several accomplices testify against the accused. The accomplices are not deemed to corroborate each other.¹⁵¹

¹⁵¹ Whitlow v. State (Tex. App.), 114 S. W. 809; People v. Creegan, 18 S. W. 865; United States v. Hinz, 121 Cal. 554, 53 Pac. 1082. Whether the corroborating witness was an accomplice is for the jury. It may be assumed from a verdict of guilty to so charge is error. McConnell v. State (Tex. App.), 18 S. W. 645; Schwartz v. State (Tex. Cr. App.), 121 Cal. 554, 53 Pac. 1082.

CHAPTER VII.

CHARACTER OF THE ACCUSED.

- § 76. Character defined—The accused may show good character.
- 77. Specific traits only relevant—Character of associates.
- 78. Bad character—When admissible.
- 79. Effect and operation of evidence of good character.
- 80. Good character, though never conclusive, may acquit if it creates a reasonable doubt.
- 81. Mode of proof—Irrelevancy of personal opinions—Derogatory rumors in rebuttal.
- 82. Specific evil acts—Relevancy of.
- 83. Remoteness—Character subsequent to the date of the crime.
- 84. The grade and moral nature of the crime.
- 85. Disposition is irrelevant.
- 86. Number of witnesses to character.
- 86a. Instructions as to the character of the accused.

§ 76. Character defined—The accused may show good character.—The character of the accused means his reputation, *i. e.*, the general *consensus* of opinion regarding him and his conduct based on his deportment and conduct, which is held by his neighbors, friends and acquaintances. The accused may always prove his good character.¹

¹ Way v. State (Ala.), 46 So. 273; Lewis v. State (Miss.), 47 So. 467; Hall v. State, 132 Ind. 317, 323, 31 N. E. 536; State v. Donohoo, 22 W. Va. 761, 764; State v. Schlegel, 50 Kan. 325, 328, 31 Pac. 1105; People v. Ashe, 44 Cal. 288, 291; Griffin v. State, 14 Ohio St. 55, 63; State v. Kinley, 43 Iowa 294, 296. The reputation which is relevant is reputation generally among all classes in the community where the accused resides, and not his reputation among a particular class, as "among his fellow workmen." State v. Brady, 71 N. J. L. 360, 59 Atl. 6.

In General.

Note on right of defendant in criminal cases to prove character, 20 L. R. A. 613; note on proof of character of person accused of crime, 20 L. R. A. 609, 14 L. R. A. (N. S.) 735, 103 Am. St. 889, Elliott on Ev., § 3038; note on good character of accused restricted to traits involved in offense, 103 Am. St. 892; note on evidence of good character of accused where the incriminating evidence is positive, 103 Am. St. 908, 909; note on what constitutes reputation, 103 Am. St. 895; note on general rule as to admissibility of evidence of good character of accused,

If, however, he offers no evidence of good character, the law presumes he has a fair and respectable, if not, indeed, an excellent character, and does not permit any presumption of guilt to arise from his silence as to his character or from his failure to offer evidence on this point. That his character is bad can never be presumed with proof, nor should the prosecution be permitted to comment unfavorably upon his omission to offer evidence of character.³

103 Am. St. 891; note on competency of witness to testify as to character of accused, 103 Am. St. 894; note on admissibility of evidence of good character of accused to create doubt, 103 Am. St. 891; note on evidence as to good character of accused where the evidence against him is circumstantial, 103 Am. St. 907; note on evidence to rebut evidence of good character of accused, 103 Am. St. 893, 894, 895, 20 L. R. A. 616; note on evidence to strengthen the presumption of innocence, 103 Am. St. 892; note on evidence of good character of accused to rebut presumption from possession of stolen goods, 20 L. R. A. 614; note on negative evidence of good character of accused, 103 Am. St. 895; note on cross-examination as to character of accused; note on right to question as to good character of accused submitted to the jury, 103 Am. St. 889; note on evidence as to good character of accused where the intent must be shown, 103 Am. St. 906.

Specific Offenses.

Note on evidence of good character, in prosecution for arson, 103 Am. St. 902; in prosecution for counterfeiting, 103 Am. St. 903; in prosecution for obtaining money by false pretenses, 103 Am. St. 902; in prosecution for homicide, 3 L. R. A. (N. S.) 352, 103 Am. St. 897, 899; Elliott Ev., §

3039; in prosecution for criminal libel, 103 Am. St. 900; in prosecution for violating election or liquor laws, 103 Am. St. 903; in prosecution for perjury, 103 Am. St. 902; in prosecution for larceny or robbery, 103 Am. St. 901; in prosecution for rape, 103 Am. St. 899; in prosecution for unlawfully carrying firearms, 103 Am. St. 904.

³ State v. Dockstader, 42 Iowa 436; Ackley v. People (burglary), 9 Barb. (N. Y.) 609, 611; McQueen v. State, 82 Ind. 72, 73; Ormsby v. People, 53 N. Y. 472, 475; Donoghoe v. People, 6 Park. Cr. (N. Y.) 120, 124; State v. Upham (counterfeiting), 38 Me. 261, 263; State v. O'Neal, 7 Ired. (N. Car.) 251, 252; People v. Bodine, 1 Denio (N. Y.) 281. *Contra*, State v. McAllister, 24 Me. 139; State v. Kabrich, 39 Iowa 277. Counsel for the accused may comment on the presumption of good character, but may not discuss the good character of the accused unless some evidence of it has been offered. Cluck v. State, 40 Ind. 263, 270, 271. The fact that the accused does not testify as a witness does not prevent him from proving his good character. State v. Hice, 117 N. Car. 782, 23 S. E. 357. It was error for the prosecuting attorney to remark in his argument to the jury that defendant had a right under the law to offer evidence of good character. and the fact that he did not do

The accused starts out with the presumption of innocence. His good character, if it be proved, will strengthen this. Its relevancy depends solely upon the inference that any reasonable man ought to draw that the accused is not guilty, because experience teaches that it is improbable that a man of good character would commit any crime or the crime with which he is charged.³

§ 77. Specific traits only relevant—Character of associates.—In a criminal prosecution, evidence of accused's general good character is admissible only when limited to the particular trait involved in the nature of the charge. The traits of character which may be proved must depend upon the nature of the crime alleged and the moral wrong which is involved in its commission.⁴

so was sufficient evidence of bad character, and that the attorney had a right to comment thereon. *State v. Williams*, 122 Iowa 115, 97 N. W. 992.

³"The object of laying evidence of character before the jury is to induce them to believe, from the improbability that a person of good character would commit crime, that there is a mistake or misrepresentation on the part of the prosecution." *Rex v. Stannard*, 7 C. & P. 673. "This presumption against the commission of crime arises from the general improbability proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of conduct will depart from it. * * * Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur, but they are exceptions; the general rule is otherwise. * * * The influence of the presumption may be slight when the accusation of crime is supported by the direct and positive testimony of credible witnesses. It will seldom avail to control the mind where the testi-

mony, though circumstantial, is reliable, strong and clear. If the evidence is nearly balanced, but slightly preponderant against the defendant, the presumption from proof of good character is entitled to great weight and will often be sufficient to turn the scale and produce an acquittal." *Cancemi v. People*, 16 N. Y. 501, 506.

⁴*Balkum v. State*, 115 Ala. 117, 22 So. 532, 67 Am. St. 19; *People v. Bezy*, 67 Cal. 223, 7 Pac. 643; *State v. Emery*, 59 Vt. 84, 90, 7 Atl. 129; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162n; *Kahlenbeck v. State*, 119 Ind. 118, 121, 21 N. E. 460; *Gordon v. State*, 3 Iowa 410, 415; *State v. Dexter*, 115 Iowa 678, 87 N. W. 417; *Bayse v. State*, 45 Neb. 261, 63 N. W. 811; *People v. Josephs (rape)*, 7 Cal. 129, 130; *People v. Fair (homicide)*, 43 Cal. 137, 148-151; *Commonwealth v. Nagle*, 157 Mass. 554, 32 N. E. 861; *Gandolfo v. State (homicide)*, 11 Ohio St. 114, 117; *Coffee v. State*, 1 Tex. App. 548, 550; *Kee v. State*, 28 Ark. 155, 164; *Westbrooks v. State*, 76 Miss. 710, 25 So. 491; *Griffin v. State*, 14 Ohio St. 55, 63; *State v. King*, 78 Mo. 555, 556; *State v. Ken-*

Thus evidence that the accused was generally reputed to be a quiet, peaceable and inoffensive man is always relevant in cases of homicide, and particularly so under a plea of self-defense. And, illogical as it may seem, this evidence has been admitted in a case of homicide by poisoning upon the theory that such traits of character, being inconsistent with a disposition to take life by one method, would be equally inconsistent with homicide by another.⁵

In a prosecution for theft a witness may testify to the general reputation as to honesty and integrity, but may not state that he never heard of accused failing to return any money which came into his hands.⁶

Evidence of general good character has been rejected in a prosecution for rape, though upon this point the cases are not wholly in harmony.⁷

nedy, 177 Mo. 98, 75 S. W. 979; Lake v. Commonwealth (Ky.), 104 S. W. 1003, 31 Ky. L. 1232; State v. Bessa, 115 La. 259, 38 So. 985; Saye v. State, 50 Tex. Cr. App. 569, 99 S. W. 551; Harper v. United States, 7 Ind. Terr. 437, 104 S. W. 673; Dungan v. State, 135 Wis. 151, 115 N. W. 350; Arnold v. State, 131 Ga. 494, 62 S. E. 806; State v. Griggsby, 117 La. 1046, 42 So. 497; Smith v. State, 142 Ala. 14, 39 So. 329; 1 Taylor Evid., § 326; 1 Greenl. Evid., § 54. Some authorities hold that evidence of good character need not be confined to the trait involved, particularly in capital cases. Hopps v. People, 31 Ill. 385, 388, 83 Am. Dec. 231; Commonwealth v. Hardy, 2 Mass. 303, 317; People v. Vane, 12 Wend. (N. Y.) 78; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 325, 52 Am. Dec. 711n, but see as sustaining the text.

Note that evidence of defendant's character be applicable to trait involved, 20 L. R. A. 612; note on admissibility of particular acts and specific traits of defendant generally, 20

L. R. A. 614; evidence of specific instances to prove character in prosecution for homicide, 14 L. R. A. (N. S.) 708; note on impeachment of defendant's character for credibility, 20 L. R. A. 616.

Character of Others.

Note on character of accomplices, 20 L. R. A. 614; character of inmates or visitors in prosecution for keeping disorderly house, 20 L. R. A. 612, Elliott Ev., § 2722; character of victims of crime, 3 L. R. A. (N. S.) 352, 17 L. R. A. (N. S.) 708, 733.

⁵ Hall v. State, 132 Ind. 317, 324, 31 N. E. 536. But evidence that the character of the accused for honesty was bad is not relevant in homicide to prove the killing or to show malice. People v. Cowgill, 93 Cal. 596, 597, 29 Pac. 228.

⁶ Leonard v. State, 53 Tex. Cr. App. 187, 109 S. W. 149.

⁷ People v. Josephs, 7 Cal. 129, 130. *Contra*, State v. Lee, 22 Minn. 407-409, 21 Am. 769.

Thus, in rape a question as to the reputation of the accused in the community may properly be disallowed. Reputation is too broad. The proper question would be as to his reputation for chastity and morality, using the latter term in its restricted sense of the absence of impurity in sexual relations.⁸

So in a prosecution for embezzlement, the general reputation of the accused for honesty may be proved, but his reputation for telling the truth is not admissible.⁹

So, too, in a prosecution for larceny, evidence of character must bear directly on the honesty and financial integrity of the accused.¹⁰

Though the accused may prove his own character, he will not be permitted to prove that others conspiring with him and jointly indicted,¹¹ or who are suspected of complicity in the crime,¹² are men of good character. This evidence is not in the least relevant to show his innocence, as the fact that the friends or acquaintances of the accused are men of unimpeachable character, in no way proves that he is a person of good character.

On the other hand, it seems that the admission of evidence showing the bad character of a co-defendant, if separately tried, is not error.¹³

§ 78. Bad character—When admissible.—Except so far as the character of the accused for veracity may be attacked when he is a witness, the state cannot show his bad character in the first instance, *i. e.*, before he offers to prove his good character.¹⁴ When-

⁸ State v. Brady, 71 N. J. L. 360, 59 Atl. 6.

⁹ State v. Hoffman, 134 Iowa 587, 112 N. W. 103.

¹⁰ State v. Bloom, 68 Ind. 54-57, 34 Am. 247; Butler v. State, 91 Ala. 87, 9 So. 191; Hays v. State, 110 Ala. 23, 20 So. 322; People v. Ryder, 151 Mich. 187, 114 N. W. 1021; State v. Conlan, 3 Penn. (Del.) 218, 50 Atl. 95.

¹¹ Walls v. State, 125 Ind. 400, 403, 25 N. E. 457; Omer v. Commonwealth (homicide), 95 Ky. 353, 362, 25 S. W. 594, 596, 15 Ky. L. 694.

¹² State v. Staton, 114 N. Car. 813, 818, 19 S. E. 96.

¹³ Aneals v. People, 134 Ill. 401, 415, 25 N. E. 1022, 1026. The defendant cannot be questioned as to the bad character of his relatives, who are in no way connected with the crime. Vale v. People, 161 Ill. 309, 43 N. E. 1091. The failure of the court to charge on the evidence of good character offered by the accused is not, in the absence of a request by him, erroneous. State v. Murphy, 118 Mo. 7, 25 S. W. 95, 96, 98.

¹⁴ Felsenthal v. State, 30 Tex. App. 675, 677, 18 S. W. 644, 645; People v. McKane, 143 N. Y. 455, 473, 38 N. E. 950; McDonald v. Common-

ever the accused shall introduce evidence of good character, rebutting evidence to show his bad character, but only as regards the trait involved in the crime charged against him, is always admissible.¹⁶

And this is the rule even though the evidence of good character was elicited upon the cross-examination of the witnesses for the state.¹⁷

To admit evidence of bad character against the accused, it is necessary that he shall have already put his character clearly and expressly in issue.¹⁸

wealth, 86 Ky. 10, 13, 4 S. W. 687, 9 Ky. L. 230; Commonwealth v. Hardy, 2 Mass. 303, 318; Montgomery v. Commonwealth (Ky.), 30 S. W. 602, 17 Ky. L. 94; State v. Thurtell (larceny), 29 Kan. 148; Carter v. State, 36 Neb. 481, 54 N. W. 853; State v. Kabrich, 39 Iowa 277, 278; Pauli v. Commonwealth, 89 Pa. St. 432, 435; State v. Ellwood, 17 R. I. 763, 766, 24 Atl. 782; State v. Lapage, 57 N. H. 245, 24 Am. 693; State v. Creson, 38 Mo. 372; State v. O'Neal, 7 Ired. (N. Car.) 251, 253; Griffin v. State, 14 Ohio St. 55, 63; Carter v. Commonwealth, 2 Va. Cas. 169; Cluck v. State, 40 Ind. 263, 270, 271; State v. Upham, 38 Me. 261, 263. Where the defendant introduces evidence to show good character in one community where he has lived the state may show his bad character in another. State v. Foster, 91 Iowa 164, 59 N. W. 8. Cf. State v. Espinozei, 20 Nev. 209, 19 Pac. 677. See also, sustaining text. State v. Nussenholtz, 76 Conn. 92, 55 Atl. 589; State v. Thompson, 127 Iowa 440, 103 N. W. 377; People v. Murphy, 146 Cal. 502, 80 Pac. 709; Puryear v. State, 50 Tex. Cr. App. 454, 98 S. W. 258; State v. Richardson, 194 Mo. 326, 92 S. W. 649; Newman v. Commonwealth (Ky.), 88 S. W. 1089, 28 Ky. L. 81; People v. Hinksman, 192 N. Y. 421, 85 N. E. 676.

Note on evidence of bad character of accused, 103 Am. St. 893; attacking defendant's character, 20 L. R. A. 69, 20 L. R. A. 610 (disorderly house); note on admissibility of evidence of bad character of deceased in prosecution for homicide, 2 L. R. A. (N. S.) 102.

¹⁶ Johnson v. State, 17 Tex. App. 565, 572; Maxwell v. State (Tex. Cr. App.), 78 S. W. 516; Cook v. State, 46 Fla. 20, 35 So. 665.

¹⁷ Reg. v. Gadbury, 8 C. & P. 676. Evidence of bad character is governed by the same rules whether elicited from independent witnesses or on the cross-examination of the accused. Keener v. State, 18 Ga. 194, 221, 63 Am. Dec. 269; Commonwealth v. O'Brien, 119 Mass. 342, 345, 20 Am. 325. The state may show the actual reputation of the defendant, though doing so may entail an inquiry into his political or religious belief. People v. McKane, 143 N. Y. 455, 473, 38 N. E. 950.

¹⁸ People v. Fair, 43 Cal. 137; State v. Beckner, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535n; Bays v. State, 50 Tex. Cr. App. 548, 99 S. W. 561; Sweatt v. State (Ala.), 47 So. 194.

The fact that it is incidentally and indirectly referred to, as when a continuance is asked for because witnesses to good character are absent, does not let in evidence of bad character.¹⁹

But the rule protecting the character of the accused from attack in the first instance is subject to a seeming exception if he goes upon the stand as a witness. If it is expressly provided, by statute or otherwise, that he may be examined or impeached as any other witness, the state may prove his bad character for veracity for the purpose of impeaching him as a witness (but for no other purpose), before he offers any evidence of good character.²⁰

§ 79. Effect and operation of evidence of good character.—Good character should be permitted to operate as a positive, appropriate and substantial defense. No distinction should be made, in application and effect, between evidence to prove exculpatory facts and evidence to prove the character of the accused.²¹

¹⁹ *Felsenthal v. State*, 30 Tex. App. 675, 677, 18 S. W. 644; *State v. Cloninger*, 149 N. Car. 567, 63 S. E. 154.

²⁰ *McDonald v. Commonwealth*, 86 Ky. 10, 13, 14, 4 S. W. 687, 9 Ky. L. 230; *State v. Cloninger*, 149 N. Car. 567, 63 S. E. 154; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098; *Burns v. State*, 75 Ohio St. 407, 79 N. E. 929; *State v. Cox*, 67 Mo. 392. Where the state neglects to rebut the defendant's evidence of good character, it is error for the court to charge "that the law does not permit the state to attack his character while allowing him to prove good character." The beneficial effect of the defendant's evidence may be nullified by the inference which may be drawn that the prosecution is *always* precluded from attacking good character. *People v. Marks*, 90 Mich. 555, 51 N. W. 638.

²¹ *State v. Murphy*, 118 Mo. 7, 25 S. W. 95, 97; *State v. McNally*, 87 Mo. 644, 658, 659; *Lee v. State*, 2

Tex. App. 338, 341; *Rex v. Stannard*, 7 C. & P. 673; *State v. Pucca*, 4 Penn. (Del.) 71, 55 Atl. 831; *Cannon v. Territory (Okla. 1909)*, 99 Pac. 622; *State v. King*, 122 Iowa 1, 96 N. W. 712.

Note on consideration of good character of accused, 103 Am. St. 904; note on effect of evidence of defendant's good character to rebut presumption from possession of stolen goods, 20 L. R. A. 614; note on effect of evidence of good character to create a doubt of guilt, 20 L. R. A. 617; note on weight and effect of evidence as to character, 20 L. R. A. 618, 103 Am. St. 905; note on consideration of evidence of good character in determining degree of guilt or crime, 20 L. R. A. 619; note on instruction as to effect of evidence of good character, 103 Am. St. 893; note on instruction limiting consideration of good character to doubtful cases, 20 L. R. A. 618.

Both rest on the same basis. A man's good character is a fact making strongly for the inference that he is innocent, and not a mere make-weight to be thrown in the scale if his guilt is trembling in the balance.

Though good character is of especial importance when the incriminating evidence is wholly circumstantial,²² it is not to be rejected, or even disregarded, when the evidence against the accused is direct.²³ And, except in a few early cases,²⁴ its admissibility has never been limited to doubtful cases, or to those in which the other evidence was contradictory or unconvincing.²⁵

The correct rule is that in all cases a good character, if proved, the satisfaction of the jury must be considered.²⁶

²² Jackson v. State, 81 Wis. 127, 138, 51 N. W. 89.

²³ State v. Rodman, 62 Iowa 456, 17 N. W. 663; Stover v. People, 56 N. Y. 315, 319.

²⁴ Rex v. Turner, 6 How. St. Tr. 565, 613; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n; United States v. Roudenbush, 1 Bald. (U. S.) 514, 27 Fed. Cas. 16198. See State v. Edwards, 13 S. Car. 30, 33.

²⁵ "It has been usual to treat the good character of the accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration, but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to his good character. It is, however, submitted with deference, that the good character of the party accused, when satisfactorily established, is an ingredient which ought always to be submitted to the jury, together with the other facts and circumstances of the

case. The nature of the charge and the evidence by which it is supported will often render such ingredient of little or no value, but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their own conclusion upon the evidence whether an individual, whose character was previously unblemished, has, or has not, committed the particular crime for which he is called upon to answer." 2 Russ. Cr. 785.

²⁶ People v. Van Dam, 107 Mich. 425, 65 N. W. 277; Murphy v. State, 108 Ala. 10, 18 So. 557; Edgington v. United States, 164 U. S. 361, 41 L. ed. 467, 17 Sup. Ct. 72; McSwean v. State, 113 Ala. 661, 21 So. 211; Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62; People v. Ashe, 44 Cal. 288, 293; United States v. Whitaker, 6 McLean (U. S.) 342, 344, 28 Fed. Cas. 16672; Cole v. State (Miss.), 4 So. 577; State v. Holmes, 65 Minn. 230, 68 N. W. 11; Latimer v. State, 55 Neb. 609, 76 N. W. 207, 70 Am. St. 403; Harrington v. State, 19 Ohio St. 264, 269; Stewart v. State, 22 Ohio St. 477, 485; State v. Henry, 5

§ 80. Good character, though never conclusive, may acquit if it creates a reasonable doubt.—Though evidence of good character should always receive due consideration, the fact that the defendant has established a high character for peace or honesty furnishes no reason why the jury must believe the evidence offered in his behalf, if it is weak or contradictory.²⁷

The rule is that evidence of good character must always be considered not alone but in connection with all the evidence bearing upon the question of the guilt or the innocence of accused. The jury have no right to separate it from the mass of the testimony, and to say that they believe the accused has a good character and that therefor they will disregard all the evidence of guilt.²⁸

An instruction in a prosecution for robbery that if the jury are satisfied beyond a reasonable doubt of the prisoner's guilt, after a consideration of all the evidence, including that showing his char-

Jones (N. Car.) 65, 66; State v. Ormiston, 66 Iowa 143, 23 N. W. 370; State v. Gustafson, 50 Iowa 194, 197; Fields v. State, 47 Ala. 603, 609, 11 Am. 771; Carson v. State, 50 Ala. 134, 138; People v. Elliott, 163 N. Y. 11; 57 N. E. 103; Cancemi v. People, 16 N. Y. 501, 505-507; Stover v. People, 56 N. Y. 315, 317; State v. Lepere, 66 Wis. 355, 28 N. W. 376; State v. Jones, 52 Iowa 150, 2 N. W. 1060; State v. Ford, 3 Strobb. (S. Car.) 517; Heine v. Commonwealth, 91 Pa. St. 145, 148; Holland v. State, 131 Ind. 568, 571, 31 N. E. 359; Lee v. State, 2 Tex. App. 338, 341; Kistler v. State, 54 Ind. 400, 405; Davis v. State, 10 Ga. 101, 105; Jupitz v. People, 34 Ill. 516, 521; Remsen v. People, 43 N. Y. 6, 57 Barb. (N. Y.) 324; People v. Mead, 50 Mich. 228, 15 N. W. 95; Commonwealth v. Leonard, 140 Mass. 473; 4 N. E. 96, 54 Am. 485; Hanney v. Commonwealth, 116 Pa. St. 322, 9 Atl. 339; Fowers v. State, 74 Miss. 777, 21 So. 657; United States v. Breese, 131 Fed. 915; Daniels v. State, 2 Penn. (Del.) 586, 48 Atl. 196, 54 L. R. A. 286; Bilton v. Territory, — Okla. —, 99 Pac. 163; People v. VanGaasbeck, 189 N. Y. 408, 82 N. E. 718; Eacock v. State, 169 Ind. 488, 82 N. E. 1039; Commonwealth v. Miller, 31 Pa. Super. Ct. 309; Mitchell v. State, 43 Fla. 188, 30 So. 803; Brazil v. State, 117 Ga. 32, 43 S. E. 460; State v. Deuel, 63 Kan. 811, 66 Pac. 1037; State v. Garick, 35 La. Ann. 970; People v. McArron, 121 Mich. 1, 79 N. W. 944; State v. Beebe, 17 Minn. 241.

Note on instruction limiting consideration of good character to doubtful cases, 20 L. R. A. 618; note on instruction as to effect of evidence of good character of accused, 103 Am. St. 893.

²⁷ State v. Brown, 34 S. Car. 41, 48, 12 S. E. 662; State v. Stewart (Del.), 67 Atl. 786; Wells v. Territory, 14 Okla. 436, 78 Pac. 124; State v. Brown, 181 Mo. 192, 79 S. W. 1111.

²⁸ Sweet v. State, 75 Neb. 263, 106 N. W. 31; Teague v. State, 144 Ala. 42, 40 So. 312.

acter for honesty, then, though they might believe he had a good character for honesty before the crime, it will not entitle him to an acquittal, and they may disregard it, is correct.²⁹ But while proof of unblemished character alone may not be sufficient as against proof of guilt beyond a reasonable doubt,³⁰ evidence of good character should go to the jury without language of disparagement by the court, to be considered with all the evidence and not independently of it.³¹

In a criminal case the circumstances may be such that an established reputation for honesty and integrity would create a reasonable doubt of guilt, and require an acquittal, though, aside from such reputation, the evidence might be convincing, and justify a verdict of guilty.

Unless the evidence of guilt is so convincing that it precludes a reasonable doubt, an acquittal will be justified if the evidence

²⁹ *McQueen v. State*, 82 Ind. 72, 74; *Wagner v. State*, 107 Ind. 71, 74, 7 N. E. 896, 57 Am. 79; *Cavender v. State*, 126 Ind. 47, 49, 25 N. E. 875; *Holland v. State*, 131 Ind. 568, 31 N. E. 359; *State v. Smith*, 9 *Houst. (Del.)* 588, 33 *Atl.* 441.

³⁰ *Harrington v. State*, 19 *Ohio St.* 264; *People v. Sweeney*, 133 N. Y. 609, 610, 30 N. E. 1005; *Hathcock v. State*, 88 Ga. 91, 13 S. E. 959; *Epps v. State*, 19 Ga. 102, 120; *Springfield v. State*, 96 Ala. 81, 11 So. 250, 252, 38 *Am. St.* 85; *Webb v. State*, 106 Ala. 52, 18 So. 491. Thus good character for honesty is not enough, alone, to rebut the presumption which arises from the unexplained possession of stolen property. *Wagner v. State*, 107 Ind. 71, 73, 7 N. E. 896, 57 *Am.* 79.

³¹ *Springfield v. State*, 96 Ala. 81, 11 So. 250, 252, 38 *Am. St.* 85; *Heine v. Commonwealth*, 91 Pa. St. 145, 148; *People v. Raina*, 45 Cal. 292, 293; *People v. Ashe*, 44 Cal. 288, 292, 293; *Holland v. State*, 131 Ind. 568, 31 N. E. 359; *State v. Alexander*,

66 Mo. 148; *Stover v. People*, 56 N. Y. 315, 319; *State v. Leppere*, 66 Wis. 355, 360, 28 N. W. 376; *Aneals v. People*, 134 Ill. 401, 415, 25 N. E. 1022; *Kistler v. State*, 54 Ind. 400, 405; *State v. Dunn (Wis.)*, 102 N. W. 935; *Teague v. State*, 144 Ala. 42, 40 So. 312. See remarks of the court in *Commonwealth v. Leonard*, 140 Mass. 473, 479, 4 N. E. 96, 54 *Am.* 485. Its weight and effect are for the jury alone. Hence it is improper to charge that, in a doubtful case, evidence of character should have great weight with them. *State v. Brown*, 34 S. Car. 41, 48, 12 S. E. 662, and *White v. United States*, 164 U. S. 100, 41 L. ed. 365, 17 *Sup. Ct.* 38. In estimating and weighing character evidence the jury may take into consideration the testimony of the accused and the impression which they may derive from his conduct and manner on the stand. *People v. Ellenbogen*, 186 N. Y. 603, 79 N. E. 1112, *aff'g* 114 *App. Div. (N. Y.)* 182, 99 N. Y. S. 897; *People v. Blatt*, 121 N. Y. S. 507.

of good character, considered in connection with all the other evidence, raises a reasonable doubt.⁸²

Evidence that the accused is a man of good character considered in connection with the other evidence may be sufficient to create a reasonable doubt of guilt, where such a doubt would not otherwise exist. The verdict of the jury, however, is to be based upon the whole evidence, and if, after considering carefully the evidence of good character, the jury still believe the accused is guilty beyond a reasonable doubt, they are justified in rejecting the evidence of good character.⁸³

A witness is competent to prove good character where he knows the character or reputation of the man, though he admitted he had never heard his character discussed.⁸⁴

⁸² *Commonwealth v. Cate*, 220 Pa. St. 138, 69 Atl. 322, 123 Am. St. 683; *Stephens v. People*, 4 Park Cr. (N. Y.) 396; *Newsom v. State*, 107 Ala. 133, 18 So. 206; *State v. Leppere*, 66 Wis. 355, 361, 362, 28 N. W. 376; *People v. Sweeney*, 133 N. Y. 609, 611, 30 N. E. 1005; *People v. Bell*, 49 Cal. 485; *Redd v. State*, 99 Ga. 210, 25 S. E. 268; *McSwean v. State*, 113 Ala. 661, 21 So. 211; *Crawford v. State*, 112 Ala. 1, 21 So. 214; *Hammond v. State*, 74 Miss. 214, 21 So. 149; *McQueen v. State*, 82 Ind. 72, 74; *Hall v. State*, 40 Ala. 698, 707; *Armor v. State*, 63 Ala. 173; *State v. Swain*, 68 Mo. 605; *State v. Lindley*, 51 Iowa 343, 1 N. W. 484, 33 Am. 139; *State v. Keefe*, 54 Kan. 197, 38 Pac. 302; *Carson v. State*, 50 Ala. 134, 138; *Long v. State*, 23 Neb. 33, 36 N. W. 310; *Baker v. State*, 53 N. J. L. 45, 20 Atl. 858; *Guzinski v. People*, 77 Ill. App. 275; *People v. Kerr*, 6 N. Y. S. 674, 6 N. Y. Cr. 406; *State v. Van Kuran*, 25 Utah 8, 69 Pac. 60. "There is no case in which the jury may not, in the exercise of a sound discretion, give a prisoner the benefit of a previous good

character. No matter how conclusive the other testimony may appear, the character of the accused may be such as to create a doubt in the minds of the jurors, and may lead them to believe, in view of the improbabilities that a person of such character would be guilty of the offense charged, that the other evidence in the case is false or the witnesses mistaken. An individual accused of crime is entitled to have it left to the jury to form their conclusions upon all the evidence, whether he, if his character was previously unblemished, has or has not committed the particular crime alleged against him." *Remsen v. People*, 43 N. Y. 6, 8, 9. Evidence of good character is substantive evidence and not a mere makeweight introduced into a doubtful case. Such evidence may have the effect to create a reasonable doubt, and thereby produce an acquittal. *Commonwealth v. Howe*, 35 Pa. Super. Ct. 554.

⁸³ *Browne v. United States*, 76 C. C. A. 31, 145 Fed. 1.

⁸⁴ *Mitchell v. State*, 51 Tex. Cr. App. 71, 100 S. W. 930.

§ 81. Mode of proof—Irrelevancy of personal opinions—Derogatory rumors in rebuttal.—Character, *i. e.*, the general reputation which the accused possesses and enjoys among his acquaintances, may be shown by the testimony of such persons only. The witness is not competent unless it is first shown that he knows such reputation,⁸⁵ which must be that which is current in the neighborhood where both he and the accused reside.⁸⁶

The witness cannot give an opinion which is merely the result of observing the disposition and conduct of the defendant. What is required of him is his knowledge of the existing general reputation which he has obtained by hearing the comments of others on the accused while he lived among those who knew him.⁸⁷

The witness must be acquainted with the character of the ac-

⁸⁵ *State v. Lambert*, — Me. —, 71 Atl. 1092; *State v. Coley*, 114 N. Car. 879, 883, 19 S. E. 705; *Gay v. State*, 40 Tex. Cr. App. 242, 49 S. W. 612. A question as to the knowledge the witness has of the character of the accused in the neighborhood where he lives must not be leading or suggestive of the answer desired. Thus a witness called to prove bad character ought not to be permitted to answer the question whether he knew the accused to be a turbulent, violent or boisterous man. *Ross v. State*, 139 Ala. 144, 36 So. 718.

Note on credibility of character witnesses in criminal cases, 14 L. R. A. (N. S.) 739-745.

⁸⁶ *People v. Rodrigo*, 69 Cal. 601, 603, 11 Pac. 481; *People v. Murphy*, 146 Cal. 502, 80 Pac. 709.

Note on admissibility of evidence to prove good character, 103 Am. St. 890; how and by whom defendant's character proved, note in 20 L. R. A. 614; note on kind of evidence admissible to prove good character of accused, 103 Am. St. 894; when particular facts admissible bearing on good character of accused, note in 103 Am.

St. 893; proof of disorderly house by evidence of general reputation, 20 L. R. A. 611.

⁸⁷ *Reg. v. Rowton*, 10 Cox Cr. Cas. 25, 30; *Commonwealth v. Rogers*, 136 Mass. 158, 159; *State v. Grinden*, 91 Iowa 505, 60 N. W. 37; *Sawyer v. People*, 91 N. Y. 667; *Hirschman v. People*, 101 Ill. 568, 574; *Berneker v. State* (larceny), 40 Neb. 810, 814, 816, 59 N. W. 372; *State v. Ward*, 73 Iowa 532, 35 N. W. 617; *Hughes v. State*, 152 Ala. 5, 44 So. 694; *State v. Day*, 188 Mo. 359, 87 S. W. 465; *People v. Albers*, 137 Mich. 678, 100 N. W. 908; *State v. Shouse*, 188 Mo. 473, 87 S. W. 480; *Younger v. State*, 80 Neb. 201, 114 N. W. 170; *State v. Boyd*, 178 Mo. 2, 76 S. W. 979; *Jackson v. State*, 147 Ala. 699, 41 So. 178. The witness need not be personally acquainted with the accused if he knows his reputation. *State v. Turner*, 36 S. Car. 534, 539, 15 S. E. 602. Nor need the witness reside in the same community. *State v. Lambert*, — Me. —, 71 Atl. 1092. *State v. Stewart* (Del.), 67 Atl. 786; *McAlpine v. State*, 117 Ala. 93, 23 So. 130.

cused before he can testify. An acquaintance extending over several years is certainly sufficient to qualify a witness to testify as to the good character of the accused. If having known the accused for several years he further testifies that he is of good character and that he never heard his character questioned and that the question of his character never was discussed outside of his own family, his evidence should be received.³⁸

Evidence of the good actions of the accused is inadmissible to prove his good reputation.³⁹ Vague rumors are not reputation, and a witness is not competent to prove reputation whose sole basis of knowledge is rumor, idle reports and fugitive gossip not traceable to any known and responsible source.⁴⁰

Affirmative testimony of express oral comments of the neighbors, friends and acquaintances of the accused, upon the reputation of the accused is not always required. Evidence that the character of the accused had never been denied or doubted, or even discussed or spoken of among his acquaintances, though negative in form, is always admissible and often of the highest value.⁴¹

³⁸ *State v. McClellan* — Kan. —, 98 Pac. 209.

³⁹ *Carthaus v. State*, 78 Miss. 560, 47 N. W. 629; *Thomas v. People*, 67 N. Y. 218, 223; *Hopps v. People*, 31 Ill. 385, 388, 83 Am. Dec. 231; *Walker v. State*, 91 Ala. 76, 9 So. 87, 88; *Kistler v. State*, 54 Ind. 400, 405; *State v. Kinley*, 43 Iowa 294, 296; *Commonwealth v. Hardy*, 2 Mass. 303, 317; *Commonwealth v. O'Brien*, 119 Mass. 342, 345, 20 Am. 325; *Keener v. State*, 18 Ga. 194, 221; *State v. Stewart* (Del.), 67 Atl. 786.

⁴⁰ *Haley v. State*, 63 Ala. 83, 86. Hence the results of a stranger's inquiries in the neighborhood where the accused resides are not admissible. *Dave v. State*, 22 Ala. 23, 39.

⁴¹ *State v. Brandenburg*, 118 Mo. 181, 185, 23 S. W. 1080, 40 Am. St. 362; *State v. Grate*, 68 Mo. 22, 27; *Cole v. State*, 59 Ark. 50; 26 S. W. 377; *Lemons v. State*, 4 W. Va. 755,

761, 6 Am. 293; *Hussey v. State*, 87 Ala. 121, 6 So. 420; *State v. Nelson*, 58 Iowa 208, 12 N. W. 253; *State v. Lee*, 22 Minn. 407. "A very sensible and commendable relaxation of the old and strict rule is the reception of negative evidence of good character as the testimony of a witness that he has been acquainted with the defendant for a considerable time, under such circumstances that he would be more or less likely to hear what was said about him, and that he has never heard any remark about his character — the fact that a person's character is not talked about at all being, on grounds of common experience, excellent evidence that he gives no occasion for censure." *State v. Lee*, 22 Minn. 407, 409, 21 Am. 769; *Johnson v. State* (Miss.), 40 So. 324; *Gandolfo v. State*, 11 Ohio St. 114; *Reg. v. Rowton*, 10 Cox Cr. Cas. 25.

§ 82. **Specific evil acts—Relevancy of.**—Evidence of specific acts of bad conduct is not admissible to show bad character. The accused may always be prepared to meet an attack on his general character, but cannot fairly be required, without notice, to controvert particular facts.⁴²

It is error to permit a character witness to be cross-examined as to his own knowledge of particular acts of bad conduct by accused.^{42a}

But a witness to good character may be asked on cross-examination to list his credibility whether he has heard rumors of particular and specific charges of the commission of acts inconsistent with the character which he was called to prove,⁴³ and

⁴² Underhill on Evidence, p. 26, 506; Davenport v. State, 85 Ala. 336, 5 So. 152; Nelson v. State, 32 Fla. 244, 13 So. 361, 362; People v. Lee Duck Lung, 129 Cal. 491, 62 Pac. 71; People v. Bishop, 81 Cal. 113, 22 Pac. 477; Steele v. State, 83 Ala. 20, 3 So. 547; McCarty v. People, 51 Ill. 231, 232; State v. Donelon, 45 La. Ann. 744, 754, 12 So. 922; Hirschman v. People, 101 Ill. 568, 574; Commonwealth v. O'Brien, 119 Mass. 342, 345, 20 Am. 325; Gordon v. State, 3 Iowa 410, 415; Taylor v. Commonwealth, 3 Bush (Ky.) 508, 511; Reg. v. Rowton, 10 Cox Cr. Cas. 25; Drew v. State, 124 Ind. 9, 17, 23 N. E. 1098; Stitz v. State, 104 Ind. 359, 4 N. E. 145; Bennett v. State, 8 Humph. (Tenn.) 118; State v. Laxton, 76 N. Car. 216; Keener v. State, 18 Ga. 194, 221, 63 Am. Dec. 269; State v. Bysong, 112 Iowa 419, 84 N. W. 505; Commonwealth v. Webster, 5 Cush (Mass.) 295, 324, 52 Am. Dec. 711; People v. White, 14 Wend. (N. Y.) 111, 114; Snyder v. Commonwealth, 85 Pa. St. 519, 522; Brownell v. People, 38 Mich. 732, 736; State v. Donelon, 45 La. Ann. 744, 12 So. 922; Basye v. State, 45 Neb. 261, 63 N. W. 811. A deputy sheriff can not be permitted to testify that he nearly always had a warrant for the defendant's arrest. Murphy

v. State, 108 Ala. 10, 18 So. 557; State v. Castle, 133 N. Car. 769, 46 S. E. 1.

Note on proof of other crimes to rebut defendant's good character, 62 L. R. A. 300.

^{42a} Cook v. State, 46 Fla. 20, 35 So. 665.

⁴³ White v. State, 111 Ala. 92, 21 So. 330; People v. Moran, 144 Cal. 48, 77 Pac. 777; State v. McDonald, 57 Kan. 537, 46 Pac. 966; Goodwin v. State (homicide), 102 Ala. 87, 15 So. 571; Siberry v. State, 133 Ind. 677, 684, 33 N. E. 681; Reg. v. Wood, 5 Jur. 295; Ingram v. State, 67 Ala. 67; State v. Pain, 48 La. Ann. 311, 19 So. 138; State v. Merriman, 34 S. Car. 16, 35, 12 S. E. 619; Ozburn v. State, 87 Ga. 173, 13 S. E. 247, 249; State v. Arnold, 12 Iowa 479, 487; State v. Dill, 48 S. Car. 249, 26 S. E. 567; Holloway v. State, 45 Tex. Cr. App. 303, 77 S. W. 14; Cook v. State, 46 Fla. 20, 35 So. 665 (homicide); Terry v. State, 118 Ala. 79, 23 So. 776; People v. Weber, 149 Cal. 325, 86 Pac. 671; State v. Smalls, 73 S. Car. 516, 53 S. E. 976; State v. Dickerson (Ohio), 82 N. E. 969; Cook v. State, 46 Fla. 20, 35 So. 665.

Note on admissibility of particular acts and specific traits of defendant on cross-examination, 20 L. R. A. 615.

generally as to the grounds of his evidence, not so much to establish the truth of such facts or charges, as to test his credibility, and to determine the weight of his evidence.⁴⁴ He may be asked if he has not heard some general report which contradicts the good reputation which he has been called upon to prove.⁴⁵

A witness to the good character of the accused may properly be cross-examined as to particular facts which are within his knowledge to test the soundness of his belief that the character of the accused is good, and the facts on which it is founded.⁴⁶ Thus, he may be asked on cross-examination whether he had not heard of a difficulty during which the accused had assaulted a person with a knife.⁴⁷

If he admits having heard derogatory reports of the accused, the latter may show their nature and subject-matter to prove that they did not relate to and do not affect the particular trait of character in issue.⁴⁸

Where it appears from the cross-examination of a character witness that he had heard that the accused had trouble with his neighbors the accused may bring out all the facts in order to show what the trouble was about and that he was not at fault.⁴⁹

§ 83. Remoteness—Character subsequent to the date of the crime.—Evidence of character, either good or bad, is irrelevant if too remote in time or place.⁵⁰

Though a man's character may have been bad at one period of his life, he may subsequently have reformed and become a law-abiding person at the date of the crime. Nor does it follow be-

⁴⁴ *Commonwealth v. O'Brien*, 119 Mass. 342, 356, 20 Am. 325; *State v. McGee*, 81 Iowa 17, 46 N. W. 764, 765.

⁴⁵ *State v. West*, 43 La. Ann. 1006, 10 So. 364; *Thompson v. State* (larceny), 100 Ala. 70, 14 So. 878.

⁴⁶ *State v. Le Blanc*, 116 La. 822, 41 So. 105.

⁴⁷ *Jones v. State*, 120 Ala. 303, 25 So. 204.

⁴⁸ *Stape v. People*, 85 N. Y. 390, 393.

⁴⁹ *State v. Doris* (Ore.), 94 Pac. 44.

⁵⁰ *State v. Taylor*, 45 La. Ann. 605, 608, 12 So. 927. Remote evidence of good character is not objectionable where the only evidence against the defendant is circumstantial. *Fry v. State*, 96 Tenn. 467, 35 S. W. 883.

Evidence of defendant's character restricted as to time, note in 20 L. R. A. 612; period to which evidence must relate, note in 103 Am. St. 890; reputation since the charge was made, note in 103 Am. St. 896, 897.

cause the accused enjoyed a reputation for peacefulness and honesty when a boy that he retained it after maturity or down to the date of the crime.⁵¹

But even when the evidence is not excluded for remoteness the remoteness of the time and place may be considered in estimating the weight of character evidence. It was so held where it was proved that the accused was of a peaceable and quiet reputation in a place where he lived many years before committing the crime.⁵²

Again, evidence of bad character must refer to a period prior to the discovery of the crime.⁵³ It is only just that this evidence should be free from any imputation or suggestion of wrong-doing which may have arisen from a public discussion of the crime or of the arrest of the accused. To permit the inquiry to extend down to the arrest or trial would be to embarrass, if not to destroy, the probability of innocence arising from good character by evidence of a single wicked transaction with which the accused may not have been connected at all. This is not only contrary to all recognized rules of evidence, but extremely unfair to the accused.⁵⁴

Thus, for example, the state is not entitled to bring out on cross-examination of a witness called to prove the good character of the accused that, after the commission of the crime, he had heard that the accused had been guilty of actions and conduct that would indicate that the witness was mistaken in his estimate of his character.⁵⁵

⁵¹ *State v. Barr*, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. 890, 29 L. R. A. 154n. The reputation of the accused as a soldier in the army is not relevant to show character, good or bad. *People v. Eckman*, 72 Cal. 582, 14 Pac. 359; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162n; *Burns v. State*, 23 Tex. App. 641, 5 S. W. 140.

⁵² *People v. Van Gaasbeck*, 118 App. Div. (N. Y.) 511, 913, 103 N. Y. S. 249.

⁵³ *White v. Commonwealth*, 80 Ky. 480, 485, 4 Ky. Law 373; *State v. Kinley*, 43 Iowa 294; *Smalls v. State*, 101

Ga. 570, 28 S. E. 981, 40 L. R. A. 369; *Lea v. State*, 94 Tenn. 495, 496, 29 S. W. 900; *Brown v. State*, 46 Ala. 175, 184; *Griffith v. State*, 90 Ala. 583, 539, 8 So. 812; *People v. McSweeney* (Cal.), 38 Pac. 743; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396; *State v. Sprague*, 64 N. J. L. 419, 45 Atl. 788; but compare *Commonwealth v. Sackett*, 22 Pick. (Mass.) 394, 399.

⁵⁴ *White v. Commonwealth*, 80 Ky. 480, 4 Ky. L. 373.

⁵⁵ *Powers v. State*, 117 Tenn. 363, 97 S. W. 815.

§ 84. **The grade and moral nature of the crime.**—The admissibility and force of evidence of character do not depend upon the degree of immorality involved in the crime,⁵⁶ but rather upon the cogency and force of the evidence tending to prove its commission and upon the motives which prompted the crime. In the case of a great crime, which apparently was planned and executed with great deliberation, no reason exists why character should not be considered, as it is extremely probable that a person of blameless and pure habits would not engage therein. Of course, unusual and atrocious crimes involving great moral turpitude are so obviously beyond the ordinary bounds of human conduct that it is clear that the perpetrator must have been prompted by extraordinary motives, far different from those guiding his every-day actions, upon which estimates of his character are based. Hence, perhaps, evidence does not possess the same cogency in connection with a crime of extraordinary malignity apparently committed with little, if any, forethought, and under the influence of some sudden and powerful emotion, as it would in the case of an inferior offense.⁵⁷

§ 85. **Disposition is irrelevant.**—It is important to distinguish between evidence of reputation to show character and direct evidence of the good or bad moral disposition of the accused. Evidence of a good disposition is not admissible for him, to mitigate or excuse his act,⁵⁸ or of a bad or malicious disposition to show the probability of his guilt.⁵⁹

⁵⁶ *Cancemi v. People*, 16 N. Y. 501, 506, 507; *Harrington v. State*, 19 Ohio St. 264, 268.

⁵⁷ *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 324, 52 Am. Dec. 711n. Cf. *McLain v. Commonwealth*, 99 Pa. St. 86. Evidence of good character has been sometimes confined in its operation to those crimes the commission of which involves some moral turpitude. It is then not relevant in mere statutory offenses not *malum in se*. *Commonwealth v. Nagle*, 157 Mass. 554, 32 N. E. 861.

⁵⁸ *State v. Emery*, 59 Vt. 84, 90, 7 Atl. 129; *Murphy v. People*, 9 Colo.

435, 448, 13 Pac. 528; *Hirschman v. People*, 101 Ill. 568; *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *Sindram v. People*, 88 N. Y. 196, 200; *Fitzpatrick v. Commonwealth*, 81 Ky. 357, 360; *Sawyer v. People*, 91 N. Y. 667, 668; *Voght v. State*, 145 Ind. 12, 43 N. E. 1049; *Berneker v. State*, 40 Neb. 810; 59 N. W. 372; *State v. Emery*, 59 Vt. 84, 7 Atl. 129. And see 1 Crim. Law Mag. 331-335. *Contra*, *State v. Lee*, 22 Minn. 407, 410, 21 Am. 769; *State v. Sterrett*, 68 Iowa 76, 78, 25 N. W. 936.

⁵⁹ *Reg. v. Rowton*, 10 Cox Cr. Cas. 25, 29.

Accordingly the opinion of a witness that a prisoner accused of murder was a kind-hearted man,⁶⁰ or as to what his disposition was when crossed or misused,⁶¹ or that his behavior was rude, arbitrary and unreasonable,⁶² is inadmissible. But the state has been permitted to show that the accused charged with homicide had been in active military service, and was thus probably disposed to acts of bloodshed and to place a low estimate on human life.⁶³

§ 86. Number of witnesses to character.—It is sometimes provided by statute that, under circumstances specifically described, that the witnesses to reputation called by the accused in a criminal trial shall not exceed a given number unless the party calling them shall provide for the payment of the fees for the witnesses in excess.⁶⁴

Such statutes, it has been held, do not violate a constitutional provision that the accused shall be entitled to compulsory process to procure the attendance of his witnesses.⁶⁵

§ 86a. Instructions as to the character of the accused.—The accused, it is said, is not entitled to an instruction that his character is presumed to be good, unless he introduces evidence of character or unless the prosecution attacks it.⁶⁶ While an express refusal of a request by the accused that the court shall charge that he is presumed to have a good character, unless the contrary is shown, would not be error, it is customary for the court to charge

⁶⁰ Cathcart v. Commonwealth, 37 Pa. St. 108.

⁶¹ Thomas v. People, 67 N. Y. 218, 223.

⁶² People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846, rev'g 20 App. Div. (N. Y.) 139, 46 N. Y. S. 1020.

⁶³ State v. Moelchen, 53 Iowa 310, 5 N. W. 186.

⁶⁴ For an example of such a statute, see 2 Bates Rev. Stat. (Ohio), § 7287.

⁶⁵ State v. Stout, 49 Ohio St. 270, 30 N. E. 437, 438. Their purpose is to prevent the waste of time and money. The accused may, under such a stat-

ute, compel the attendance of ten witnesses to his character at public expense. If he desires more he must pay their expenses. The limitation is a reasonable one, and in no way deprives the accused of any constitutional right. Commonwealth v. Thomas (Ky.), 104 S. W. 326, 31 Ky. L. 899.

⁶⁶ Bodine v. State, 129 Ala. 106, 29 So. 926; Sanders v. People, 124 Ill. 218, 16 N. E. 81; People v. Brasch, 193 N. Y. 46, 85 N. E. 809; State v. Gartrell, 171 Mo. 489, 71 S. W. 1045.

on the presumption of good character as a part of the law of the case. In any event, it would be error for the court to single out the failure of the accused to offer evidence of good character and call attention to it as a part of its instruction.⁶⁷

Any charge which directly or indirectly tells the jury that the prosecution cannot in the first instance attack the character of the accused would be error as from such a charge, the jury might reasonably infer that the prosecution is compelled by the law to keep silence as to evidence which it has in its possession which, if permitted to be received, would prove the accused to be a man of bad character.⁶⁸ It is error to refuse to charge that the character of the accused may be such as to lead the jury to believe that the evidence against him was false.⁶⁹ Any instruction which confines the effect of character evidence to a doubtful case, is erroneous for the reason that the good character of the accused must be considered without reference to the apparently conclusive or inconclusive character of the other evidence.⁷⁰

⁶⁷ *People v. Bodine*, 1 Denio (N. Y.) 281; *State v. Sanders*, 84 N. Car. 728. ⁶⁸ *People v. Childs*, 90 App. Div. (N. Y.) 58, 85 N. Y. S. 627.

⁶⁹ *People v. Marks*, 90 Mich. 555, 51 N. W. 638; *People v. Gleason*, 122 Cal. 370, 55 Pac. 123. ⁷⁰ *State v. Birkey*, 122 Iowa 102, 97 N. W. 980.

CHAPTER VIII.

PROOF OF OTHER CRIMES.

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| <p>§ 87. General rule regarding evidence of crimes other than that charged in the indictment.</p> <p>88. Connected or intermingled crimes forming parts of one whole.</p> <p>89. Evidence of other offenses to show specific intention or guilty knowledge.</p> | <p>§ 90. Relevant evidence not inadmissible because indirectly proving or tending to prove another crime — Dissimilar crimes united in motives.</p> <p>91. Identity of means employed in several crimes — Identity of accused.</p> <p>92. Sexual crimes.</p> |
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§ 87. General rule regarding evidence of crimes other than that charged in the indictment.—The rule which requires that all evidence which is introduced shall be relevant to the guilt or the innocence of the accused is applied with considerable strictness in criminal proceedings. The wisdom and justness of this, at least from the defendant's stand-point, are self-evident. He can with fairness be expected to come into court prepared to meet the accusations contained in the indictment only, and, on this account, all the evidence offered by the prosecution should consist wholly of facts which are within the range and scope of its allegations. The large majority of persons of average intelligence are untrained in logical methods of thinking, and are therefore prone to draw illogical and incorrect inferences, and conclusions without adequate foundation. From such persons jurors are selected. They will very naturally believe that a person is guilty of the crime with which he is charged if it is proved to their satisfaction that he has committed a similar offense, or any offense of an equally heinous character. And it cannot be said with truth that this tendency is wholly without reason or justification, as every person can bear testimony from his or her experience, that a man who will commit one crime is very likely subsequently to commit another of the same description.

To guard against this evil, and at the same time to avoid the

delay which would be incident to an indefinite multiplication of issues, the general rule (to which, however, some very important exceptions may be noted) forbids the introduction of evidence which will show, or tend to show, that the accused has committed any crime wholly independent of that offense for which he is on trial.¹

¹ *People v. Corbin*, 56 N. Y. 363, 15 Am. 427; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. 851; *Coleman v. People*, 55 N. Y. 81; *State v. Shuford*, 69 N. Car. 486, 493; *State v. Jeffries*, 117 N. Car. 727, 23 S. E. 163; *People v. Gibbs*, 93 N. Y. 470; *State v. Murphy*, 84 N. Car. 742; *Snyder v. Commonwealth*, 85 Pa. St. 519, 521; *Mason v. State*, 42 Ala. 532, 537; *Coble v. State*, 31 Ohio St. 100, 102; *State v. Boyland*, 24 Kan. 186, 187; *Clapp v. State*, 94 Tenn. 186, 202, 203, 30 S. W. 214; *People v. Fowler*, 104 Mich. 449, 62 N. W. 572; *People v. Baird*, 104 Cal. 462, 464, 38 Pac. 310; *People v. Bowen*, 49 Cal. 654; *State v. Moberly*, 121 Mo. 604, 610, 26 S. W. 364; *Painter v. People*, 147 Ill. 444, 447, 463, 35 N. E. 64; *Garrison v. People*, 87 Ill. 96; *State v. Burk*, 88 Iowa 661, 667, 56 N. W. 180; *State v. Crawford*, 39 S. Car. 343, 17 S. E. 799; *Cotton v. State (Miss.)*, 17 So. 372; *State v. Bates*, 46 La. Ann. 849, 851, 15 So. 204; *Commonwealth v. Jackson*, 132 Mass. 16-21, citing many cases; *Holder v. State*, 58 Ark. 473, 25 S. W. 279; *State v. Lapage*, 57 N. H. 245, 24 Am. 69; *Stone v. State*, 4 Humph. (Tenn.) 27; *People v. Stout*, 4 Park. Crim. (N. Y.) 71, 127; *People v. Dowling*, 84 N. Y. 478; *State v. Kelley*, 65 Vt. 531, 27 Atl. 203, 36 Am. St. 884; *Turner v. State*, 102 Ind. 425, 427, 1 N. E. 869; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *Meyer v. State*, 59 N. J. L. 310, 36 Atl. 483; *State v. Reynolds*, 5 Kan. App. 515, 47

Pac. 573; *Ware v. State*, 36 Tex. Cr. App. 597, 38 S. W. 198; *Tyrrell v. State (Tex., 1897)*, 38 S. W. 1011; *Rhea v. State*, 37 Tex. Cr. App. 138, 38 S. W. 1012; *Shears v. State*, 147 Ind. 51, 46 N. E. 331. Admissions made by accused before a crime, as to the commission of other independent crimes, to induce a third person to take part in the crime are receivable. *State v. Hayward*, 62 Minn. 474, 65 N. W. 63; *McSwean v. State*, 21 So. 211, 113 Ala. 661, not reported in full.

General rule as to evidence of other crimes in criminal cases, note 62 L. R. A. 193; reason for general rule excluding, 105 Am. St. 977. See also *Elliott Ev.*, § 2720.

See, also, sustaining the text: *Gasenheimer v. United States*, 26 App. Dec. 432; *State v. Hight (N. Car.)*, 63 S. E. 1043; *Vickers v. United States (Okla.)*, 98 Pac. 467; *Denham v. State (Ga. App.)*, 63 S. E. 62; *Campbell v. State (Tex. Cr. App.)*, 116 S. W. 581; *Belt v. State*, 47 Tex. Cr. App. 82, 78 S. W. 933; *Gardner v. State (Tex. Cr. App.)*, 117 S. W. 140; *State v. Williams*, 111 La. 179, 35 So. 505; *People v. Governale*, 193 N. Y. 581, 86 N. E. 554; *Clark v. State (Ga. App.)*, 62 S. E. 663; *Hinson v. State*, 51 Tex. Cr. App. 102, 100 S. W. 939; *Majors v. People*, 38 Colo. 437, 88 Pac. 636; *Morse v. Commonwealth (Ky.)*, 111 S. W. 714, 33 Ky. L. 831, 894; *State v. Shockley*, 29 Utah 25, 80 Pac. 865; *Alford v. State*, 52 Tex. Cr. App. 621,

To this general rule there are several distinct exceptions which have been permitted from absolute necessity, to aid in the detection and punishment of crime. These exceptions ought to be carefully limited and guarded by the courts and their number should not be increased. But it must be admitted that the modern tendency on the part of the courts is to be liberal in the admission of evidence of collateral crimes. The exceptions to the general rule arise either from the necessity of the case, as, for example, where two or more crimes constituent parts of one transaction so that to prove either necessitates proof of the other, or when the intent is to be proved from circumstances or in the third place where the identity of the accused is expressly in issue, that is to say, where the evidence conclusively shows a crime was committed by some one but there is a sharp conflict as to the person who committed it.^{1a}

108 S. W. 364; *Driver v. State*, 48 Tex. Cr. App. 20, 85 S. W. 1056; *Lane v. State*, 49 Tex. Cr. App. 335, 92 S. W. 839; *Curtis v. State*, 52 Tex. Cr. App. 606, 108 S. W. 380; *Wesley v. State* (Tex. Cr. App. 1905), 85 S. W. 802; *Custer v. State*, 48 Tex. Cr. App. 144, 86 S. W. 757; *Herndon v. State*, 50 Tex. Cr. App. 552, 99 S. W. 558; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100; *People v. Weaver*, 177 N. Y. 434, 69 N. E. 1094; *State v. Anderson*, 120 La. 331, 45 So. 267; *Raymond v. Commonwealth*, 123 Ky. 368, 96 S. W. 515, 29 Ky. L. 785; *State v. Berger*, 121 Iowa 581, 96 N. W. 1094; *Brom v. People*, 216 Ill. 148, 74 N. E. 790; *Posey v. United States*, 26 App. D. C. 302; *State v. Dulaney* (Ark. 1908), 112 S. W. 158; *Pointer v. State*, 41 So. 929, 148 Ala. 676, not reported in full; *Dillard v. State*, 152 Ala. 86, 44 So. 537; *Louisville & N. R. Co. v. Commonwealth*, 117 Ky. 345, 78 S. W. 167, 25 Ky. L. 1442; *Topolewski v. State*, 130 Wis. 244, 109 N. W. 1037, 118 Am. St. 1019, 7 L. R. A. (N. S.) 756n; *People v. Hosier*, 196 N. Y. 506, 89 N. E. 1107; *People v. Argentos* (Cal. App. 1909), 106 Pac. 65.

^{1a} *To rebut special defenses*: Proof of other crimes to rebut special defenses—note, 62 L. R. A. 299, 300.

Corroboration and relation of parties: Proof of other offenses to corroborate other testimony—note, 105 Am. St. 993; proof of other offenses to show relation of the parties—note, 105 Am. St. 993.

As constituting part of res gesta: Proof of other crimes as constituting part of *res gesta*—note, 105 Am. St. 984, 62 L. R. A. 308, 319; in prosecution for arson, 62 L. R. A. 319; in prosecution of assault, 62 L. R. A. 314; in prosecution for assault with intent to murder, 62 L. R. A. 313; in prosecution for burglary, 62 L. R. A. 317; in prosecution for forgery, 62 L. R. A. 319; in prosecution for larceny, 62 L. R. A. 315; in prosecution for murder, 62 L. R. A. 308; in prosecution for rape, 62 L. R. A. 314; in prosecution for receiving stolen property, 62 L. R. A. 317; in prosecution for robbery, 62 L. R. A. 318.

Miscellaneous instances of excep-

§ 88. Connected or intermingled crimes forming parts of one whole.

—If several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme.²

tion to rule: When evidence as to other crimes not prejudicial—note, 62 L. R. A. 347; evidence of to prove defendant's connection with act charged, 62 L. R. A. 278, 105 Am. St. 978; to show common scheme or system connecting defendant with act charged, 62 L. R. A. 291; to show the criminal character of accused, 105 Am. St. 981, 988, 992; to show identity of accused, 105 Am. St. 984; to show that crime was committed to conceal another, 105 Am. St. 990; evidence of other crimes to characterize act, 105 Am. St. 993; to affect credibility of witnesses, 105 Am. St. 1005; remoteness of time as affecting admissibility, 105 Am. St. 1005; insinuation by prosecution of other crimes—statement, 62 L. R. A. 348; cross-examination of defendant concerning, 62 L. R. A. 345; instructing jury concerning, 62 L. R. A. 350-355.

In prosecution for particular offenses: Notes on evidence of other crimes in prosecution for adultery, 105 Am. St. 1004; in prosecution for arson, 105 Am. St. 996, 1001; in prosecution for counterfeiting, 105 Am. St. 995, 996; in prosecution for embezzlement, 105 Am. St. 996, 1001; in prosecution for false pretenses, 25 Am. St. 387, 105 Am. St. 996, 1001, 1003; in prosecution for fraud, 105 Am. St. 997, 1001; in prosecution for gambling, Elliott Ev., § 3004; in prosecution for

larceny, 62 L. R. A. 231, 281, 315, 322; in prosecution for violation of liquor law, 62 L. R. A. 230, 290, 325; in prosecution for subornation of perjury, 105 Am. St. 983; in prosecution for rape, 62 L. R. A. 314, 322, 105 Am. St. 1004; in prosecution for receiving stolen goods, 105 Am. St. 995; of crimes committed in resisting arrest or in attempting to escape after commission of crime charged, 62 L. R. A. 368, 105 Am. St. 991; in prosecution for robbery, 62 L. R. A. 288, 318, 324; in prosecution for sexual offenses, 62 L. R. A. 329, 338, 105 Am. St. 989, 993, 994, 1003; in prosecution for uttering forged checks, 105 Am. St. 995, 996.

² Rex v. Ellis, 6 B. & Cr. 145; Commonwealth v. Call, 21 Pick. (Mass.) 515, 522; Commonwealth v. Sturdivant, 117 Mass. 122, 132, 19 Am. 401n; State v. Valwell, 66 Vt. 558, 562, 29 Atl. 1018; People v. Bidleman, 104 Cal. 608, 38 Pac. 502; People v. Dailey, 143 N. Y. 638, 37 N. E. 823, aff'g 73 Hun (N. Y.) 16, 25 N. Y. S. 1050; Mixon v. State (Tex., 1895), 31 S. W. 408; Dawson v. State, 32 Tex. Cr. App. 535, 25 S. W. 21, 40 Am. 791; Wilkerson v. State, 31 Tex. Cr. App. 86, 90, 19 S. W. 903; Davis v. State, 32 Tex. Cr. App. 377, 23 S. W. 794; Turner v. State, 102 Ind. 425, 427, 1 N. E. 869; Frazier v. State, 135 Ind. 38, 41, 34 N. E. 817;

Accordingly, where two or more persons are assaulted at or about the same time and place, it will be permitted to prove all the assaults on the trial of one indicted for any one of them for the reason that all the assaults are merely parts of one transaction, and to prove one necessitates proof of all.³ So where the accused was being tried for the forgery of money orders purporting to be issued by an express company, it was held competent to permit the state to prove that, a few days before the forged orders were uttered by the accused, the office from which they appeared to have been issued was robbed.⁴ Under this exception to the rule it is not material that the crimes are dissimilar if they are all parts of one indivisible whole.

But no separate and isolated crime can be given in evidence under this exception to the rule. In order that a collateral crime may be relevant as evidence it must be connected with the crime under investigation as part of a general and composite transaction.⁵

- Bottomley v. United States, 1 Story 757; State v. Perry, 136 Mo. 126, 37 (N. S.) 135, 3 Fed. Cas. 1688; State v. Folwell, 14 Kan. 105; Walters v. People, 6 Park. Cr. (N. Y.) 15, 22; Reese v. State, 7 Ga. 373; Reg. v. Bleasdale, 2 Carr. & K. 765; People v. Haver, 4 N. Y. Cr. 171; Phillips v. People, 57 Barb. (N. Y.) 353, aff'd, 42 N. Y. 200; State v. Desroches, 48 La. Ann. 428, 19 So. 250; State v. Williamson, 106 Mo. 162, 170, 17 S. W. 172; People v. Pallister, 138 N. Y. 601, 605, 33 N. E. 741; Hickam v. People, 137 Ill. 75, 27 N. E. 88, 89; State v. Testerman, 68 Mo. 408, 415; Killins v. State, 28 Fla. 313, 334, 9 So. 711; State v. Gainor, 84 Iowa 209, 50 N. W. 947; Pitner v. State, 37 Tex. Cr. App. 268, 39 S. W. 662; People v. Foley, 64 Mich. 148, 157, 31 N. W. 94; Heath v. Commonwealth, 1 Rob. (Va.) 735, 743; Crews v. State, 34 Tex. Cr. 533, 31 S. W. 373; Brown v. Commonwealth, 76 Pa. St. 319, 337; Commonwealth v. Robinson, 146 Mass. 571, 578, 16 N. E. 452; Morris v. State, 30 Tex. App. 95, 16 S. W. 757; State v. Perry, 136 Mo. 126, 37 S. W. 804; State v. Deliso (N. J. 1908), 69 Atl. 218; People v. Smith (Cal. App.), 99 Pac. 1111; Bennett v. State, 47 Tex. Cr. App. 52, 81 S. W. 30; Taylor v. Commonwealth (Ky.), 92 S. W. 292, 20 Ky. L. 1348; Gray v. State (Tex. Cr. App. 1905), 86 S. W. 764; State v. Shockley, 29 Utah 25, 80 Pac. 865; Ryan v. United States, 26 App. D. C. 74; State v. O'Connell (Iowa, 1909), 123 N. W. 201.
- ³Greenwell v. Commonwealth, 125 Ky. 192, 100 S. W. 852, 30 Ky. L. 1282.
- ⁴State v. Bell, 212 Mo. 111, 111 S. W. 24.
- ⁵The theory upon which this evidence is relevant is that the motive prompting the commission of the several crimes is the same, or that the objects aimed at are identical. Thus, for example, where it was alleged that the accused had poisoned his wife for the purpose of securing her property, the state was permitted to

To illustrate the exception, that the crime must be connected either by identity of motive or by being a constituent part of the *res gestæ* we may cite a case where the body of the deceased, a woman, was found some distance from her residence. When the person who discovered it came to the residence, he found her two children mortally wounded, and discovered foot prints from the house leading to the spot where the body of the woman had been found.⁶ On the other hand, if from remoteness in point of time, or from distance in point of place, or by reason of intervening circumstances of whatever nature, the court can see that there is no necessary connection between the two crimes, evidence of the independent and disconnected crime should be rejected. So, while it may be allowed on a trial for burglary to prove that crimes were committed by the accused on the night of the burglary, it will not be allowed to prove burglaries or attempted burglaries within a year prior thereto.⁷

The movements of the accused within a reasonable period prior to the instant of the crime are always relevant to show that he was making preparations to commit it. Hence, on a trial for homicide, it is when necessary permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial.⁸ And, generally, when several similar crimes occur near each other, either in time or in locality, as, for example, several burglaries or incendiary fires upon the same night, or on different nights but in the same building, it is relevant to show that the accused, being present at one of them, was present at the others if the crimes seem to be connected.⁹

prove that a few days before he had administered poison to her mother with the same end in view. *Goersen v. Commonwealth*, 99 Pa. St. 388. See also, *Commonwealth v. Johnson*, 199 Mass. 55, 85 N. E. 188; *Griggs v. United States*, 85 C. C. A. 596, 158 Fed. 572.

⁶ *State v. Adams*, 138 N. Car. 688, 50 S. E. 765.

⁷ *Commonwealth v. Parsons*, 195 Mass. 560, 81 N. E. 291.

⁸ *Horn v. State*, 98 Ala. 23, 13 So. 329; *Renfro v. State*, 84 Ark. 16, 104 S. W. 542; *Morse v. Commonwealth (Ky.)*, 111 S. W. 714, 33 Ky. L. 831, 894; *Young v. State (Tex. Cr. App.)*, 1908, 113 S. W. 276; *State v. Cavin*, 199 Mo. 154, 97 S. W. 573; *Campos v. State*, 50 Tex. Cr. App. 289, 97 S. W. 100. See cases cited, §§ 321, 376.

⁹ "Where several felonies are connected as parts of one scheme or plot, like the acts of a drama, and all tend

Evidence that a person charged with a crime was seen in the vicinity where the crime was committed shortly after or before the event is admissible, and if when seen he was engaged in the commission of another crime, the evidence, otherwise admissible, is not therefore to be disregarded.¹⁰

Usually some connection between the crimes must be shown to have existed in fact and in the mind of the accused, uniting them for the accomplishment of a purpose common to both, before such evidence can be received.¹¹

Thus on a trial of the accused for a homicide it may be shown that the accused shot and killed the owner of the premises he was breaking into, though such proof shows or tends to show the accused was guilty of the crime of burglary.

The connection must appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt and the evidence should be rejected. The minds of the jurors must not be poisoned and prejudiced against the prisoner by receiving evidence of this description unless the case clearly comes under the exception.¹²

to a common end, then they may be given in evidence to show the process of motive and design in the final crime. The several crimes are parts of a chain of cause and consequence, so linked together as to be necessarily provable as several parts of the same act or crime." The court in *People v. Stout*, 4 Park. Cr. (N. Y.) 71, 127; *Mason v. State*, 42 Ala. 532, 535, 539. See *Thomas v. State*, 103 Ind. 419, 432, 2 N. E. 808; *People v. Cahill* (Cal. App., 1909), 106 Pac. 115.

¹⁰ *State v. Johnson*, 111 La. 935, 36 So. 30.

¹¹ In *Hall v. People*, 6 Park. Cr. (N. Y.) 671, the defendant was charged with stealing certain articles. It was held error to permit proof that other articles stolen from another party were found in his possession. The court said: "This testimony is loose

and dangerous. The people might have shown the condition of things where the property was found, but they could not prove another felony, unless it was so strongly connected with the felony charged as to prove, or strongly tend to prove, that the man who committed the one was guilty of the other." But when two persons in a stage coach were robbed at the same time, it was held that on the trial of the accused for robbing one of them, it might be shown that property belonging to the other was found on him. *Rex v. Rooney*, 7 C. & P. 517.

¹² See remarks of Agnew, J., in *Shaffner v. Commonwealth*, 72 Pa. St. 60, 13 Am. 649, and *Cf. People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. 851; *Burge v. United States*, 26 App. D. C. 524 (homicide).

It is immaterial (at least where the evidence of another crime is offered to show guilty intent or knowledge) that the other crime was committed before or after the crime for which the accused is on trial.¹³

§ 89. Evidence of other offenses to show specific intention or guilty knowledge.—Another exception to the rule occurs when the intention present in an act is material. Thus, suppose the question is, was a given act, either by the accused, or by some other person, intentional or accidental? Here it is relevant to prove that the person whose intention is in question had performed acts of a precisely similar nature either before or after the act the intention of which is in question. And if it be found that he has performed many such acts, we have the best of grounds for drawing the conclusion that the act, in the present instance, is intentional and not accidental.¹⁴ So where the commission of an act

¹³ *People v. Shulman*, 80 N. Y. 373; *State v. Williams*, 76 Me. 480; *Reg. v. Cotton*, 12 Cox Cr. Cas. 400; *Bielschowsky v. People*, 3 Hun (N. Y.) 40; *State v. Bridgman*, 49 Vt. 202, 210, 24 Am. 124; *Williams v. People*, 166 Ill. 132, 46 N. E. 749; *Penrice v. State* (Tex. Cr. App.), 105 S. W. 797; *People v. Putnam*, 90 App. Div. (N. Y.) 125, 85 N. Y. S. 1056; *State v. Johnson*, 111 La. 935, 36 So. 30; *Rex v. Wyatt*, 73 L. J. K. B. 15, 52 Wkly. Rep. 285, 68 J. P. 31, 20 Cox Cr. Cas. 462, 20 Times Law Rep. 68.

¹⁴ *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. 326; *Morse v. Commonwealth* (Ky.), 111 S. W. 714, 33 Ky. L. 831, 894. Where upon the trial of one for a homicide by poisoning, the defendant admits the death by poisoning, but alleges that the poison was accidentally taken or administered, it is relevant to show that other persons, as, for example, relatives and friends with whom the accused came in contact, had died,

previous to the present crime by the same poison. *Reg. v. Cotton*, 12 Cox Cr. Cas. 400, 1 Green's Cr. Law 102, 104; *Goersen v. Commonwealth*, 99 Pa. St. 388; *Zoldoske v. State*, 82 Wis. 580, 597, 52 N. W. 778.

To show intent: Proof of other offenses admissible where it tends to show intent, — notes, 105 Am. St. 978, 981, 991, 992, 994, 1001, 62 L. R. T. 214-274; to show fraudulent intent, 105 Am. St. 983; to show felonious intent, 105 Am. St. 991; to show innocence of intent, 105 Am. St. 995; to show guilty intent, 105 Am. St. 991, 996; to rebut inference of innocent intent, 105 Am. St. 991, 997; where the act is criminal regardless of intent, 105 Am. St. 998; where defendant admits criminal intent, 105 Am. St. 998; to show intent where it may be otherwise shown, 105 Am. St. 999; to show common scheme, plan or system indicating intent, 105 Am. St. 1000, 62 L. R. A. 218; to show intent where there is other evidence or pre-

alleged to be a crime is admitted by the accused but he denies that he intended to commit it or alleges that he did it without guilty knowledge his doing similar acts, wholly independent and unconnected with that under investigation is relevant to show intention.

Evidence of similar and independent crimes (but never of those which are dissimilar) is often relevant to show the presence of some specific intent. Thus, evidence of forgeries by the accused has been received to prove the intent to defraud, which is essential in forgery;¹⁵ and of arson or of attempts at arson to prove that a burning was not the result of accident.

sumption of intent, 62 L. R. A. 215; to show intent where intent is immaterial, 62 L. R. A. 218; in prosecution for fraud or false pretenses, 62 L. R. A. 222; in prosecution for counterfeiting, 62 L. R. A. 229; in prosecution for embezzlement, 62 L. R. A. 226; in prosecution for forgery, 62 L. R. A. 224.

¹⁵ Langford v. State, 33 Fla. 233, 14 So. 815; People v. Sanders, 114 Cal. 216, 46 Pac. 153; Anson v. People, 148 Ill. 494, 506, 135 N. E. 145; People v. Bidleman, 104 Cal. 608, 615, 38 Pac. 502; State v. Valwell, 66 Vt. 558, 562, 29 Atl. 1018; State v. Smalley, 50 Vt. 736, 750; Commonwealth v. McCarthy, 119 Mass. 354, 355; Commonwealth v. Bradford, 126 Mass. 42, 45; Coleman v. People, 55 N. Y. 81, 91; Stafford v. State, 55 Ga. 591, 592; Pearce v. State, 40 Ala. 720; State v. Neagle, 65 Me. 468, 469; State v. Ransell, 41 Conn. 433, 441; State v. Plunkett, 64 Me. 534, 538; People v. Everhardt, 104 N. Y. 591, 11 N. E. 62; Bishop v. State, 55 Md. 138; State v. Saunders, 68 Iowa 370, 27 N. W. 455; Lindsey v. State, 38 Ohio St. 507; Meister v. People, 31 Mich. 99; People v. Hensler, 48 Mich. 49, 11 N. W. 804; State v. Habib, 18 R. I. 558, 30 Atl. 462;

State v. Crawford, 39 S. Car. 343, 17 S. E. 799; Devoto v. Commonwealth, 3 Metc. (Ky.) 417, 419; People v. Rando, 3 Park Cr. (N. Y.) 335, 336; Shriedley v. State, 23 Ohio St. 130, 142; Yarborough v. State, 41 Ala. 405, 2 Russell on Cr. 251; Rex v. Dunn, 1 Moody C. C. 146; McGlasson v. State, 37 Tex. Cr. App. 620, 40 S. W. 503, 66 Am. St. 842. "In all cases where the guilt of the party depends upon the intent, purpose, or design with which the act is done, or upon his guilty knowledge, I understand it to be the general rule that collateral facts may be examined into for the purpose of establishing such guilty intent, design, purpose, or knowledge." Bottomley v. United States, 1 Story (N. S.) 135, 143, 3 Fed. Cas. 1688. See, also, as sustaining text: State v. Register, 133 N. Car. 746, 46 S. E. 21; State v. Talley, 77 S. Car. 99, 57 S. E. 618; 122 Am. St. 559; Wyatt v. State (Tex. Cr. App.), 114 S. W. 812; Anderson v. Commonwealth (Ky.), 117 S. W. 364; Jeffries v. United States, 7 Ind. Ter. 47, 103 S. W. 761; State v. Lowe, 6 Kan. App. 110, 50 Pac. 912; Chamberlin v. State, 80 Neb. 812, 115 N. W. 555; Sweatt v. State, 153

So, when it is material to show that a given act was done with a fraudulent intention, as, for example, in a prosecution for obtaining goods by false pretenses. Other disconnected false pretenses in which the presence of fraud is recognized may be proved solely to show the intent.¹⁶ To illustrate where the accused had used a fraudulent abstract of title to induce one to sell him goods in exchange for real estate it may be shown that the accused had on the same day employed the same means to induce another person to sell him goods.¹⁷

§ 90. Relevant evidence not inadmissible because indirectly proving or tending to prove another crime—Dissimilar crimes united in motives.—All evidence is relevant which throws, or tends to throw, any light upon the guilt or the innocence of the prisoner. And relevant evidence which is introduced to prove any material fact ought not to be rejected merely because it proves, or tends to prove, that at some other time or at the same time the accused has been guilty of some other separate, independent and dissimilar crime. The general rule is well settled that all evidence

Ala. 70, 45 So. 588; *Mitchell v. State*, 140 Ala. 118, 37 So. 76, 103 Am. St. 17n; *Ryan v. United States*, 26 App. D. C. 74; *Warford v. People*, 43 Colo. 107, 96 Pac. 556; *Raymond v. Commonwealth*, 123 Ky. 368, 96 S. W. 515, 29 Ky. L. 785; *Carnes v. State*, 51 Tex. Cr. App. 437, 103 S. W. 403; *Weatherford v. State*, 51 Tex. Cr. App. 430, 103 S. W. 633; *Commonwealth v. McDermott*, 37 Pa. Super. Ct. 1; *People v. Neff*, 191 N. Y. 210, 83 N. E. 970; *Woodward v. State*, 84 Ark. 119, 104 S. W. 1109.

¹⁶ *Commonwealth v. Tuckerman*, 10 Gray (Mass.) 173; *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 217, 48 Am. Dec. 596; *Thomas v. State*, 103 Ind. 419, 432, 2 N. E. 808; *People v. Schooley*, 89 Hun (N. Y.) 391, 35 N. Y. S. 429. See, also, §§ 89, 423, 438. "A man may have one forged or counterfeit note in his possession

and yet, with reason, be assumed to be ignorant of its true character. But if he has been proved to have had many such false instruments in his hands at various times; and particularly, if it appears that he knew that they were suspected of being forged, he can not complain if the inference is drawn that he was aware of their character." It is reversible error for the court to fail to instruct the jury that evidence of other crimes should only be considered upon the question of the intent. *Martin v. State*, 36 Tex. Cr. App. 125, 35 S. W. 976; *Thornley v. State* (Tex. Cr. App.), 35 S. W. 981. See, also, *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370; *Vasser v. State*, 75 Ark. 373, 87 S. W. 635; *Gassenheimer v. United States*, 26 App. D. C. 432.

¹⁷ *State v. Roberts*, 201 Mo. 702, 100 S. W. 484; *Walsh v. United States*, 174 Fed. 615.

must be relevant. If evidence is relevant upon the general issue of guilt, or innocence, no valid reason exists for its rejection merely because it may prove, or may tend to prove, that the accused committed some other crime, or may establish some collateral and unrelated fact.¹⁸

Thus, the fact that the evidence introduced to prove the motive of the crime for which the accused is on trial points him out as

¹⁸ *Moore v. United States*, 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. 26; *Commonwealth v. Call*, 21 Pick. (Mass.) 515, 522; *Commonwealth v. Choate*, 105 Mass. 451, 458; *State v. Fontenot*, 48 La. Ann. 305, 19 So. 111; *Mason v. State*, 42 Ala. 532, 537, 539; *Reg. v. Lewis*, 6 C. & P. 161, 163; *Reg. v. Crickmer*, 16 Cox Cr. Cas. 701; *People v. Stout*, 4 Park. Cr. (N. Y.) 71, 114; *Painter v. People*, 147 Ill. 444, 447, 463, 35 N. E. 64; *State v. Walton*, 114 N. Car. 783, 18 S. E. 945; *Ray v. State*, 4 Ga. App. 67, 60 S. E. 816; *Stone v. State*, 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145n; *State v. Dulaney* (Ark., 1908), 112 S. W. 158; *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370; *Commonwealth v. Levinson*, 34 Pa. Super. Ct. 286; *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55; *People v. Dudenhausen*, App. Div. (N. Y.), 115 N. Y. S. 374; *Thompson v. United States*, 75 C. C. A. 172, 144 Fed. 14; *State v. Franklin*, 69 Kan. 798, 77 Pac. 588; *State v. Bailey*, 190 Mo. 257, 88 S. W. 733; *People v. Zimmerman*, 3 Cal. App. 84, 84 Pac. 446. In the case of *Walker v. Commonwealth*, 1 Leigh (Va.), on p. 574, the court says: It frequently happens that as the evidence of circumstances must be resorted to, for the purpose of proving the commission of the particular offense charged, the proof of these circumstances involves the proof of other acts, which may be criminal, or may be apparently

innocent. In such cases it is proper that the chain of events should be unbroken. If one or more links of this chain consist of circumstances, which tend to prove the prisoner has been guilty of other crimes than that charged, this is no reason why the court should exclude these circumstances. They are so entirely connected and blended with the main fact that they can not be departed from with propriety, and there is no reason why the criminality of such intimate and connected circumstances should exclude them more than other facts apparently innocent."

Relevancy and *materiality* of evidence of other crimes—notes, 62 L. R. A. 320, 325, 326, 105 Am. St. 980, 981; admissibility merely to prove defendant's propensity to commit crime, 105 Am. St. 981, 988, 992; reasons for admitting evidence of other crimes, 105 Am. St. 979, 980; test of admissibility, 105 Am. St. 980; purpose for which admissible, 105 Am. St. 579; exceptions to rule excluding, 105 Am. St. 973; admissibility of evidence of similar offenses, 105 Am. St. 979; evidence of other offenses where they constitute a series of crimes, 105 Am. St. 983; evidence where the other offenses are an essential ingredient of the crime charged, 105 Am. St. 982; *State v. Hansford*, 81 Kan. 300, 106 Pac. 738; *Hall v. State* (Ga. App., 1909), 66 S. E. 390; *Parrish v. Commonwealth* (Ky., 1909), 123 S. W. 339.

guilty of an independent and totally dissimilar offense is not enough to bring about its rejection, if it is otherwise competent.¹⁹

Thus, to illustrate where it was necessary for the prosecution to show the absence of the accused from the state to avoid the statute of limitation it was admissible to prove that the accused has spent several years in a penitentiary in another state, though this evidence tends to show accused had committed a felony.²⁰

Under this exception to the general rule, where facts and circumstances amount to proof of another crime than that which is charged, and it appears probable that the crime charged grew out of the other crime, or was in some way caused by it, the facts and circumstances of the other crime may be proved to show the motive of the accused.²¹

This exception is of value in a homicide where the accused has taken the life of two or more persons at or about the same time and place and he is indicted and on trial for the killing of only one of them. So that accused had killed three persons at one time and place in an attempt to commit a burglary may, of necessity, be proved on his trial for the murder of any one of them.²² So evidence of facts leading up to the homicide participated in by the accused is always relevant to show his intent, though the evidence may reveal another crime committed by him.²³ It may be shown that in the affray in which the deceased was killed the accused shot him once before he inflicted the death wound.^{23a} So, in most cases where the intent is in question, prior crimes of the same nature, if not too remote in time, are receivable in evidence, though the court can see that there is no connection between them.²⁴

¹⁹ *Brown v. State*, 26 Ohio St. 176, 181; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Farris v. People*, 129 Ill. 521, 21 N. E. 821, 16 Am. St. 283, 4 L. R. A. 582; *State v. Madigan*, 57 Minn. 425, 59 N. W. 490, 492; *State v. Sargood*, 80 Vt. 412, 68 Atl. 51; *State v. Gillispie*, 63 W. Va. 152, 59 S. E. 957; *Sanderson v. State*, 169 Ind. 301, 82 N. E. 525; *State v. Dickerson*, 77 Ohio St. 34, 82 N. E. 869, 122 Am. St. 479; *Cortez v. State*, 47 Tex. Cr. App. 10, 83 S. W. 812.

²⁰ *State v. Moran*, 131 Iowa 645, 109 N. W. 187.

²¹ *Commonwealth v. Ferrigan*, 44 Pa. St. 386, 387.

²² *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135; holding also that this evidence might be received to corroborate a confession by the accused.

²³ *Clark v. State*, 79 Neb. 473, 113 N. W. 221.

^{23a} *People v. Jeina*, 125 App. Div. (N. Y.) 697, 110 N. Y. S. 83.

²⁴ *Withaup v. United States*, 127

Thus, it may be shown that the victim of a homicide, for which the defendant is on trial, was a police officer, or other person who, when he was killed, was engaged in investigating the circumstances of another prior and independent crime of which the accused was suspected.²⁵

Thus, where the accused kills an officer who attempts to arrest him without a warrant, proof that the accused had committed a felony is competent, as that is necessary to justify an arrest without a warrant.²⁶

And, generally, if one crime may have been perpetrated for the purpose of aiding in the commission or concealment of an-

Fed. 530, 62 C. C. A. 328; Toll v. State, 40 Fla. 169, 23 So. 942.

To show motive: Proof of other crimes to show motive—notes, 62 L. R. A. 199, 208, 105 Am. St. 984, 986, 987; to show single motive for several crimes, 105 Am. St. 990; to show motive—common plan or system, 62 L. R. A. 199; in prosecution for murder, 62 L. R. A. 200; in prosecution for assault with intent to murder, 62 L. R. A. 207; in prosecution for arson, 62 L. R. A. 208; in concealment, resisting arrest or escape, 62 L. R. A. 211.

To show malice: Evidence of other crimes to show malice, 62 L. R. A. 277, 105 Am. St. 989.

²⁵ Moore v. United States, 150 U. S. 57, 61, 37 L. ed. 996, 14 Sup. Ct. 26; Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54; State v. Honore, 121 La. 573, 46 So. 655 (killing of police officer); Cortez v. State, 47 Tex. Cr. App. 10, 83 S. W. 812; People v. Morse, 196 N. Y. 306, 89 N. E. 816.

²⁶ In such a condition of affairs, the court properly charged that the proof of the commission of a felony was necessary to justify such arrest, that the testimony was inadmissible, of itself, and its only purpose was to show

the cause of the attempted arrest. State v. Honore, 121 La. 573, 46 So. 655. In a recent case in the state of New York, where the accused, having shot a man during a quarrel and fled, was subsequently found by two officers in a building about five hundred feet away, where he shot the two officers who were not in uniform and killed one of them, the court made a distinction between receiving evidence of the prior shooting for the purpose of showing the occasion for the flight of the accused and the purpose of the officers pursuing him; and receiving the same evidence as direct proof that the accused shot the officers or that the killing of the officer was a part of the commission of a felony. The evidence of the prior crime was received because it might show the lawful character and purpose of the pursuit by the officers as the right of the accused, whose plea was self-defense, to defend himself would not apply if he were being lawfully pursued by policemen after committing a felony. The court ruled out this evidence for every other purpose, holding that the first shooting was an independent crime. People v. Governale, 193 N. Y. 581, 86 N. E. 554.

other, or to aid the escape of the accused,²⁷ the incidental crime may be shown as furnishing a motive for the commission of the crime for which the accused has been indicted.²⁸ Hence, adultery committed by the accused with a woman may be proved upon his trial for the killing of the woman's husband. For it is obvious that an illicit intercourse, of which the adultery was a part, proved to exist between the prisoner and the wife of his victim, would be a strong circumstance for the jury to consider in determining the existence of a motive prompting the accused to desire the removal of the husband in order that he might obtain possession of the woman.²⁹

The two crimes, though dissimilar, are so far unified in motive that they are really parts of a single transaction. They were both designed to bring about a single result. The adultery which may be called the subsidiary crime is not relevant, because any inference that the defendant killed the husband can be drawn justly or universally from the fact that he debauched the wife. It is received solely to show that the defendant, having committed adultery with the wife, was thereafter possessed of a motive, which *might*, under the circumstances, prompt him to the greater crime, that he might remove the person who stood in the way of the complete enjoyment of his illicit passion.³⁰

²⁷ If the circumstances tend to show that accused has committed an independent, dissimilar crime to enable him to commit or conceal the offense charged, evidence of the independent crime is admissible, when the intent to commit or conceal the independent offense was the motive of the offense charged. *Morse v. Commonwealth* (Ky.), 111 S. W. 714, 33 Ky. L. 831, 894.

²⁸ *Willingham v. State*, 33 Tex. Cr. App. 98, 25 S. W. 424; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *State v. Pancoast* (N. Dak., 1896), 67 N. W. 1052; *State v. Seymour*, 94 Iowa 699, 63 N. W. 661; *Painter v. People*, 147 Ill. 444, 447, 463, 35 N. E. 64; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Crass v. State*, 31 Tex.

Cr. App. 312, 315, 20 S. W. 579; *People v. Stout*, 4 Park. Cr. 71, 115; *Rex v. Clewes*, 4 C. & P. 221; *Alsobrook v. State*, 126 Ga. 100, 54 S. E. 805; *State v. Lewis*, 181 Mo. 235, 79 S. W. 671; *Cawthon v. State*, 119 Ga. 395, 46 S. E. 897; *Welch v. Commonwealth* (Ky.), 108 S. W. 863, 33 Ky. L. 51.

²⁹ *People v. Stout*, 4 Park. Cr. (N. Y.) 71, 115, 132; *State v. Rash*, 12 Ired. (N. Car.) 382, 384; *Pierson v. People*, 79 N. Y. 424, 435, 436, 35 Am. 524; *Templeton v. People*, 27 Mich. 501; *Commonwealth v. Ferrigan*, 44 Pa. St. 386, 387; *State v. Watkins*, 9 Conn. 47, 53; *Van Gesner v. United States*, 153 Fed. 46, 82 C. C. A. 180.

³⁰ In *Goersen v. Commonwealth*, 99 Pa. St. 388, the court said: "Under

§ 91. **Identity of means employed in several crimes—Identity of accused.**—Where a crime has been committed by some peculiar, extraordinary and novel means or implement or apparatus or in a peculiar or extraordinary manner, evidence of a similar crime committed by the accused, by the same means, or in the same manner, has been received to prove the identity of the accused as an inference from the similarity of method.⁸¹ Thus, where the accused is charged with arson in setting fire to a building by means of a box or other apparatus contrived solely for incendiary purposes, it may be shown that he had employed a similar device elsewhere, with the same object in view.⁸²

Often it may be permitted to prove a collateral offense or crime as part of the evidence which is introduced to identify the accused.⁸³ Take, for example, the case of one who is on trial for a crime which is alleged to have been committed by him under an assumed name; and he claims that the crime was committed by another person. Under such circumstances, it is proper to permit the state to prove any fact which will tend to identify the accused, one of which would be, that he has committed similar offenses under the same assumed name. So on an indictment under an assumed name for embezzlement it may properly be shown that the accused embezzled other sums of money under the same name. The jury should be instructed, however, that evidence of other crimes offered to identify the accused should be considered by the jury only for the purpose of establishing the identity of the accused.⁸⁴

some circumstances evidence of another offense may be given. It may be done to establish identity, to show the act charged was intentional and willful, not accidental; to show guilty knowledge and purpose and to rebut any inference of mistake; in death by poison to show defendant knew the substance administered to be poison; to show him to be one of an organization banded together to commit similar crimes and to connect the other offense with the one charged as part of the same transaction."

⁸¹ *Morse v. Commonwealth* (Ky.), 111 S. W. 714, 33 Ky. L. 831, 894.

⁸² *Commonwealth v. Choate*, 105 Mass. 451, 457; *Rex v. Fursey*, 6 Car. & Payne 81.

⁸³ *Rosc. Cr. Ev.* 90; *Rex v. Rooney*, 7 C. & P. 517, 518; *United States v. Boyd*, 45 Fed. 851; *Osborne v. People*, 2 Park. Cr. (N. Y.) 583; *Untreinor v. State*, 146 Ala. 133, 41 So. 170; *State v. Bates*, 182 Mo. 70, 81 S. W. 408.

⁸⁴ *Morse v. Commonwealth* (Ky.), 111 S. W. 714, 33 Ky. L. 831, 894.

So where the accused is on trial for arson, it may be shown that goods, which were stored in the burned building, were found in his possession, though this evidence tends to prove him guilty of the larceny of the goods. And evidence that tracks found in the vicinity of each of two houses, which had been broken into, corresponded with the foot-wear of the accused is admissible as tending to prove his whereabouts on the night in question.³⁵

§ 92. Sexual crimes.—Crimes involving illicit sexual intercourse either in incest, adultery or rape constitute another exception to the general rule. Thus, under an indictment for adultery or incest evidence of the commission of similar crimes by the same parties prior, but not subsequent, to the offense alleged is received for the purpose of showing inclination.³⁶

In all such cases the mutual relations and the disposition of the parties towards one another are relevant upon the question, did they have illicit intercourse? And, it is a very fair inference that the accused was guilty of the crime alleged, if it affirmatively appears that he had committed acts of adultery or incest with the same person on prior occasions.³⁷

³⁵ *Frazier v. State*, 135 Ind. 38, 41, 34 N. E. 817.

Proof of other crimes to show identity of accused, 105 Am. St. 984.

³⁶ *Callison v. State*, 37 Tex. Cr. App. 211, 39 S. W. 300; *Commonwealth v. Bell*, 166 Pa. St. 405, 411, 31 Atl. 123; *People v. Patterson*, 102 Cal. 239, 244, 36 Pac. 436; *State v. Bridgman*, 49 Vt. 202, 24 Am. 124; *State v. Marvin*, 35 N. H. 22, 28, 29; *State v. Wallace*, 9 N. H. 515, 517, 518; *Commonwealth v. Nichols*, 114 Mass. 285, 288, 19 Am. 346n; *Commonwealth v. Bowers*, 121 Mass. 45, 46; *State v. Williams*, 76 Me. 480; *State v. Pippin*, 88 N. Car. 646, 647; *State v. Kemp*, 87 N. Car. 538, 540; *People v. Skutt*, 96 Mich. 449, 450, 56 N. W. 11; *Peo-*

ple v. Jenness, 5 Mich. 305, 319; *McLeod v. State*, 35 Ala. 395, 398; *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *Proper v. State*, 85 Wis. 615, 55 N. W. 1035; *State v. Markins*, 95 Ind. 464, 48 Am. 733; *Lefforge v. State*, 129 Ind. 551, 29 N. E. 34; *Lovell v. State*, 12 Ind. 18. Evidence of illicit intercourse indulged in by the same parties *subsequently* to the date upon which the adultery is laid was admitted in *State v. Williams*, 76 Me. 480. But the weight of the cases would seem to exclude subsequent adulterous acts. *State v. Neubauer* (Iowa, 1909), 124 N. W. 312.

³⁷ See § 381.

Proof of other offenses in prosecutions for sexual crimes, 62 L. R. A. 329, 338.

CHAPTER IX.

DECLARATIONS WHICH ARE A PART OF THE RES GESTAE.

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| <p>§ 93. Scope and limit of facts and declarations forming a part of the <i>res gestæ</i>.</p> <p>94. Necessity for approximation of unity in time, place and motive prompting the declarations.</p> <p>95. Declarations must explain and illustrate the main transaction.</p> <p>96. Contemporaneous character of the declarations.</p> | <p>§ 97. Interval for consideration or taking advice.</p> <p>98. Mental and physical conditions as influencing the declarations.</p> <p>99. Admissibility for the accused.</p> <p>100. Declarations uttered prior to the crime.</p> <p>101. Declarations by bystanders and other third persons.</p> |
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§ 93. **The scope and limit of facts and declarations forming the *res gestæ*.**—The expression, *res gestæ*, as applied to a crime, means the complete criminal transaction from its beginning or starting point in the act of the accused until the end is reached. What in any case constitutes the *res gestæ* of a crime depends wholly on the character of the crime and the circumstances of the case.¹ The rule of the *res gestæ* under which it is said that all facts which are a part of the *res gestæ* are admissible, is a rule determining the relevancy and not the character or probative force of the evidence. If the court determines that the fact offered is a part of the *res gestæ*, it will be accepted because as it is said that fact is then relevant. Relevancy is always a judicial question to be determined according to the issue which is to be tried. Taking the main facts which are embraced in the commission of any crime and which are essential to be proved, it will be found, in most instances, that they are connected with others which are not essential to be proved, but which tend more or less to prove those facts which are to be proved. Every occurrence which is the result of human agency is more or less implicated and involved

¹ State v. Foley, 113 La. 52, 36 So. 885, 104 Am. St. 493.

with other occurrences. One event is the cause or the result of another or two or more events or incidents may be collaterally connected or related. Circumstances constituting a criminal transaction which is being investigated by the jury, and which are so interwoven with others, and with the principal facts which are at issue that they cannot be very well separated from the principal facts at issue without depriving the jury of proof which is necessary for them to have in order to reach a direct conclusion on the evidence, may be regarded as *res gestæ*.²

And it is a rule that evidence of connected, precedent, or surrounding circumstances is proper to show the probability that the principal fact has happened in all cases where it may naturally be assumed that a connection exists between the main fact and the subordinate fact.³

Some crimes like homicide and rape consist of a single and complete and continuous transaction circumscribed in its incidents both as to time and place. For example, in homicide, the circumstances and details of what occurred at the very instant of the homicide are usually the *res gestæ* of the homicide.⁴ Thus as a

² Sprinkle v. United States, 141 Fed. 811, 73 C. C. A. 285.

³ Powers v. People, 42 Ill. App. 427, 431; State v. Ryder, 80 Vt. 422, 68 Atl. 652. *Res gestæ* includes those circumstances which are the undersigned incidents of a particular litigated act. They may be separated by the act from a lapse of time more or less appreciable, and may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone as well as things done; their sole distinguishing feature being that they should be necessary incidents of the litigated act in the sense that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. State v. Kane (N. J.), 72 Atl. 39.

⁴ Williams v. State, 147 Ala. 10, 41

So. 992; State v. Cavin, 199 Mo. 154, 97 S. W. 573; Menefee v. State, 50 Tex. Cr. App. 249, 97 S. W. 486; Lyles v. State, 48 Tex. Cr. App. 119, 86 S. W. 763.

In particular offenses: Proof of *res gestæ* in particular offenses: In prosecution for homicide, Elliott Ev., § 3029; in prosecution for rape—note, 19 L. R. A. 744; Elliott Ev., § 3098; in prosecution for robbery, Elliott Ev., § 3134; in prosecution for seduction, Elliott Ev., § 3149; in prosecution for treason, Elliott Ev., § 3160.

Other offenses part of res gestæ: When other crime is part of *res gestæ*—note, 62 L. R. A. 308, 319, 105 Am. St. 984; in prosecution for arson, 62 L. R. A. 319; in prosecution for assault, 62 L. R. A. 314; in prosecution for assault with intent to murder, 62 L. R. A. 313; in prosecution

part of the *res gestæ* of the homicide, it is usually competent to show that the accused, in killing the person for whose death he is on trial, in the same transaction killed another person. But the tendency is to extend the scope of the criminal transaction to incidents occurring immediately before and after it. Accordingly, it is permitted to show what the accused did immediately after committing the crime.⁵ And also in homicide what took place immediately before the shooting to show the intent.⁶ So, for example, it may be shown that the accused had prepared to commit the homicide or that he had threatened to kill the deceased, or that he was seen in the company of the deceased before the homicide. It has been held proper to admit, as part of the *res gestæ* of the homicide, proof that prior to the homicide, the defendant had quarreled with another person than the accused and had attempted to kill him.⁷

An event which is the cause of or furnishes a motive for the homicide is always admissible as of the *res gestæ*, though preceding it considerably in point of time.⁸ So, where two men are jointly indicted for a homicide committed by both in concert and at the same time, the acts of either of them are admissible as part of the *res gestæ* on the trial of the other.⁹ So where the accused assaulted two persons at the same time and place, evidence showing the assault on either person or the effects of the assault on either, is admissible against the accused on his trial for either of the two assaults. The crimes are separate in their character and punishment, but connected into one indivisible transaction.

The principles at the foundation of the rule permitting the proof of all incidents constituting a part of the *res gestæ* are also

for burglary, 62 L. R. A. 317; in prosecution for forgery, 62 L. R. A. 319; in prosecution for assault with intent to murder, 62 L. R. A. 313; in prosecution for larceny, 62 L. R. A. 315; in prosecution for murder, 62 L. R. A. 308; in prosecution for receiving stolen property, 62 L. R. A. 317; in prosecution for rape, 62 L. R. A. 314; in prosecution for robbery, 62 L. R. A. 318.

⁵ Pate v. State, 150 Ala. 10, 43 So.

343; Arnold v. State, 131 Ga. 494, 62 S. E. 806.

⁶ Morris v. State, 146 Ala. 66, 41 So. 274; Herd v. State, 50 Tex. Cr. App. 600, 99 S. W. 1119.

⁷ McKinney v. State, 49 Tex. Cr. App. 591, 96 S. W. 48.

⁸ Thompson v. State (Tex. Cr. App., 1908), 113 S. W. 536.

⁹ McCoy v. State, 91 Miss. 257, 44 So. 814.

the basis for the admission of circumstantial evidence. The facts which are a part of the *res gestæ* must tend to prove the principal facts. So, circumstantial evidence is only relevant where it clearly has a tendency to prove the necessary facts.

This is well illustrated by the use and application of circumstantial evidence. Thus, suppose the question is, did A. kill B. by shooting him? Evidence would be admissible to prove as part of the *res gestæ* or main transaction, and as a natural result of it, that A. was seen a few minutes after the killing in the neighborhood of the crime with a recently discharged and smoking pistol in his hand. But obviously such a fact witnessed a week after the crime would be wholly irrelevant, as it could not be a natural result of the transaction for which A. is on trial, or in any way connected with it.

The principles just enumerated regulate the admission of relevant facts. Upon similar principles the declarations of participants referring to relevant facts and illustrating them are also received without producing the declarant as an exception to the rule rejecting hearsay evidence.

For example, let us suppose that A., when discovered with the smoking pistol, impulsively declared that the deceased had attacked him; and that he had shot to defend himself, or a party who has been assaulted immediately thereafter states some fact relevant to the assault or to the purpose or intention of the assailant. Usually statements made by third persons not produced as witnesses are objectionable as hearsay. But, it has been remarked, here the events speak for themselves, giving out their fullest meaning through the unprompted language of the participants. The spontaneous character of the language is assumed to preclude the probability of its premeditation or fabrication. Its utterance on the spur of the moment is regarded, with a good deal of reason, as a guarantee of its truth. These instinctive utterances are as much original evidence as are the events whence they emanate or of which they form an inseparable part. Their value as evidence does not depend in the slightest degree upon our confidence in the credibility of the declarant, or upon our knowledge of him as a man who habitually tells the truth. He is regarded merely as the channel through which the events describe themselves contemporaneously, or nearly so, with their occurrence.

These declarations must possess three characteristics: *First*, they must have been uttered contemporaneously with and grow out of the act upon which they have a bearing so as to be spontaneous and not narrative; *second*, they must qualify, illustrate, explain or unfold its character or significance, so as, *third*, to be connected with it in such a manner that the declaration and the act form a single and indivisible transaction.

§ 94. **Necessity for approximation of unity in time, place and motive prompting the declarations.**—If the declaration springs out of or accompanies the event, it is reasonable to suppose that the motive prompting each is identical. This identity or unity of motive may have reference to the motive of the crime itself, or to the motive of persons who are charged with it, or of the person or persons who were the passive participants in it and whose declarations are offered. So the elements of time and place are very important, for the subsequent presence of persons at the *locus in quo* who were not there when the event occurred may suggest the intervention of new motives prompting the declaration. If a new motive has prompted the declarations, it is no longer admissible as a part of the original transaction. Hence an immediate and sudden accusation of crime, a confronting with the *corpus delicti*, the flight, pursuit or arrest of an accused person, the placing of the accused in jail, or the doing of something by accused or by the person whose declaration is offered which has no necessary connection with the crime, entailing a change of scene and the intervention of new persons, both unexpected and sudden, may rob any explanatory declaration of its character as a part of a relevant transaction.¹⁰

Thus, declarations passing between parties are admissible when the nature of the relations between them is in question, as, for

¹⁰ State v. Walker, 78 Mo. 380, 386, 652; Simmons v. State, 145 Ala. 61, 387; State v. Johnson, 35 La. Ann. 40 So. 660; Morello v. People, 226 Ill. 968; Little v. Commonwealth, 25 388, 80 N. E. 903; Mitchell v. State, Gratt. (Va.) 921, 924, 926; Stephenson v. State, 110 Ind. 358, 372, 11 N. 82 Ark. 324, 101 S. W. 763.
How near main transaction must be to declaration made in order to constitute part of *res gesta*—note, 19 L. E. 360, 59 Am. 216; Hall v. State; 132 Ind. 317, 321, 31 N. E. 536; Brown v. State, 127 Wis. 193, 106 N. W. 536; State v. Ryder, 80 Vt. 422, 68 Atl. R. A. 737.

example, when it cannot otherwise be ascertained what feelings they entertained towards each other at a particular time.¹¹

This rule applies when the question of malice or premeditation is raised on the trial of a homicide. The statements of the accused, uttered at the commission of the crime, being often the only evidence procurable to show his mental state, are then received for or against him to show that the killing was deliberate or under the sudden impulse of anger or fear.¹²

§ 95. Declarations must illustrate and explain main transaction.—

The range of events included by the term *res gestæ* varies according to the crime which is charged and the particular facts constituting the criminal transaction. This fact must be kept in view, for it is largely the explanatory and illustrative character of the declarations as applied to the principal transaction that admits them as evidence.¹³

¹¹ Garber v. State, 4 Coldw. (Tenn.) 161, 170; Brumley v. State, 21 Tex. App. 222, 239, 17 S. W. 140, 57 Am. 612; State v. Gabriel, 88 Mo. 631; Sprinkle v. United States, 141 Fed. 811, 73 C. C. A. 285. Under the statute of Georgia the declarations to be received as *res gestæ* must be connected in point of time, so as to be free from all suspicion of deliberation. Taylor v. State, 120 Ga. 857, 48 S. E. 361.

¹² State v. Walker, 77 Me. 488, 491, 1 Atl. 357; Gantier v. State (Tex. 1893), 21 S. W. 255; Miller v. State, 31 Tex. Cr. App. 609, 21 S. W. 925, 37 Am. St. 836; Schlemmer v. State, 51 N. J. L. 23, 27, 29, 15 Atl. 836; Plant v. State, 140 Ala. 52, 37 So. 159.

¹³ State v. Brown, 28 Ore. 147, 41 Pac. 1042; Bow v. People, 160 Ill. 438, 43 N. E. 593; Norfleet v. Commonwealth (Ky. 1896), 33 S. W. 938, 17 Ky. L. 1137; State v. Bigelow, 101 Iowa 430, 70 N. W. 600; Jones v.

State, 71 Ind. 66, 81, 82; Crookham v. State, 5 W. Va. 510, 513; State v. Walker, 77 Me. 488, 491, 1 Atl. 357; United States v. Noelke, 17 Blatchf. (U. S.) 554, 570; Garber v. State, 4 Coldw. (Tenn.), 161, 169; Schlemmer v. State, 51 N. J. L. 23, 29, 15 Atl. 836; United States v. Angell, 11 Fed. 34, 41; Lewis v. State, 29 Tex. App. 201, 15 S. W. 642; Commonwealth v. M'Pike, 3 Cush. (Mass.) 181, 184; State v. Horan, 32 Minn. 394, 396, 20 N. W. 905; Driscoll v. People, 47 Mich. 413, 415, 416, 11 N. W. 221; State v. Ryder, 80 Vt. 422, 68 Atl. 652; Vann v. State, 45 Tex. Cr. App. 434, 77 S. W. 813, 107 Am. St. 997; State v. Jarrell, 141 N. Car. 722, 53 S. E. 127; State v. Laster, 71 N. J. L. 586, 60 Atl. 361; Moody v. State, 120 Ga. 868, 48 S. E. 340; Humphrey v. State (Tex. Cr. App. 1909), 116 S. W. 570; People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690; Lawrence v. State, 103 Md. 17, 63 Atl. 96; Stevens v. State,

No general rule can be enunciated as to what declarations do or do not constitute a part of the *res gestæ*. The main question is: are they relevant to, and do they explain and illustrate the facts of the transaction in issue? In other words, can we learn from them something of the motives or intention present in a relevant act? For declarations forming a part of the *res gestæ* are only admissible when the act with which they are connected is equivocal, or its nature or purpose, its motive and meaning are doubtful, and the words of the person are invoked to render his actions clear and intelligible.

§ 96. **Contemporaneous character of the declarations.**—Whether the declaration must be precisely contemporaneous with the transaction which it is presumed to illustrate and unfold, has been much discussed. It is useless to look for harmony in the cases.¹⁴ The early rule was very strict that the declaration must be strictly contemporaneous with the main transaction charged as an offense. So, for example, the exclamation, "I am stabbed!" uttered by the deceased at the instant of the fatal blow, would be received, while his exclamation, "A. stabbed me," made a few seconds afterwards, while pursuing his assailant, would be rejected.¹⁵

It is absolutely impossible to lay down any rule which will be applicable in criminal cases generally to determine whether a declaration is or is not a part of the *res gestæ*. Some crimes, such as murder and rape, often consist of a single isolated act on the part of the active participant, occupying but a very small portion of time from its inception to its consummation; while other crimes, as a conspiracy to defraud or to obtain money by false

138 Ala. 71, 35 So. 122; State v. Ripley, 32 Wash. 182, 72 Pac. 1036, and Underhill on Ev., p. 75.

¹⁴ "Declarations, to be admissible, must be contemporaneous with the main fact or transaction, but it is impracticable to fix, by any general rule, any exact instant of time, so as to preclude debate or conflict of opinion in regard to this particular point." Lund v. Inhabitants, 9 Cush. (Mass.) 36, 43. In order to render declara-

tions admissible as part of the *res gestæ*, they must be substantially contemporaneous with the crime, and be the instinctive utterances of the mind under the active influence of the transaction. State v. Way, 76 S. Car. 91, 56 S. E. 653; Stovall v. State, 53 Tex. Cr. App. 30, 108 S. W. 699.

¹⁵ Reg. v. Bedingfield, 14 Cox Cr. Cas. 341, 342; People v. O'Brien, 92 Mich. 17, 19, 52 N. W. 84; Sheehy v. Territory, 9 Ariz. 269, 80 Pac. 356.

pretenses, consist of a series of connected facts and incidents spread over a considerable portion of time, some of which may be innocent in themselves, but all of which lead up to, and terminate in, the criminal transaction which is the principal fact.

Again, it is now the universal practice to permit certain actions of the accused after the commission of the crime to be proved as relevant to show that he committed it. Thus it may be shown that he attempted to escape, or fled from justice or that he destroyed evidence or endeavored to fabricate evidence. Such facts may, with correctness, be assumed to form a part of the *res gestæ*, though not contemporaneous with the principal transaction. If this is so, there can be no impropriety in receiving the declarations accompanying them.¹⁶

Nor is the period intervening between the criminal transaction and the subsidiary act material if they are connected. An interval of a day will not exclude the subsidiary act with its accompanying declaration.¹⁷

But it has been also determined that statements of the deceased uttered four or five minutes after the mortal wound has been inflicted are not receivable as a part of the *res gestæ* where it is not proved what, if anything, happened between the wounding and the statement from which it might be reasonably inferred that the intervening circumstances were a part of the crime.¹⁸

On the whole, the *res gestæ* cannot be arbitrarily confined within any limits of time. The element of time is not always material. If the declarations are narrative and descriptive in their form and character, if they are not the impromptu outpourings of the mind, they should be rejected, though uttered only a few minutes after the main transaction.¹⁹

¹⁶ The *res gestæ* of larceny is not restricted to the limited time when the hand reaches out and grasps the stolen property. The intention, and all conduct by which it may be shown, form, also, a part thereof, and declarations accompanying acts preceding the taking may be proven. *State v. Gabriel*, 88 Mo. 631, 639.

¹⁷ *Carroll v. State*, 3 Humph. (Tenn.) 315; *Cornwell v. State*,

Mart. & Yerg. (Tenn.) 147; *McGowan v. Commonwealth (Ky.)*, 117 S. W. 387.

¹⁸ *Vickery v. State*, 50 Fla. 144, 38 So. 907.

¹⁹ *People v. Ah Lee*, 60 Cal. 85, 91; *State v. Raven*, 115 Mo. 419, 422, 22 S. W. 376; *State v. Daugherty*, 17 Nev. 376, 379, 30 Pac. 1074; *Jones v. State*, 71 Ind. 66, 81; *Hall v. State*, 132 Ind. 317, 321, 322, 31 N. E. 536;

§ 97. **Interval for consideration or taking advice.**—The spontaneous, unpremeditated character of the declarations and the fact that they seem to be the natural and necessary concomitants of some relevant transaction in which their author was a participant, constitute the basis for their admission as evidence.²⁰ So it has been held that spontaneous exclamations of persons who were not actually present at a homicide, are properly admitted as a part of the *res gestæ* where they were uttered on hearing the report of a revolver which was employed in committing the homicide.²¹

If a sufficient period has intervened between the act and the statement for consideration, preparation or taking advice, the statement may be rejected. The mere likelihood or probability that the statement was the result of advice, preparation or consideration may exclude it. Actual preparation need not be shown.

Stephenson v. State, 110 Ind. 358, 11 N. E. 360, 59 Am. 216; Parker v. State, 136 Ind. 284, 290, 35 N. E. 1105; State v. Carey, 56 Kan. 84, 42 Pac. 371; Turner v. State, 89 Tenn. 547, 559, 15 S. W. 838; Hall v. State, 48 Ga. 607, 608; State v. Howard, 120 La. 311, 45 So. 260; Tinsley v. State, 52 Tex. Cr. App. 91, 106 S. W. 347; Bradley v. State (Tex. Cr. App. 1908), 111 S. W. 733; Lockhart v. State, 53 Tex. Cr. App. 589, 111 S. W. 1024; Herrington v. State, 130 Ga. 307, 60 S. E. 572; State v. Carlton, 48 Vt. 636, 643 (two minutes after main act); State v. Pomeroy, 25 Kan. 349 (three to five minutes afterwards); Mayfield v. State, 101 Tenn. 673, 49 S. W. 742 (thirty minutes); Pryse v. State (Tex. Cr. App. 1908), 113 S. W. 938 (thirty minutes after the shooting); State v. Trusty, 1 Penn. (Del.) 319, 40 Atl. 766 (by deceased five minutes after receiving the mortal wound); State v. Kelleher, 201 Mo. 614, 100 S. W. 470 (two or three minutes); Stanley v.

State, 39 Tex. Cr. App. 482, 46 S. W. 645; People v. McBride, 120 Mich. 166, 78 N. W. 1076; State v. Birks, 199 Mo. 263, 97 S. W. 578 (fifteen minutes later); Williams v. State, 66 Ark. 264, 50 S. W. 517; Williams v. State, 147 Ala. 10, 41 So. 992.

²⁰ Mayes v. State, 64 Miss. 329, 333, 1 So. 733, 60 Am. 58. "The principle of admission is, that the declarations are *pars rei gestæ*, and therefore it has been contended that they must be contemporaneous with it; but this has been decided not to be necessary, on good grounds; for the nature and strength of the connection are the material things to be looked to, and, although concurrence of time can not but be always material evidence to show the connection, yet it is by no means essential." Rouch v. Great West. R. R. Co., 1 Q. B. 51, 60, cited and approved in Hunter v. State, 40 N. J. L. 495, 539; Baker v. State, 85 Ark. 300, 107 S. W. 983.

²¹ State v. Sexton, 147 Mo. 89, 48 S. W. 452.

Declarations made immediately after the principal transaction have been received in homicide cases.²²

So, too, declarations uttered immediately before the crime, have been received. Most of the cases are cases of homicide. Indeed, the rule of the *res gestæ* is most frequently invoked in that crime. So, an exclamation by the victim of the homicide to a police officer on his being shot that the accused "shot me without cause or provocation" was received.²³ And exclamations uttered by bystanders before or during the commission of the homicide are admissible.²⁴ Any conversation taking place immediately before the homicide between the accused and his victim is *res gestæ*.²⁵ And in a case of robbery, a declaration by the person robbed to those who had come to aid him to the effect that the accused was the person who robbed him has been received.²⁶

A man who has assaulted may state on the witness stand that immediately after the assault he was asked by persons who came to his assistance what had happened and he stated to them "he got knocked out," and described to them the weapon with which he was struck and the name of the person who struck him and told them whence he had fled.²⁷ So, generally in all cases of homicide and assault, the statement by the person injured as to the mode

²² *Lambert v. People*, 29 Mich. 71; *Driscoll v. People*, 47 Mich. 413, 415, 11 N. W. 221; *Bateson v. State*, 46 Tex. Cr. App. 34, 80 S. W. 88; *Flores v. State* (Tex. Cr. App.), 79 S. W. 808; *Franklin v. State* (Tex. Cr. App.), 88 S. W. 357; *State v. Foley*, 113 La. 52, 36 So. 885, 104 Am. St. 493; *Selby v. Commonwealth* (Ky.), 80 S. W. 221, 25 Ky. L. 2209; *Walker v. State*, 146 Ala. 45, 41 So. 878; *Commonwealth v. Hargis*, 124 Ky. 356, 99 S. W. 348, 30 Ky. L. 510. In *Commonwealth v. M'Pike*, 3 Cush. (Mass.) 181, 184, 50 Am. Dec. 727, a declaration by the victim of a homicide made after she had left the room where she was assaulted, and had gone upstairs, was received.

²³ *State v. Foley*, 113 La. 52, 36 So. 885, 104 Am. St. 493.

²⁴ *Kennedy v. Commonwealth* (Ky.), 100 S. W. 242, 30 Ky. L. 1063.

²⁵ *Fleming v. State*, 150 Ala. 19, 43 So. 219.

²⁶ *State v. Epstein*, 25 R. I. 131, 55 Atl. 204. In a recent New York case it was laid down as a rule regulating the admissions of declarations that they should be of an explanatory character and describe the circumstances of the injury where they were uttered by the injured person. The point was also dwelt upon that they must be spontaneous and made within such period after the injury as precludes fabrication. *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690.

²⁷ *State v. Harris* (R. I. 1908), 69 Atl. 506.

by which the assault had been perpetrated made immediately after the assault to a person who comes to the assistance of the person assaulted, is competent as a part of the *res gestæ*; the fact that the statement was illicit by a question does not exclude it.²⁸

And the American cases, as a rule, do not sustain the strict English doctrine that the declarations, to be admissible, must be strictly contemporaneous with the main transaction, if the declarations are illustrative and spontaneous and not mere narratives of what has passed.²⁹

§ 98. Mental and physical conditions as influencing declarations.—Many crimes involve scenes and actions which, by their exciting character, engross the mind and stir it deeply. The period within which a declaration may be uttered and yet be admissible can, to some extent, be measured by the character of the passions and emotions which exist in the breast of the speaker. Thus, in order that statements should be *res gestæ* on a trial for murder, the speaker must have been prompted to speak solely from the excitement of the event of which it is claimed the statement formed

²⁸ State v. Lewis (Iowa 1908), 116 N. W. 606.

²⁹ State v. Punshon, 133 Mo. 44, 34 S. W. 25; Chalk v. State, 35 Tex. Cr. App. 116, 32 S. W. 534; Moran v. People (Ill. 1896), 45 N. E. 230; State v. Horan, 32 Minn. 394, 395, 20 N. W. 905, 50 Am. 583 (a few minutes); Smith v. State, 21 Tex. App. 277, 305, 17 S. W. 471 (fifteen minutes after); Commonwealth v. Hackett, 2 Allen (Mass.) 136; Lovett v. State, 80 Ga. 255, 4 S. E. 912; United States v. Noelke, 17 Blatchf. 554, 570; United States v. Angell, 11 Fed. 34, 41; Evans v. State, 58 Ark. 47, 22 S. W. 1026; State v. Frazier, 1 Houst. (Del.) 176; Jones v. State, 71 Ind. 66, 81; State v. Walker, 77 Me. 488, 491, 1 Atl. 357. See, also, the remarks of the court in Vicksburg & c. R. Co. v. O'Brien, 119 U. S. 99, 105, 106, 30 L. ed. 299, 7 Sup.

Ct. 118; Ferguson v. State, 141 Ala. 20, 37 So. 448; Bowles v. Commonwealth, 103 Va. 816, 48 S. E. 527; People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690; State v. Bebb, 125 Iowa 494, 101 N. W. 189; Ludlow v. State (Ala. 1908), 47 So. 321; State v. Alton, 105 Minn. 410, 117 N. W. 617; Martin v. State, 47 Tex. Cr. App. 174, 82 S. W. 657; Wright v. State, 88 Md. 705, 41 Atl. 1060; Bice v. State, 51 Tex. Cr. App. 133, 100 S. W. 949; McKinney v. State, 40 Tex. Cr. App. 372, 50 S. W. 708; Freeman v. State, 40 Tex. Cr. App. 545, 46 S. W. 641, 51 S. W. 230. A witness may state that he gave an alarm after a burglary, and what he said in connection with and while giving it is clearly a part of the *res gestæ*. State v. Moore, 117 Mo. 395, 401, 22 S. W. 1086. *Contra*, People v. Ah Lee, 60 Cal. 85, 87, 91.

a part, and before he could sufficiently regain his self-possession to be suspected of having made the statement from design.³⁰

If the declarant is implicated, either as agent or patient, in a murderous assault, the fear, hatred, rage or other passion which customarily accompanies a homicide, or attempted homicide, and engrosses the minds of all participants, may, with reason, be considered to prolong the period during which language may be presumed to be spontaneous. The presence of these passions is not conducive to the mental calmness and deliberation necessary to concoct an untrue narrative declaration. On the other hand the mental distraction which is the result of a mortal wound, the physical shock or nervous excitement which is the result of serious bodily injury,³¹ the pain and physical anguish of the sufferer, the danger of death and the urgent need for procuring speedy relief or aid would be very likely to prevent the language of the victim from assuming a narrative or retrospective character.

The imperative present needs of the body, filling the mind with apprehension and fear, certainly preclude under these circumstances much mental consideration of past events, or mental preparation or intention to narrate them; and tend to make all language used the reflection of the existing mental condition.³²

The mind, even when thus aroused and stirred, is still open to the reception of new thoughts and impressions which may supply opportunity for fabricating declarations and deprive them of their character as part of the *res gestæ*. If some time elapses, whether long or short and incidents intervene which change the declarant's mental condition and fill his mind with new thoughts

³⁰ State v. Gianfala, 113 La. 463, 37 So. 30.

³¹ Soto v. Territory (Ariz. 1908), 94 Pac. 1104.

³² "In general, subject to some apparent or real qualifications, what one said in its nature explanatory, while performing an admissible act, whether he is a party or a third person, may be shown in evidence whenever the act is shown. In this way a defendant may even be entitled to introduce in his own behalf accom-

panying declarations not otherwise admissible. Statements, from whatever source, to be thus competent, must be contemporaneous with the act they would illustrate. Perhaps a few of the cases require them to be so in the strict sense. But it is at least better doctrine that they are competent, whenever near enough the act, either before or after, to be prompted by the same motive, and apparently to constitute a part of it." 1 Bishop Cr. Pro., § 1086.

and ideas, it may be presumed that the door is thereby opened for the introduction of new motives which may suggest or influence the declarations made.

The occurrences which may bring this about, depend largely upon the circumstances of each case. The actions of the accused in telephoning for a physician to aid the deceased, or in calling in other persons to his aid, in going to his own room or home and changing his clothing, and particularly where, after doing this, he goes to the sheriff's office or to a police station and surrenders himself, deprive any statements which he may make after these events have occurred of their character as *res gestæ*. And it is immaterial that the transactions which intervene cover but a few moments of time.³³

The same principles would apply to declarations by one who is the victim of the crime. His statement made after the intervention of incidents calculated to prompt him with new motives would be rejected. The fact that bystanders had spoken to the deceased and that, having found him lying badly wounded, had placed him in a more comfortable position, and the further fact that the accused had fled from the scene of the crime will not exclude declarations of the deceased if they are properly of the *res gestæ*.³⁴

§ 99. **Admissibility for the accused.**—Declarations which are commonly called self-serving cannot be given in evidence in favor of the accused unless they are part of the *res gestæ*.³⁵ If, however, the accused makes a statement or utters an exclamation which is spontaneous and which is connected with the incidents of the criminal transaction, and explanatory of it, it may be received, though it is in his favor. If the statement is reasonable and consistent with innocence, it should receive due consideration by the jury and may have considerable weight as evidence. The value of his statements as evidence is diminished as the time elapses after the transaction to which they relate.³⁶ And

³³ Johnson v. State, 129 Wis. 146, 108 N. W. 55, 5 L. R. A. (N. S.) 809n; Davis v. Commonwealth (Ky.), 77 S. W. 1101, 25 Ky. L. 1426.

³⁴ Price v. State (Okla. 1908), 98 Pac. 447.

³⁵ People v. Huntington (Cal. App. 1908), 97 Pac. 760; Mason v. State (Ind. 1908), 85 N. E. 776.

³⁶ State v. Jacobs (Mo. App. 1908), 113 S. W. 244; State v. Kane (N. J. L. 1909), 72 Atl. 39.

it should not be forgotten that the rule of the *res gestæ* is based upon the principle that if a part of a transaction is shown by one party another party to the same transaction may introduce in evidence all or any part of a remainder.

Hence, the whole declaration or conversation must be stated and admitted.⁸⁷ If the declaration was made by the accused in answer to assertions, questions or taunting remarks by the victim of a homicide, the latter are competent to explain the declaration or modify its force and meaning by showing the true motives which prompted it. And it is a general rule that whenever the prosecution shall introduce any declarations of the accused, under the rule of the *res gestæ*, he may offer other declarations forming a part of the same conversation if they are explanatory thereof, though they might not have been competent coming from him in the first instance.⁸⁸

§ 100. Declarations uttered prior to the crime.—If the declaration meets the requirements of the rule now under consideration, that is, if it explains or illustrates a relevant fact, it is not incompetent, merely because its utterance precedes the actual commission of the crime. Evidence is always relevant which shows that the accused made preparations to commit a crime, and from such preparative actions a criminal intention may, with justice, be inferred.

Declarations accompanying these acts of preparation are received to explain and unfold their significance, and, indirectly, to illuminate the subsequent language, conduct and state of mind of the accused.⁸⁹

Thus, where one of two travelers killed the other while *en route* the court admitted the statements of the deceased, showing

⁸⁷ *M'Kee v. People*, 36 N. Y. 113; *Ga.* 374, 410, 37 Am. 76n; *Schnicker v. People*, 88 N. Y. 192, 195; *Carr v. State*, 43 Ark. 99, 104; *Commonwealth v. Castles*, 9 Gray (Mass.) 121, 69 Am. Dec. 278; *Cluverius v. Commonwealth*, 81 Va. 787; *Wood v. State*, 92 Ind. 269, 272; *People v. Scott*, 153 N. Y. 40, 46 N. E. 1028.

⁸⁸ *Shrivers v. State*, 7 Tex. App. 450, 455. See *supra*, § 119a.

⁸⁹ *Price v. State*, 107 Ala. 161, 18 So. 130; *State v. Peffers*, 80 Iowa 580, 46 N. W. 662; *Cox v. State*, 64

whence they came and whither they were going, as a part of the *res gestæ* leading up to the crime.⁴⁰

The declarations, if of the *res gestæ*, may be offered by the accused in his own behalf to illustrate or to show his motives, or to rebut an inference of a criminal intention;⁴¹ and before any part of the declaration is offered against him, if the action to be explained is clearly relevant and is already in evidence.

The subsidiary or preparative act to be explained must be relevant to the guilt of the accused. Otherwise, no mere suggestion or probability that the declaration will throw light upon the crime, will avail to let it in, if the accompanying action is not relevant.⁴²

If the relevant act is in evidence, the accused need not wait to prove a declaration in his own favor, until another declaration is introduced against him. He may prove the declaration at once.⁴³

§ 101. Declarations by bystanders and third persons.—The oral or written declarations of persons other than the accused or the passive participant in the crime, if they possess the character of declarations forming a part of the *res gestæ*, are receivable. If the act of a third party is relevant and is in evidence, his statement accompanying and explanatory of it, which is the natural concomitant of the act, and is prompted by the identical motive, should be admitted.⁴⁴

⁴⁰ State v. Vincent, 24 Iowa 570, 573, 574, 95 Am. Dec. 753.

⁴¹ State v. Walker, 77 Me. 488, 490, 1 Atl. 357; Dukes v. State, 11 Ind. 557, 564, 71 Am. Dec. 370; State v. Daley, 53 Vt. 442, 445, 38 Am. 694; Monroe v. State, 5 Ga. 85; Foster v. State, 8 Tex. App. 248; Maddox v. State (Ala. 1909), 48 So. 689; State v. Kane (N. J. L.) 72 Atl. 39; Price v. State (Okla.), 98 Pac. 447.

⁴² People v. Williams, 3 Park. Cr. (N. Y.) 84; Griffith v. State, 90 Ala. 583, 589, 8 So. 812; Brumley v. State, 21 Tex. App. 222, 239, 17 S. W. 140, 57 Am. 612.

⁴³ Foster v. State, 8 Tex. App. 248; Thomas v. State, 27 Ga. 287, 297; State v. Abbott, 8 W. Va. 741, 754,

and cases in note 1, p. 124; Morrow v. State, 48 Ind. 432, 435; Mack v. State, 48 Wis. 271, 278, 280, 4 N. W. 449; Schlemmer v. State, 51 N. J. L. 23, 29-31, 15 Atl. 836. *Contra*, State v. Hicks, 92 Mo. 431, 437, 4 S. W. 742; Fleming v. State (Tex. Cr. App.), 114 S. W. 383; Douglass v. State (Tex. Cr. App.), 114 S. W. 808; Lyles v. State, 130 Ga. 294, 60 S. E. 578.

⁴⁴ Hunter v. State, 40 N. J. L. 495, 535-540; State v. Gabriel, 88 Mo. 631, 639; Haines v. People, 138 Ill. App. 49.

Admissibility of declarations of conspirators as part of *res gestæ*—note, 19 L. R. A. 745.

But if the declarations of a third person are merely narrative and unconnected with a relevant act, so that by no proper extension of the rule can they be included among the *res gestæ*, they will, with some few exceptions, be rejected as hearsay,⁴⁵ though the declaration is in form a confession that the declarant committed the crime.⁴⁶

The exclamations of persons who were present at a fracas in which a homicide occurred, showing the means and mode of killing, are admissible for⁴⁷ or against the accused,⁴⁸ because of their unpremeditated character and their connection with the event by which the attention of the speaker was engrossed. Presence alone is not enough. The declarant, whose language is offered as evidence, must have been more than a mere observer or bystander at the occurrence he describes. It must not only appear that he was present, but that he was an active participant, either by word or act, in the event.⁴⁹

⁴⁵ *State v. Beaudet*, 53 Conn. 536, 4 Atl. 237, 55 Am. 155; *State v. Davis*, 77 N. Car. 483; *State v. Badger*, 69 Vt. 216, 37 Atl. 293. Nor can the state prove threats to lynch defendant, made by a crowd to show the community believe him guilty. *State v. Sneed*, 88 Mo. 138, 141, 147; *State v. Kapelino*, 20 S. Dak. 591, 108 N. W. 335; *Casey v. State*, 50 Tex. Cr. App. 392, 97 S. W. 496; *Perdue v. State*, 126 Ga. 112, 54 S. E. 820.

⁴⁶ *West v. State*, 76 Ala. 98, 99; *State v. Gallehugh*, 89 Minn. 212, 94 N. W. 723. But narrative statements by third persons, assented to or acquiesced in by the accused on his hearing them are generally received as his own admissions or confessions, being made so by his adoption. See *post*, §§ 122-124, and *Underhill on Ev.*, Chap. IV.

⁴⁷ *Flanegan v. State*, 64 Ga. 52; *State v. Jones*, 77 S. Car. 385, 58 S. E. 8; *Haines v. People*, 138 Ill. App. 49. Where a homicide occurred in

the dark, a declaration made by a bystander during the affray that he had cut the accused in the back is relevant for the latter where it appears that he was not cut in the back, but that the deceased had received several apparently mortal wounds in his back. *Flanegan v. State*, 64 Ga. 52, 56.

⁴⁸ *Appleton v. State*, 61 Ark. 590, 33 S. W. 1066; *State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *State v. Hinson* (N. Car. 1909), 64 S. E. 124; *Shirley v. State*, 144 Ala. 35, 40 So. 269; *Grant v. State*, 124 Ga. 757, 53 S. E. 334. The exclamation, "Don't strike him, for you have shot him," by a participant, addressed to the accused, was received against him in *State v. Walker*, 78 Mo. 380, 386, 387.

⁴⁹ *Whart. Cr. Ev.*, § 262; *Roscoe's Cr. Ev.*, § 23; 1 *Bish. Cr. Pro.*, § 1087; *Bradshaw v. Commonwealth*, 10 Bush. (Ky.) 576, 578; *State v. Moore*, 38 La. Ann. 66; *State v. Riley*,

42 La. Ann. 995, 997, 8 So. 469; Flynn v. State, 43 Ark. 289, 292, 293; Benjamin v. State, 41 So. 739, 148 Ala. 671, not reported in full; Baker v. State, 45 Tex. Cr. App. 392, 77 S. W. 618. Thus, where the defendant had given evidence that he had been assaulted by a mob led by deceased, he was permitted to show that some unknown person in the crowd exclaimed "Kill him! Kill him!" meaning the defendant. Morton v. State, 91 Tenn. 437, 19 S. W. 225. The fact that the declarant was a participant must be shown by independent evidence. It cannot be proved by the declaration itself. Flynn v. State, 43 Ark. 289, 293; State v. Draughon (N. Car., 1909), 65 S. E. 913.

CHAPTER X.

DYING DECLARATIONS.

- § 102. Definition—Religious element.
- 103. Consciousness of nearness of death as shown by the declarant's language.
- 104. Sending for legal or spiritual advisers, nature of wounds or other circumstances showing a consciousness of approaching death.
- 105. Period intervening between the statement and the death.
- 106. Dying declarations not admissible to prove all crimes.
- 107. Dying declarations distinguished from those which are a part of the *res gestæ*.
- 108. Opinions contained in dying declarations are not admissible.
- 109. Must refer to the *res gestæ* of the homicide.
- 110. Mode of proof, credibility, relevancy and weight.
- 111. Declaration is admissible in its entirety—Contradictory or untruthful character.
- 112. The form of the declaration.
- 113. Declarations by signs—Mental condition of the declarant.
- 114. Dying declarations made by children.

§ 102. Definition—Religious element.—Dying declarations constitute an exception to the rule rejecting hearsay evidence. Such declarations are those made by the victim of a homicide, referring to the material facts which concern the cause and circumstances of the killing, and which are uttered under a fixed belief that death is impending and is certain to follow immediately, or in a very short time, without an opportunity for retraction and in the absence of all hopes of recovery.¹

And dying declarations constitute direct evidence of the facts they are relevant to prove as distinguished from circumstantial evidence of such facts.²

¹ Underhill on Evid., § 100; 1 96 Pac. 456.

Greenl. on Evid., § 136; Simons v. People, 150 Ill. 66, 73, 36 N. E. 1019; Starkey v. People, 17 Ill. 17; People v. Cipolla (Cal.), 100 Pac. 252. In Oregon the matter is governed by statute. State v. Fuller, 52 Ore. 42, 668.

² State v. Sexton, 147 Mo. 89, 48 S. W. 452; People v. Morse, 196 N. Y. 306, 89 N. E. 816. Definition and admissibility of dying declaration—note, 86 Am. St. 638.

The certainty of the declarant's belief that he is *in extremis*, and that, in a very short time, those immortal and spiritual elements which inhabit the body will forsake it, to encounter the dread possibilities of the unknown and supernatural world beyond the grave, is deemed to furnish a sanction equivalent to that of a solemn and positive oath administered in a court of justice.³

To illustrate or to explain the mental condition of the deceased, the accused should be permitted to show that the language of the deceased was prompted by motives of revenge or malice; and that, when he uttered the accusatory statement, he entertained vindictive feelings towards the accused and was in a reckless and irreverent frame of mind. So it may be shown, that immediately prior to or after the declaration, the deceased had used profane language;⁴ and such evidence furnishes good grounds for the presumption that the speaker does not believe that he is soon to die. The fear of punishment for perjury in this world is wholly ab-

* "The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, when every hope of this world is gone, when every motive to falsehood is silenced; and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered as creating an obligation equal to that imposed by a positive oath administered in a court of justice." Eyre, J., in *Woodcock's Case*, 2 Leach C. Law 563 (1789). The earliest case is *Rex v. Ely*, in 1720, 12 Viner's Abr. 118; *Starkey v. People*, 17 Ill. 17; *Hill v. State*, 41 Ga. 484, 503. It seems that an instruction that dying declarations are to receive as much credit as testimony given under oath in open court is erroneous. *State v. Vansant*, 80 Mo. 67; *State v. Mathes*, 90 Mo. 571, 2 S. W. 800; *Lambeth v. State*, 23 Miss. 322, 359. The absence of an opportunity to cross-examine the declarant or for the jury

to observe his demeanor upon the witness stand, detracts from their credibility as evidence, not from their competency. *People v. Kraft*, 148 N. Y. 631, 43 N. E. 80. Hence, if the deceased was an infidel and had a contempt for the church or totally irreligious, so that he had no apprehension of punishment for lying and no belief in a state of future rewards and punishments, that fact, while not rendering his declaration inadmissible (*People v. Sanford*, 43 Cal. 29), because to permit this would be to disqualify a witness because of his religious belief or want of it, is competent to go to the jury as affecting the credit to be given to it. *Gambrell v. State* (Miss. 1908), 46 So. 138; *Hill v. State*, 64 Miss. 431, 432; *People v. Chin Mook Sow*, 51 Cal. 597, 600; *Goodall v. State*, 1 Ore. 333, 334, 80 Am. Dec. 396; *State v. Elliott*, 45 Iowa 486, 487; *State v. Ah Lee*, 8 Ore. 214, 218; *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540.

⁴ *Tracy v. People*, 97 Ill. 101, 106.

sent. Unless, therefore, the dying man possesses and is controlled by a vivid and conscientious feeling of accountability to God, in whose presence he expects soon to appear, it is very probable that he may be materially influenced in his utterances by the passions of anger and revenge. Hence, these declarations ought to be received with the greatest caution as respects the primary facts admitting them. All men are prone to excuse and justify their own conduct and to endeavor to revenge themselves on those who have injured them. These proclivities, however, in the case of dying declarations, are supposed to have been overcome by the apprehension of immediate death which will deprive the dying man of all opportunity for repentance if he lies and subject him to severe punishment beyond the grave.⁵

The main ground for admitting dying declarations being that the danger of immediate death and the belief of the declarant that he is *in extremis* are regarded as equivalent to an oath, it follows that every dying declaration will be presumed, until the contrary appears, to be made under a solemn and religious sense of responsibility to a Deity who will punish perjury.⁶ But accused may show on cross-examination that deceased, in making the statements, was in a reckless, irreverent state of mind, and entertained feelings of malice and hostility toward accused.⁷

§ 103. Consciousness of nearness of death, as shown by declarant's language.—The deceased, at the time of the declaration, must have been under a sense of approaching death without any hope of re-

⁵ *People v. Sanchez*, 24 Cal. 17, 24; *People v. Hodgdon*, 55 Cal. 72, 76, 36 Am. 30. But the fact that the declarant believes, as a matter of religious opinion, that he may repent of his sins, lying included, at any moment before death, does not alone render his declaration inadmissible. *North v. People*, 139 Ill. 81, 28 N. E. 966. In a note to *People v. Chin Mook Sow*, 51 Cal. 597, 601, will be found a summary of the religious belief of the Chinese as described by one of them on the witness stand.

⁶ *Lambeth v. State*, 23 Miss. 322, 355; *Solomon v. State*, 2 Ga. App. 92, 58 S. E. 381; *Moody v. State*, 1 Ga. App. 772, 58 S. E. 262; *State v. Knoll*, 69 Kan. 767, 77 Pac. 580. In *State v. Hood*, 63 W. Va. 182, 59 S. E. 971, it was held that it was no ground for excluding a dying declaration that it did not appear in the evidence that the declarant believed in God and in rewards and punishment after death.

⁷ *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042.

covery. He must believe that there is no possibility of his recovery or his statement will not be competent.*

* *Commonwealth v. Bishop*, 165 Mass. 148, 42 N. E. 560; *Collins v. State*, 46 Neb. 37, 64 N. W. 432; *People v. Kraft*, 91 Hun (N. Y.) 474, 36 N. Y. S. 1034; *Commonwealth v. Brewer*, 164 Mass. 577, 42 N. E. 92; *Commonwealth v. Mika*, 171 Pa. St. 273, 33 Atl. 65; *White v. State*, 111 Ala. 92, 21 So. 330; *Jones v. State (Tex. 1897)*, 38 S. W. 992; *United States v. Woods*, 4 Cranch C. (U. S.) 484, 28 Fed. Cas. 16760; *Archibald v. State*, 122 Ind. 122, 123, 23 N. E. 758; *State v. Faile*, 41 S. Car. 551, 19 S. E. 690; *Ex parte Meyers*, 33 Tex. Cr. App. 204, 26 S. W. 196; *State v. Cronin*, 64 Conn. 293, 305, 29 Atl. 536; *State v. Wilson*, 121 Mo. 434, 442, 26 S. W. 357; *Walston v. Commonwealth*, 16 B. Mon. (Ky.) 15, 34; *Powers v. State*, 87 Ind. 144, 151; *Whitaker v. State*, 79 Ga. 87, 91, 3 S. E. 403; *Mitchell v. State*, 71 Ga. 128, 141; *State v. Schmidt*, 73 Iowa 469, 35 N. W. 590; *State v. Daniel*, 31 La. Ann. 91, 95; *State v. Blackburn*, 80 N. Car. 474, 478; *State v. Mathes*, 90 Mo. 571, 2 S. W. 800; *Peak v. State*, 50 N. J. L. 179, 182, 12 Atl. 701; *Vaughan v. Commonwealth*, 86 Ky. 431, 435, 6 S. W. 153, 9 Ky. L. 644; *Hammil v. State*, 90 Ala. 577, 8 So. 380; *State v. Johnson*, 26 S. Car. 152, 153, 1 S. E. 510; *State v. Banister*, 35 S. Car. 290, 296, 14 S. E. 678; *Cole v. State*, 105 Ala. 76, 16 So. 762; *State v. Clark (W. Va. 1908)*, 63 S. E. 402; *Sutherland v. State*, 121 Ga. 190, 48 S. E. 915; *State v. Daniels*, 115 La. 59, 38 So. 894; *Robinson v. State*, 130 Ga. 361, 60 S. E. 1005; *Wilson v. State*, 140 Ala. 43, 37 So. 93; *Commonwealth v. Hargis*, 124 Ky. 356, 99 S. W. 348, 30 Ky. L. 510; *Delaney v. State*, 148 Ala. 586, 42 So. 815; *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100; *Brom v. People*, 216 Ill. 148, 74 N. E. 790; *Fogg v. State*, 81 Ark. 417, 99 S. W. 537; *People v. Glover (Cal. 1903)*, 74 Pac. 745; *Grant v. State*, 118 Ga. 804, 45 S. E. 603; *Oliver v. State*, 129 Ga. 777, 59 S. E. 900; *Bricker v. Commonwealth (Ky.)*, 102 S. W. 1175, 31 Ky. L. 596; *State v. McCoomer*, 79 S. Car. 63, 60 S. E. 237; *Lyles v. State*, 48 Tex. Cr. App. 119, 86 S. W. 763; *Brown v. Commonwealth (Ky.)*, 83 S. W. 645, 26 Ky. L. 1269; *State v. Knoll*, 69 Kan. 767, 77 Pac. 580; *Brennan v. People*, 37 Colo. 256, 86 Pac. 79; *Hunter v. State (Tex. Cr. App.)*, 114 S. W. 124; *People v. Brecht*, 105 N. Y. S. 436; *State v. Boggan*, 133 N. Car. 761, 46 S. E. 111; *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540; *People v. Del Verno*, 192 N. Y. 470, 85 N. E. 690; *Gardner v. State*, 55 Fla. 25, 45 So. 1028; *Smith v. State*, 48 Fla. 307, 37 So. 573; *Sutherland v. State*, 121 Ga. 190, 48 S. E. 915; *Bilton v. Territory (Okla. 1909)*, 99 Pac. 163, and cases cited in *Underhill on Ev.*, p. 139. "An undoubted belief in the mind of the declarant at the time the declarations are made, that the finger of death is upon him is indispensable." *People v. Sanchez*, 24 Cal. 17, 24. "If there is the least hope, no matter how faint, the requisite certainty of belief does not exist." *Peak v. State*, 50 N. J. L. 179, 222, 12 Atl. 701.

A declaration to be admissible as

His mental condition in this respect must be shown before his declaration is received, and if he entertained any hopes, however slight, that his injury is not mortal, his statement should be rejected. If, however, it is shown that he was conscious of near approaching death, it is immaterial that no one had told him that he was about to die, though his silence and conduct, when told he must die, is always relevant to show that he did or did not believe what was told him.⁹

The statement of the accused tending to show his knowledge or belief that he is dying, and that he entertains no hope of recovery, though a part of the declaration, is always admissible.¹⁰

It is perhaps the most satisfactory and convincing evidence of a consciousness of approaching death in his mind but it is not the only evidence, nor is any particular form of words required of him.¹¹

a dying declaration must have been made under a sense of impending death (86 Am. St. 655, 658), and without hope of recovery (86 Am. St. 660, 661), and with belief in its imminence, 86 Am. St. 660. The declaration need not state belief in the imminence of death, 86 Am. St. 658, 660. Circumstances under which may be made, 86 Am. St. 639, 640; dying condition of person making, 86 Am. St. 654, 663; ratification of declaration previously made, 86 Am. St. 647.

⁹ Hammil v. State, 90 Ala. 577, 578, 8 So. 380.

¹⁰ State v. Cronin, 64 Conn. 293, 29 Atl. 536; State v. Vaughan, 22 Nev. 285, 39 Pac. 733; Commonwealth v. Thompson, 159 Mass. 56, 59, 33 N. E. 1111; Pate v. State, 150 Ala. 10, 43 So. 343; State v. Bohanon, 142 N. Car. 695, 55 S. E. 797; Moore v. State, 40 So. 345, 146 Ala. 687, not reported in full; State v. Biango (N. J., 1907), 68 Atl. 125; State v. Nowells, 135 Iowa 53, 109 N. W. 1016; Jarvis v. State, 138 Ala. 17, 34 So. 1025; Lipscomb v. State, 75 Miss. 559, 23

So. 210, 230; People v. Brecht, 105 N. Y. S. 436; Rice v. State, 51 Tex. Cr. App. 255, 103 S. W. 1156; Asher v. Commonwealth (Ky.), 91 S. W. 662, 28 Ky. L. 1342; Farmer v. Commonwealth (Ky.), 91 S. W. 582, 28 Ky. L. 1168; Copeland v. State (Fla., 1909), 50 So. 621; State v. Brady, 124 La. 951, 50 So. 806.

¹¹ State v. Johnson, 26 S. Car. 152, 158, 1 S. E. 510; People v. Samario, 84 Cal. 484, 485; 24 Pac. 283; Lester v. State, 37 Fla. 382, 20 So. 232; Fulcher v. State, 28 Tex. App. 465, 13 S. W. 750; McLean v. State, 16 Ala. 672; State v. Newhouse, 39 La. Ann. 862, 865, 2 So. 799; State v. Black, 42 La. Ann. 861, 863, 8 So. 594; United States v. Heath, 20 D. C. (9 Mackey) 272; State v. Gillick, 7 Iowa 287; Mockabee v. Commonwealth, 78 Ky. 380, 382; State v. Mills, 91 N. Car. 581, 594; State v. Dalton, 20 R. I. 114, 37 Atl. 673; Long v. State, 48 Tex. Cr. App. 175, 88 S. W. 203; State v. Brown, 188 Mo. 451, 87 S. W. 519; Roberts v. State, 48 Tex. Cr. App. 378, 88 S. W. 221; Bilton v. Territory (Okla. 1909), 99 Pac. 163.

Thus, if the deceased states that it is useless to send for a doctor,¹² that he is sure to die,¹³ or obliged to die,¹⁴ that he cannot live and wants to make a dying declaration,¹⁵ that he does not think,¹⁶ or expect that he will recover from his wounds,¹⁷ that he has no hope of recovery,¹⁸ that he knows he is going to die,¹⁹ that he knows that he cannot live,²⁰ that he is killed,²¹ or uses similar expressions, it is conclusively presumed that he has a full and real sense of approaching death.

But if the declarant, when making his statement, merely states that he "has no hope at present,"²² or says, "Who knows? perhaps I may get well,"²³ or may recover,²⁴ or expresses a hope

¹² State v. Jones, 47 La. Ann. 1524, 18 So. 515. 172; Pate v. State, 150 Ala. 10, 43 So. 343.

¹³ State v. Aldrich, 50 Kan. 666, 672, 32 Pac. 408; State v. Turlington, 102 Mo. 642, 656, 15 S. W. 141; State v. Smith, 48 La. Ann. 533, 19 So. 452; Crump v. Commonwealth (Ky.), 20 S. W. 390, 14 Ky. L. 450; Logan v. State, 149 Ala. 11, 43 So. 10; DuBose v. State, 120 Ala. 300, 25 So. 185; Gregory v. State, 148 Ala. 566, 42 So. 829; Harper v. State, 129 Ga. 770, 59 S. E. 792; State v. Gianfala, 113 La. 463, 37 So. 30; Newton v. State, 51 Fla. 82, 41 So. 19; State v. Kelleher, 201 Mo. 614, 100 S. W. 470; Titus v. State, 117 Ala. 16, 23 So. 77; Walker v. State, 41 So. 878, 147 Ala. 699, not reported in full; Rowsey v. Commonwealth, 116 Ky. 617, 76 S. W. 409, 25 Ky. L. 841.

¹⁴ State v. Banister, 35 S. Car. 290, 295, 296, 14 S. E. 678; Rice v. State, 49 Tex. Cr. App. 569, 94 S. W. 1024.

¹⁵ Pierson v. State, 21 Tex. App. 14, 17 S. W. 468; Starks v. State, 137 Ala. 9, 34 So. 687; Payne v. State, 45 Tex. Cr. App. 564, 78 S. W. 934.

¹⁶ McQueen v. State, 94 Ala. 50, 52, 10 So. 433, 434.

¹⁷ State v. Gay, 18 Mont. 51, 44 Pac. 411; State v. Nance, 25 S. Car. 168,

¹⁸ State v. Garrison, 147 Mo. 548, 49 S. W. 508.

¹⁹ Heninburg v. State, 151 Ala. 26, 43 So. 959.

²⁰ People v. Callaghan, 4 Utah 49, 6 Pac. 49; Hunter v. State (Tex. Cr. App.), 114 S. W. 124; Pitts v. State, 140 Ala. 70, 37 So. 101; State v. Mayo, 42 Wash. 540, 85 Pac. 251.

²¹ Simons v. People, 150 Ill. 66, 74, 36 N. E. 1019; State v. Elkins, 101 Mo. 344, 350, 14 S. W. 116; State v. Russell, 13 Mont. 164, 32 Pac. 854, 856; Luker v. Commonwealth (Ky.), 5 S. W. 354, 9 Ky. L. 385; Patterson v. State, 49 Tex. Cr. App. 613, 95 S. W. 129; Smith v. State, 145 Ala. 17, 40 So. 957; Greer v. State (Ala. 1908), 47 So. 300. See also, the case of Brown v. State, 150 Ala. 25, 43 So. 194.

²² Reg. v. Jenkins, L. R. 1 C. C. 187, 191, L. J. 38 M. C. 82; Crockett v. State, 45 Tex. Cr. App. 276, 77 S. W. 4.

²³ Jackson v. Commonwealth, 19 Gratt. (Va.) 656.

²⁴ Bowles v. Commonwealth, 103 Va. 816, 48 S. E. 527.

that, in case he dies, he may meet a person in heaven,²⁵ or hopes that the attending surgeon will do what he can for the sake of his family,²⁶ or thinks he is in great danger²⁷ and may not recover,²⁸ his declarations, not having been made in immediate apprehension of death, are inadmissible. The competency of dying declarations is for the court, and, where the declarations are admitted in evidence, they receive only such weight as the jury may determine.²⁹

§ 104. Sending for legal or spiritual advisers, nature of wounds or other circumstances showing a consciousness of approaching death.

—As in all cases where a person's mental condition is relevant, this condition may, and from the very nature of things very often must be shown by circumstances and not proved by the express declarations of the deceased.³⁰ The consciousness of approaching death may be inferred from the circumstances surrounding the dying man.³¹ He need not state expressly that he thinks or believes his end is near, or that he is at peace with his God,³² while making his statement, if the nature of his wounds,³³ or his general physical condition,³⁴ and his actions and language are such that the court is reasonably satisfied that he realized that he was about to die and had abandoned all hopes of recovery.³⁵

²⁵ *State v. Medlicott*, 9 Kan. 257, 282, 285.

²⁶ *Rex v. Crockett*, 4 C. & P. 544.

²⁷ *Errington's Case*, 2 *Lewin's C. C.* 148.

²⁸ *People v. Hodgdon*, 55 Cal. 72, 76, 36 Am. 30; *State v. Knoll*, 69 Kan. 767, 77 Pac. 580.

²⁹ *State v. Fuller* (Ore. 1908), 96 Pac. 456.

When hope of recovery entertained by others is material, and when not —note, 86 Am. St. 661, 662, 663.

³⁰ *State v. Fuller* (Ore. 1908), 96 Pac. 456.

³¹ *State v. Evans*, 124 Mo. 397, 407, 28 S. W. 8; *People v. Chase*, 79 Hun (N. Y.) 296, 299, 29 N. Y. S. 376; *Lester v. State*, 37 Fla. 382, 20 So. 232; *White v. State*, 111 Ala. 92, 21 So. 330.

³² *State v. Black*, 42 La. Ann. 861, 864, 8 So. 594.

³³ *Hill v. Commonwealth*, 2 Gratt. (Va.) 594, 595, 605; *Woodcock's Case*, 2 Leach C. Law 563, 567; *Dumas v. State*, 62 Ga. 58, 64; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100.

³⁴ *State v. Fuller* (Ore. 1908), 96 Pac. 456, where decedent's face was pallid or yellow, her breath short and pulse weak and her eyes glassy. *State v. Roberts*, 28 Nev. 350, 82 Pac. 100.

³⁵ *Fitzgerald v. State*, 11 Neb. 577, 10 N. W. 495; *People v. Bemmerly*, 87 Cal. 117, 118, 25 Pac. 266; *People v. Kraft*, 91 Hun (N. Y.) 474, 36 N. Y. S. 1034; *People v. Taylor*, 59 Cal. 640, 646; *Dumas v. State*, 62 Ga. 58, 62; *State v. Russell*, 13 Mont. 164, 32

A physician may testify to declarant's physical condition.³⁶

Perhaps the most useful and important circumstance in determining whether the consciousness of approaching dissolution is present in the mind of the declarant is his sending for a spiritual adviser that he may receive religious consolation preparatory to death.³⁷ If the dying person was a Roman Catholic, evidence that he had sent for a priest to receive his confession and from whom he wished to receive extreme unction and absolution would, in the absence of other controlling circumstances, be conclusive that he was in immediate apprehension of death.³⁸

But the silence or failure of the declarant to make a reply when he is told by his attending physician that he cannot be cured with his pleading to God for mercy is not conclusive that he has abandoned all hopes of recovery.³⁹

Other elements may be considered. So the actual character of the wound itself, and its seriousness,⁴⁰ where it is in a vital part and thus calculated to justify an apprehension of mortal danger in the mind of the wounded man; the urgency expressed by him that a surgeon should be called,⁴¹ the use of religious expressions

Pac. 854, 856; *State v. Wilson*, 24 Kan. 186, 189, 197, 36 Am. 257; *Hawkins v. State*, 98 Md. 355, 57 Atl. 27. Cf. *Radbourne's Case*, 2 Leach C. Law 512, 520, 521.

³⁶ *Heningburg v. State* (Ala. 1907), 45 So. 246.

³⁷ *Hammil v. State*, 90 Ala. 577, 579, 581, 8 So. 380; *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470. It is proper, however, to exclude evidence on the part of accused to show that the declarant refused to send for a priest about the time he uttered the statement which is offered as his dying declaration. *State v. Zorn*, 202 Mo. 12, 100 S. W. 591.

³⁸ *Carver v. United States*, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. 228; *Reg. v. Howell*, 1 Den. C. C. 1; *People v. Buettner*, 233 Ill. 272, 84 N. E. 218; *People v. Stacy*, 119 App. Div. (N. Y.) 743, 104 N. Y. S. 615.

³⁹ *State v. Daniels*, 115 La. 59, 38 So. 894. Though deceased, when advised of a change for the worse, said that he did not feel any worse, and that he could not afford to die, his statement thereupon made that he believed he was about to die, and that he had been told by the doctors that he was about to die, and made it as his dying statement, was admissible; it appearing that he had confidence in his physician, and the circumstances tending to show that his opinions as to his recovery had undergone a change, and his death having occurred within three hours after the statement was made. *State v. Craig*, 190 Mo. 332, 88 S. W. 641.

⁴⁰ *Robinson v. State*, 130 Ga. 361, 60 S. E. 1005; *Jones v. State*, 130 Ga. 274, 60 S. E. 840.

⁴¹ The fact that the deceased sent

by the dying declarant looking to a speedy entrance into another world, his bidding farewell to his relatives and friends gathered about his bedside,⁴² his expressing a desire to execute a will and sending an urgent call for the immediate attendance of a legal adviser to frame it, and designating the minister to preach the funeral sermon,⁴³ are facts from which, taken together or in connection with other evidence, the existence of a consciousness of near approaching death may be inferred. But the opinion of a witness that the deceased did or did not think he would die is never admissible.⁴⁴

So the fact that the deceased having stated that he thinks he has been fatally wounded when asked who shot him says he is too weak to talk now but he will tell who shot him next morning does not render his dying declaration inadmissible.⁴⁵

§ 105. Period intervening between the statement and the death.—

Though a statement was made while the deceased was hopeful of recovery, it is receivable if he subsequently ratifies it when all hope is gone.⁴⁶ On the other hand, the fact that he, after he

for a doctor may indicate an expectation of ultimate recovery. *Mathedy v. Commonwealth* (Ky.), 19 S. W. 977, 14 Ky. L. 182. But in *State v. Evans*, 124 Mo. 397, 408, 28 S. W. 8, it is said: "The mere fact that the victim, while writhing under the tortments of a murderous blow, seeks relief from anguish by sending for a physician is not indicative of a hope of life, but of a natural desire to be relieved of pain." And see, on consenting to an operation, *State v. Thompson*, 49 Ore. 46, 88 Pac. 583, 124 Am. St. 1015n; *Reg. v. Howell*, 1 Den. C. C. 1; *McQueen v. State*, 103 Ala. 12, 15 So. 824. That a person mortally wounded consents to be removed to a sanitarium for the satisfaction of his family is not inconsistent with his own abandonment of the hope of recovery. *State v. Howard*, 120 La. 311, 45 So. 260.

⁴² *People v. Bemmerly*, 87 Cal. 117,

118, 25 Pac. 266; *Ward v. State*, 85 Ark. 179, 107 S. W. 677.

⁴³ *State v. Nelson*, 101 Mo. 464, 468, 14 S. W. 712; *Digby v. People*, 113 Ill. 123, 127, 55 Am. 402.

⁴⁴ *State v. Tilghman*, 11 Ired. (N. Car.) 513, 551. See *Davis v. State*, 120 Ga. 843, 48 S. E. 305. One witness may testify to the presence of an expectation of death and the declaration may be shown by another. *People v. Garcia*, 63 Cal. 19, 20; *Austin v. Commonwealth* (Ky.), 40 S. W. 905, 19 Ky. L. 474. And parol evidence to show the feeling of death being imminent is always proper. *Cleveland v. Commonwealth* (Ky.), 101 S. W. 931, 31 Ky. L. 115.

⁴⁵ *State v. McCoomer*, 79 S. Car. 63, 60 S. E. 237.

⁴⁶ *Bryant v. State*, 35 Tex. Cr. App. 394, 33 S. W. 978, 36 S. W. 79; *State v. Evans*, 124 Mo. 397, 409, 28 S. W. 8; *Snell v. State*, 29 Tex. App. 236,

makes the statements, gets better so that he is encouraged to believe and to express a hope that he will recover, will not exclude his statement actually made in immediate expectation of death.⁴⁷

It is never necessary that the dying declaration should have been made while the declarant was actually drawing his last breath.⁴⁸

The fact that a considerable period has intervened between the making of the declaration and the death of the declarant is immaterial, and furnishes no valid ground for rejecting the declaration if it is shown that, when it was made, the speaker was in fact fully impressed with the belief that he would die in a short time.⁴⁹ Thus, declarations which were uttered forty-eight hours,⁵⁰ six days,⁵¹ ten days,⁵² eleven days,⁵³ fifteen days,⁵⁴ seventeen days,⁵⁵

15 S. W. 722, 25 Am. St. 723; Reg. v. Steele, 12 Cox Cr. Cas. 168; Mockabee v. Commonwealth, 78 Ky. 380; Johnson v. State, 102 Ala. 1, 16 So. 99, 103; Small v. Commonwealth, 91 Pa. St. 304; Sims v. State, 139 Ala. 74, 36 So. 138, 101 Am. St. 17.

Ratification of declaration previously made—note, 86 Am. St. 647.

⁴⁷ State v. Caldwell, 115 N. Car. 794, 804, 20 S. E. 523; State v. Tilghman, 11 Ired. (N. Car.) 513, 552; State v. Reed, 53 Kan. 767, 773, 37 Pac. 174, 42 Am. St. 322; State v. Turlington, 102 Mo. 642, 657, 15 S. W. 141; Swisher v. Commonwealth, 26 Gratt. (Va.) 963, 21 Am. 330; People v. Stacy, 192 N. Y. 577, 85 N. E. 1114, aff'g 119 App. Div. (N. Y.) 743, 104 N. Y. S. 615; Rose v. State, 143 Ala. 114, 42 So. 21; Lowe v. State (Ga.), 63 S. E. 1114. An express statement that the deceased has surrendered all hope of recovery is indispensable where from the evidence it appears that his mind was busy with the idea of prosecuting those who had shot him at the time he made his statement. State v. Daniels, 115 La. 59, 38 So. 894.

⁴⁸ Johnson v. State, 102 Ala. 1, 16

So. 99, 103; Commonwealth v. Hanev, 127 Mass. 455, 457; Rice v. State, 51 Tex. Cr. App. 255, 103 S. W. 1156; Bricker v. Commonwealth (Ky.), 102 S. W. 1175, 31 Ky. L. 596; Commonwealth v. Latampa, 226 Pa. 23, 74 Atl. 736.

Declaration need not be made immediately before death, 86 Am. St. 662, 665.

⁴⁹ State v. Reed, 53 Kan. 767, 773, 37 Pac. 174, 42 Am. St. 322; Kennedy v. Commonwealth (Ky.), 100 S. W. 242, 30 Ky. L. 1063; State v. Brown, 111 La. 696, 35 So. 818.

Time when declaration should have been made—note, 86 Am. St. 663, 665, 1 L. R. A. (N. S.) 419.

⁵⁰ Woodcock's Case, 2 Leach C. Law 563.

⁵¹ People v. Weaver, 108 Mich. 649, 66 N. W. 567; Moore v. State, 96 Tenn. 209, 33 S. W. 1046; Daughdrill v. State, 113 Ala. 7, 21 So. 378.

⁵² Tinkler's Case, 1 East Pleas Crown 354.

⁵³ Rex v. Mosly, 1 Mood. C. C. 98, 101.

⁵⁴ State v. Blackburn, 80 N. Car. 474, 478.

⁵⁵ Commonwealth v. Cooper, 5 Al-

seven weeks⁵⁶ and five months,⁵⁷ before the death of the declarant have been received.⁵⁸

The burden of proving the presence in the mind of the declarant of the sense of approaching death is upon the prosecution.⁵⁹

§ 106. Declarations not admissible to prove all crimes.—Declarations made *in extremis* are never admissible as dying declarations in civil cases, though they may be received upon other grounds than their *ante mortem* character, as, for example, where they are declarations reciting facts of pedigree, or where they form a part of the *res gestæ*.⁶⁰

The declaration of a deceased person, which is offered in evidence as a dying declaration, is only admissible as such in case his death is the subject of an inquiry which is made because of an accusation of homicide, and the circumstances accompanying or leading up to or the cause of that death are the subject-matter of the declaration.⁶¹

len (Mass.) 495, 81 Am. Dec. 762; Commonwealth v. Roberts, 108 Mass. 296.

⁵⁶ Fulcher v. State, 28 Tex. App. 465, 472, 13 S. W. 750.

⁵⁷ State v. Craine, 120 N. Car. 601, 27 S. E. 72.

⁵⁸ State v. Crabtree, 111 Mo. 136, 20 S. W. 7; Boulden v. State, 102 Ala. 78, 15 So. 341; State v. Banister, 35 S. Car. 290, 14 S. E. 678; State v. Daniel, 31 La. Ann. 91; People v. Chase, 79 Hun (N. Y.) 296, 297, 29 N. Y. S. 376; Commonwealth v. Haney, 127 Mass. 455, 457; Kehoe v. Commonwealth, 85 Pa. St. 127; McEwen v. State, 152 Ala. 38, 44 So. 619.

⁵⁹ Peak v. State, 50 N. J. L. 179, 222, 223, 12 Atl. 701; Digby v. People, 113 Ill. 123, 128, 55 Am. 402; Wallace v. State, 90 Ga. 117, 15 S. E. 700; Reg. v. Jenkins, L. R. 1 C. C. 187,

191; Lester v. State, 37 Fla. 382, 20 So. 232. A statement made two or three minutes before death is admissible as a dying declaration, though the deceased did not say that he was going to die until he had finished his declaration. People v. Lee Sare Bo, 72 Cal. 623, 625, 14 Pac. 310.

⁶⁰ Daily v. New York & C. R. Co., 32 Conn. 356, 87 Am. Dec. 176; Friedman v. Railroad Co., 7 Phila. (Pa.) 203; Marshall v. Chicago & C. R. Co., 48 Ill. 475, 479, 480, 95 Am. Dec. 561; Wilson v. Boerem, 15 John. (N. Y.) 286; Zipperian v. People, 33 Colo. 134, 79 Pac. 1018; State v. Teachey, 138 N. Car. 587, 50 S. E. 232; Jones v. State (Ark. 1909), 115 S. W. 166.

⁶¹ 1 Greenl. on Ev., § 156; Rex v. Mead, 2 B. & C. 605; People v. Fong Ah Sing, 70 Cal. 8, 13, 11 Pac. 323;

The rule admitting dying declarations does not apply in the case of any crime, except homicide. And even where a crime, as for example, abortion, is by statute declared to be murder, if the woman, on whom it has been performed, dies, dying declarations are inadmissible. The accused is not indicted for the murder but for the abortion, and the victim's death is not a material and constituent element of the abortion, but affects the punishment alone.⁶²

An exception to this rule, more apparent than real, is sometimes

Montgomery v. State, 80 Ind. 338, 347, 41 Am. 815; *People v. Smith*, 104 N. Y. 491, 505, 10 N. E. 873, 58 Am. 537n; *People v. Davis*, 56 N. Y. 95, 96; *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297, 299; *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953, 955, 956; *State v. Shelton*, 2 Jones (N. Car.) 360, 364, 64 Am. Dec. 587; *State v. Nelson*, 101 Mo. 464, 14 S. W. 712; *Mitchell v. Commonwealth* (Ky.), 14 S. W. 489, 12 Ky. L. 458; *State v. McCoomer*, 79 S. Car. 63, 60 S. E. 237; *Connell v. State*, 46 Tex. Cr. App. 259, 81 S. W. 746; *People v. Schiavi*, 96 App. Div. (N. Y.) 475, 89 N. Y. S. 564; *Lockhart v. State*, 53 Tex. Cr. App. 589, 111 S. W. 1024; *Richards v. Commonwealth*, 107 Va. 881, 59 S. E. 1104; *State v. Harris*, 112 La. 937, 36 So. 810. The dying declaration of an accomplice in a burglary is inadmissible as a dying declaration against another accomplice, as his death is not under investigation. *People v. Hall*, 94 Cal. 595, 30 Pac. 7.

⁶²*Railing v. Commonwealth*, 110 Pa. St. 100, 103, 108, 1 Atl. 314; *Rex v. Hutchison* (1822), 2 B. & C. 608; *People v. Davis*, 56 N. Y. 95, 103, 104; *Lyles v. State*, 48 Tex. Cr. App. 119, 86 S. W. 763; *People v. Stison*, 140 Mich. 216, 103 N. W. 542, 112 Am. St. 397; *State v. Harper*, 35 Ohio St. 78, 80, 35 Am. 596; *Reg. v. Hind*, 8

Cox Cr. Cas. 300, 301; *Wooten v. Wilkins*, 39 Ga. 223, 99 Am. Dec. 456; *Rex v. Mead*, 2 B. & C. 605, 607. *Contra*, *Montgomery v. State*, 80 Ind. 338, 41 Am. 815; 3 *Crim. Law Mag.* 523; *State v. Dickinson*, 41 Wis. 299; *Commonwealth v. Sinclair*, 195 Mass. 100, 80 N. E. 799. The same principle was held applicable where, upon an indictment for robbery, the dying statement of the person robbed was offered to prove the accused guilty of the robbery. *Rex v. Lloyd*, 4 C. & P. 233. "The rule that dying declarations should point distinctly to the cause of death, and to the circumstances producing and attending it, is one that should not be relaxed. Declarations are uncertain evidence, liable to be misunderstood, imperfectly remembered and incorrectly related. As to dying declarations there can be no cross-examination. The condition of the declarant is often unfavorable to clear recollection, and to the giving of a full and complete account of all the particulars which it might be important to know. Hence, all vague and indefinite expressions, all language that does not distinctly point to the cause of death and its attendant circumstances, but requires to be aided by inference or supposition to establish facts tending to criminate, should be held inadmissible." *State v. Center*, 35 Vt. 378, 386.

made in the case of the homicide of two persons by one who is on trial for the murder of one of them only. If the circumstance of the deaths are so closely connected that they may be regarded as parts of a single transaction, the dying declaration of A. may be admitted on a trial for the killing of B., in a case where A. and B. were killed in the same transaction. The cases in which this exception has prevailed have been homicides by poisoning, where the deaths were nearly simultaneous in time and place, and where they were produced by the same means.⁶³

This exception has not, however, received universal recognition and should not be pressed too far.⁶⁴ And the mere circumstance that a person's death occurred in a disturbance in which the person for whose homicide the prisoner was indicted was killed, is insufficient to admit his declaration, when it is not shown that the declarant's death was directly due to the defendant's act.⁶⁵

§ 107. Dying declarations distinguished from those which are a part of the *res gestæ*.—It may be of value to distinguish clearly and somewhat in detail between declarations, whether of deceased, or living persons, which are admissible as original evidence forming a part of the *res gestæ* of the crime; and those which are wholly hearsay and which are received solely because they are dying declarations.⁶⁶

In regard to the former class of declarations it need only be said that they are generally admitted whatever the crime charged, on account of their unprompted, natural, contemporaneous and explanatory connection with the main transaction.⁶⁷ On the other hand dying declarations, not necessarily constituting any part of the *res gestæ*, but being usually subsequent in time and always narrative of past events, both in their form and nature, are mainly

⁶³ *Rex v. Baker*, 2 Mood. & Rob. 53; *State v. Terrell*, 12 Rich. (S. Car.) 321, 329; *State v. Wilson*, 23 La. Ann. 558, 559. Where the declarant was found unconscious in a house which had been robbed, her dying declarations were rejected on a trial for the homicide of the owner of the house, who was her husband, and who was found dead at the same time on a

road three hundred yards from the house. *Brown v. Commonwealth*, 73 Pa. St. 321, 329, 13 Am. 740.

⁶⁴ *State v. Bohan*, 15 Kan. 407.

⁶⁵ *State v. Westfall*, 49 Iowa 328.

⁶⁶ See *Hill's Case*, 2 Gratt. (Va.) 594, 605.

Dying declarations as part of *res gestæ*—note, 86 Am. St. 665.

⁶⁷ See *ante*, § 94, *et seq.*

admitted that homicide may not go unpunished, where the death of the declarant is the subject-matter of a criminal trial.⁶⁸

In such a case, if no third person were present at the instant of the homicide (and this, it is well known, is very frequently the case), it would be impossible to procure direct evidence upon the main fact in issue, as the mouth of the accused is closed by the policy of our law unless he shall see fit to testify for himself. But the fact that the evidence is received from the necessity of the matter furnishes no basis for its exclusion where other evidence of the cause and the attendant circumstances of the death is to be had. This is so even if the other proof is uncontradicted or conclusive.⁶⁹ And dying declarations are not admissible only in cases where the evidence is wholly circumstantial.

§ 108. Opinions contained in dying declarations are not admissible.

—The recitals in dying declarations, which are admissible in evidence, include recitals of fact which might have been given by the declarant if living and appearing as a witness at the trial, and may include statements of facts occurring or existing coincident with the commission of the homicide, and tending to establish every essential element of the crime. The declarations should not contain matter which would be excluded if the declarant were a witness.⁷⁰ Dying declarations are not admissible if stating opinions only. He is beyond the reach of cross-examination to ascertain the grounds upon which his opinion may be based, and other reasons may exist which would exclude his opinion if he were a living witness.

⁶⁸ *State v. Wood*, 53 Vt. 560, 564; *Commonwealth v. Casey*, 11 Cush. (Mass.) 417, 421, 59 Am. Dec. 150.

⁶⁹ *Reynolds v. State*, 68 Ala. 502; *People v. Beverly*, 108 Mich. 509, 66 N. W. 379. And dying declarations are not admissible only in cases where the evidence is wholly circumstantial.

⁷⁰ *State v. Black*, 42 La. Ann. 861, 8 So. 594; *Johnson v. State*, 17 Ala. 618; *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953; *People v. Olmstead*,

30 Mich. 431; *People v. Taylor*, 59 Cal. 640, 645; *Gardner v. State*, 55 Fla. 25, 45 So. 1028; *George v. State*, 145 Ala. 41, 40 So. 961, 117 Am. St. 17; *Connell v. State*, 46 Tex. Cr. App. 259, 81 S. W. 746.

Dying declarations, as a general rule, must consist of facts, and not opinions, 86 Am. St. 649, 652, but there are circumstances under which opinion may be shown by such a declaration, 86 Am. St. 649, 652.

Opinions in dying declarations are inadmissible. It is indispensable that the dying declaration should consist solely of facts, and not of conclusions, mental impressions or opinions.⁷¹

Hence it is proper to reject from evidence a statement of the deceased to a witness that he (the witness) knew how the shooting was done, that it was uncalled for and that the trouble was between the deceased and the witness.⁷² Thus, a dying statement that the deceased thought or believed⁷³ the accused had shot him, or that he expected the accused would try to kill him,⁷⁴ is inadmissible where the deceased did not see his assailant, but based his declaration wholly upon threats which had been made by the accused. But opinions in dying declarations are admissible whenever they would be received, if the declarant were himself a witness.⁷⁵ So a declaration that as the accused arose he was reaching in his pocket for his revolver is not a mere statement of a conclusion, but is descriptive of the act of accused in getting his revolver from his pocket, which he did.⁷⁶ And if an expression of an opinion or of a conclusion or of some belief not based on any fact within the knowledge of declarant, which is embraced in the declaration, can be separated from it, the court may do this and then strike out

⁷¹ *United States v. Veitch*, 1 Cranch C. C. (U. S.) 115, 28 Fed. Cas. 16614; *People v. Shaw*, 63 N. Y. 36; *State v. Mace*, 118 N. Car. 1244, 24 S. E. 798; *Mose v. State*, 35 Ala. 421; *State v. Williams*, 67 N. Car. 12; *State v. Elkins*, 101 Mo. 344, 351, 14 S. W. 116; *State v. Black*, 42 La. Ann. 861, 8 So. 594; *Moeck v. People*, 100 Ill. 242, 245, 39 Am. 38; *Matherly v. Commonwealth (Ky.)*, 19 S. W. 977, 978, 14 Ky. L. 182; *Berry v. State (Tex. 1897)*, 38 S. W. 1038; *Baker v. State*, 85 Ark. 300, 107 S. W. 983; *Johnson v. Commonwealth (Ky.)*, 107 S. W. 768, 32 Ky. L. 1117. An objection to the declaration because containing opinions must be promptly made. *State v. O'Brien*, 81 Iowa 88, 46 N. W. 752.

⁷² *Sanford v. State*, 143 Ala. 78, 39 So. 370.

⁷³ *Warren v. State*, 9 Tex. App. 619, 35 Am. 745; *Whitley v. State*, 38 Ga. 50; *People v. Wasson*, 65 Cal. 538, 539, 4 Pac. 555.

⁷⁴ *People v. Shaw*, 63 N. Y. 36, 38.

⁷⁵ *Brotherton v. People*, 75 N. Y. 159, 165; *Montgomery v. State*, 80 Ind. 338, 346, 41 Am. 815; *Boyle v. State*, 105 Ind. 469, 472, 5 N. E. 203, 55 Am. 218; *Hall v. State*, 132 Ind. 317, 323, 31 N. E. 536; *State v. Foot You*, 24 Ore. 61, 32 Pac. 1031, 33 Pac. 537; *Cleveland v. Commonwealth (Ky.)*, 101 S. W. 931, 31 Ky. L. 115. See also, *Underhill on Evidence*, § 186.

⁷⁶ *State v. Brown*, 188 Mo. 451, 87 S. W. 519.

what is inadmissible and receive what is admissible.⁷⁷ And a statement that the killing was intentional,⁷⁸ or without reason or provocation,⁷⁹ or for nothing,⁸⁰ is not such an expression of an opinion as will exclude a dying declaration. A dying declaration in these words, "Oh, Lordy! Willie shot me for nothing, without any cause," was not objectionable as a statement of a conclusion rather than a fact.⁸¹

This is the general rule and has been sustained by the majority of the cases. But in Kentucky it has been held that a declaration which either expressly or by implication states that the accused killed the deceased without cause is not competent. In that state it has been held that the statement of the decedent that the trouble "came up over" his daughters, and that there was some talk about the daughters which displeased the decedent and that the accused then shot the decedent without cause is not admissible.⁸²

§ 109. Must refer to the *res gestæ* of the homicide.—The declaration is admissible only so far as it points directly to the facts constituting the *res gestæ* of the homicide; that is to say, to the act of killing and to the circumstances immediately attendant thereon.⁸³

A dying statement showing why the deceased went to the place where the homicide was committed, or that, after the crime, he

⁷⁷ *Lipscomb v. State*, 76 Miss. 223, 25 So. 158.

⁷⁸ *State v. Nettlebush*, 20 Iowa 257.

⁷⁹ *State v. Black*, 42 La. Ann. 861, 8 So. 594; *Powers v. State*, 74 Miss. 777, 21 So. 657; *Wroe v. State*, 20 Ohio St. 460; *House v. State* (Miss. 1909), 48 So. 3; *Lockhart v. State*, 53 Tex. Cr. App. 589, 111 S. W. 1024. *Contra*, *Jones v. Commonwealth* (Ky.), 46 S. W. 217, 20 Ky. L. 355. A statement that accused shot him for nothing and because "of the crazy fool that was in him, or because he was just a crazy fool," were inadmissible. *Johnson v. Commonwealth* (Ky.), 107 S. W. 768, 32 Ky. L. 1117; *Craft v. State* (Tex. Civ. App., 1909), 122 S. W. 547.

⁸⁰ *Jackson v. State* (Miss. 1908), 47 So. 502.

⁸¹ *McMillan v. State*, 128 Ga. 25, 57 S. E. 309.

⁸² *Wagner v. Commonwealth* (Ky.), 108 S. W. 318, 32 Ky. L. 1185.

⁸³ *Starr v. Commonwealth*, 97 Ky. 193, 30 S. W. 397, 16 Ky. L. 843; *State v. Johnson*, 17 Ala. 618; *State v. Johnson*, 26 S. Car. 152, 153, 1 S. E. 510; *Wakefield v. State*, 50 Tex. Cr. App. 124, 94 S. W. 1046; *State v. Harris*, 112 La. 937, 36 So. 870; *State v. Doris* (Ore. 1908), 94 Pac. 44. See comprehensive note in 86 Am. St. 647, 649. The death of declarant and not of another should be under inquiry to render declaration admissible, 86 Am. St. 665, 666; *State v. Kelleher* (Mo., 1909), 123 S. W. 551.

stated to a bystander that he was unarmed,⁸⁴ or stating actions of the accused or of the deceased prior to the circumstances directly involved in the homicide as the possible motive for it, is not admissible.⁸⁵ Thus a statement that enmity always existed between the prisoner and the declarant,⁸⁶ or that they had always been friends,⁸⁷ or describing previous altercations between them,⁸⁸ or detailing threats made by the accused against the deceased long prior to the crime,⁸⁹ has been rejected. But a dying declaration describing threats is admissible if the threats are a part of the *res gestæ* of the homicide,⁹⁰ and generally the fact that a dying declaration, whether written or oral, is partly inadmissible, because it contains opinions or other irrelevant matter, does not exclude the whole of it if the part which is inadmissible can be separated from that which is not.⁹¹

§ 110. Mode of proof—Credibility, relevancy and weight.—The determination whether a statement should be received as a dying declaration is for the court upon all the facts.⁹² A *prima facie* case

⁸⁴ State v. Eddon, 8 Wash. 292, 36 Pac. 139; State v. Horn, 204 Mo. 528, 103 S. W. 69.

⁸⁵ People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233; Leiber v. Commonwealth, 9 Bush (Ky.) 11.

⁸⁶ Mose v. State, 35 Ala. 421.

⁸⁷ Starr v. Commonwealth, 97 Ky. 193, 30 S. W. 397, 398, 16 Ky. L. 843; State v. Doris (Ore. 1908), 94 Pac. 44.

⁸⁸ State v. Shelton, 2 Jones (N. Car.) 360, 64 Am. Dec. 587; Jones v. Commonwealth (Ky.), 46 S. W. 217, 20 Ky. L. 355; Foley v. State, 11 Wyo. 464, 72 Pac. 627.

⁸⁹ North v. People, 139 Ill. 81, 28 N. E. 966; State v. Wood, 53 Vt. 560; State v. Draper, 65 Mo. 335, 241, 27 Am. 287; Merrill v. State, 58 Miss. 65, 67; Hackett v. People, 54 Barb. (N. Y.) 370.

⁹⁰ State v. Wood, 53 Vt. 560, 565.

⁹¹ State v. Bridgham (Wash. 1908),

97 Pac. 1096. The court should charge that the declaration is admitted only to prove the fact and manner of the homicide and should direct the jury to disregard parts of it referring to other matters.

⁹² State v. Baldwin, 79 Iowa 714, 45 N. W. 297, 299; People v. Kraft, 148 N. Y. 631, 43 N. E. 80; Whitaker v. State, 79 Ga. 87, 92, 3 S. E. 403; Kehoe v. Commonwealth, 85 Pa. St. 127; Evans v. State, 58 Ark. 47, 22 S. W. 1026, 1027; People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690; State v. Doris (Ore., 1908), 94 Pac. 44; Bateson v. State, 46 Tex. Cr. App. 34, 80 S. W. 88; Park v. State, 126 Ga. 575, 55 S. E. 489; State v. Crone, 209 Mo. 316, 108 S. W. 555; Sims v. State, 139 Ala. 74, 36 So. 138, 101 Am. St. 17; State v. Zorn, 202 Mo. 12, 100 S. W. 591; Sailsberry v. Commonwealth (Ky.), 107 S. W. 774, 32 Ky. L. 1085; Tarver v. State, 137 Ala. 29, 34 So.

is sufficient to authorize a submission of dying declarations to the jury.⁹³ But this *prima facie* proof must be strong, and unless the court is firmly convinced that the declaration was made in actual expectation of immediate death it should not be received. To avoid creating prejudice against the accused in the minds of the jurors, it is advisable, as a matter of practice, to take the preliminary proof out of their presence and hearing,⁹⁴ though evidence may be received in the presence of the jurors, they being instructed that it must be dismissed from their consideration if the dying declaration is rejected.⁹⁵

627; *Coyle v. Commonwealth* (Ky.), 93 S. W. 584, 29 Ky. L. 340; *Bilton v. Territory* (Okla., 1909), 99 Pac. 163; *State v. Gallman*, 79 S. Car. 229, 60 S. E. 682; *State v. Franklin*, 80 S. Car. 332, 60 S. E. 953; *Brennan v. People*, 37 Colo. 256, 86 Pac. 79.

⁹³ *State v. Fuller* (Ore., 1908), 96 Pac. 456.

Grounds of admissibility of dying declarations—note, 86 Am. St. 638, 639, 56 L. R. A. 353; character of to be admissible, 86 Am. St. 647, 654; religious belief of declarant immaterial, 86 Am. St. 641, 642; but such fact may affect weight of testimony, 86 Am. St. 642; declarant must have been sane, 86 Am. St. 640; whether actual danger of death essential to admissibility, 86 Am. St. 654, 655; right of jury to determine existence facts essential to admissibility, 16 L. R. A. (N. S.) 660; whose declarations admissible, 86 Am. St. 640; competency of declarant as witness, 86 Am. St. 640, 642; intention or motive cannot generally be shown by, 86 Am. St. 652, 654; when intention or motive may be shown by, 86 Am. St. 652, 654; written dying declarations admissible, 86 Am. St. 642, 644; declarations of husband or wife, when admissible against the other, 86 Am. St. 641.

What admissible as dying declarations and in what cases, 86 Am. St. 637, 668; in prosecution for abortion, 86 Am. St. 666, 667; in prosecution for burglary, 2 Am. St. 398; in prosecution for homicide, 86 Am. St. 665, 666, 63 L. R. A. 916; in prosecution for seduction, 86 Am. St. 667, 668.

⁹⁴ *Doles v. State*, 97 Ind. 555, 559; *State v. Furney*, 41 Kan. 115, 13 Am. St. 262; *Swisher v. Commonwealth*, 26 Gratt. (Va.) 963, 21 Am. 330; *State v. Crone*, 209 Mo. 316, 108 S. W. 555.

⁹⁵ *Price v. State*, 72 Ga. 441, 555; *People v. Smith*, 104 N. Y. 491, 493, 498, 10 N. E. 873, 58 Am. 537n; *Johnson v. State*, 47 Ala. 9; *Doles v. State*, 97 Ind. 555, 559, 560. Dying declarations are admissible from the necessities of the case, but they should be received with caution, for the reason that the declarant has not been administered an oath, and an opportunity for cross-examination has not been afforded defendant, and that the declarant might be influenced against defendant; and for the further reason that the physical condition of the declarant might render the statement more or less unreliable. Circumstances surrounding the declaration should be weighed the same as those surrounding other evidence"—

After the declaration is admitted, its credibility and weight are wholly for the jury,⁸⁶ and these elements are to be determined by the same rules that are employed in judging the evidence of a living witness.⁸⁷ So an instruction that dying declarations are to be received or considered with great caution may properly be refused.⁸⁸

The dying declaration may be introduced not only as evidence against the accused, but as evidence in his favor as well,⁸⁹ though

or one of similar import, should be given. *State v. Mayo*, 42 Wash. 540, 85 Pac. 251.

⁸⁶ *Lambeth v. State*, 23 Miss. 322, 329; *State v. McCanon*, 51 Mo. 160; *Walston v. Commonwealth*, 16 B. Mon. (Ky.) 15, 35; *Doles v. State*, 97 Ind. 555, 562; *McQueen v. State*, 94 Ala. 50, 10 So. 433; *Evans v. State*, 58 Ark. 47, 55, 22 S. W. 1026; *State v. Zorn*, 202 Mo. 12, 100 S. W. 591; *DuBose v. State*, 120 Ala. 300, 25 So. 185; *State v. Adams* (Del., 1906), 65 Atl. 510; *Willoughby v. Territory*, 16 Okla. 577, 86 Pac. 56; *Jackson v. State* (Miss., 1908), 47 So. 502; *Carter v. State*, 2 Ga. App. 254, 58 S. E. 532; *Gardner v. State*, 55 Fla. 25, 45 So. 1028; *State v. Davis*, 134 N. Car. 633, 46 S. E. 722.

⁸⁷ *Justice v. State*, 99 Ala. 180, 182, 13 So. 658; *Jones v. State*, 70 Miss. 401, 404, 12 So. 444; *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042; *Moody v. State*, 1 Ga. App. 772, 58 S. E. 262; *Smith v. State*, 118 Ga. 61, 44 S. E. 817; *Gambrell v. State* (Miss., 1908), 46 So. 138; *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018; *State v. Davis*, 134 N. Car. 633, 46 S. E. 722; *State v. Adams* (Del., 1906), 65 Atl. 510; *State v. Doris* (Ore., 1908), 94 Pac. 44; *DuBose v. State*, 120 Ala. 300, 25 So. 185. Indeed, it has been held that the jury may also consider whether, as a matter of fact,

the deceased was *in extremis*, and had lost all hopes of recovery. *State v. Banister*, 35 S. Car. 290, 296, 14 S. E. 678; *Commonwealth v. Brewer*, 164 Mass. 577, 42 N. E. 92. A *prima facie* case that decedent was in the article of death and conscious of his condition is sufficient to carry a statement offered as a dying declaration to the jury, leaving to them the ultimate determination as to whether decedent was in the article of death and realized his condition. *Robinson v. State*, 130 Ga. 936, 60 S. E. 1005; *Bird v. State*, 128 Ga. 253, 57 S. E. 320.

⁸⁸ *Brown v. State*, 150 Ala. 25, 43 So. 194.

⁸⁹ *In Brock v. Commonwealth*, 92 Ky. 183, 186, 17 S. W. 337, 13 Ky. L. 450, where it appeared that deceased was drawing a pistol when killed, his dying statement that he had brought on the quarrel and was wholly to blame, was received in the defendant's favor. See, also, *Felder v. State*, 23 Tex. App. 477, 5 S. W. 145, 59 Am. 777n; *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270. Dying declarations are admissible on the ground that they are made under a solemn, religious sense of impending death concerning circumstances of which deceased was not likely to have been mistaken, but, since an accused is deprived of the power of cross-exam-

declarations of the deceased that he did not believe that the accused meant to kill him,¹⁰⁰ and that he did not want him prosecuted for the homicide have been rejected,¹ as being evidence of no fact except that the declarant possessed a Christian spirit and was ready to forgive his slayer.

In conclusion, it may be said that a witness, called to prove a dying declaration, is not expected to repeat the exact language used by the deceased, provided he can give the substance of what he heard in a reasonably connected and complete form.²

§ 111. Declaration admissible in its entirety—Contradictory or untruthful character.—A part of the declaration which is inadmissible may be stricken out on motion,³ but generally, all the deceased has said relevant to the guilt of the accused and bearing upon the facts of the homicide should be admitted, and it is erroneous for the court to reject any portion of it.⁴

So, whatever was said by third parties to the deceased, if it forms a part of the conversation containing the declaration, should not be rejected. The accused has the right to prove whatever was said, explaining, limiting or qualifying the declaration, or which will rebut the inference of his guilt which may be drawn therefrom. But he can not be permitted to prove statements which, while made during the conversation containing the declaration, are

ination, they should not be given great weight, where deceased had not a deep sense of accountability to her Maker, and an unenlightened conscience. *State v. Trusty*, 1 Penn. (Del.) 319, 40 Atl. 766.

¹⁰⁰ *McPherson v. State*, 22 Ga. 478.

¹ *State v. Nelson*, 101 Mo. 464, 468, 14 S. W. 712; *Adams v. People*, 47 Ill. 376; *Slone v. Commonwealth* (Ky.), 110 S. W. 235, 33 Ky. L. 266.

² *People v. Chin Mook Sow*, 51 Cal. 597; *Roberts v. State*, 5 Tex. App. 141; *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. 50; *Park v. State*, 126 Ga. 575, 55 S. E.

489; *State v. Clark* (W. Va., 1908). 63 S. E. 402.

³ *People v. Farmer*, 77 Cal. 1, 18 Pac. 800.

⁴ *State v. Terrell*, 12 Rich. (S. Car.) 321; *Archibald v. State*, 122 Ind. 122, 123, 23 N. E. 758; *State v. Petsch*, 43 S. Car. 132, 20 S. E. 993, 999; *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. 50; *People v. Fong Ah Sing*, 70 Cal. 8, 13, 11 Pac. 323; *Bennett v. State* (Tex. Cr. App.), 75 S. W. 314; *Commonwealth v. Spahr*, 211 Pa. 542, 60 Atl. 1084.

Admissibility of partial or distinct statements—note, 86 Am. St. 646.

not connected with the declaration, but are distinct and independent in their character.⁵

The admission of dying declarations does not violate a constitutional provision that the accused shall be confronted with the witnesses against him, and shall have an opportunity to hear their evidence.⁶ The contradictory, fragmentary or incomplete character,⁷ or even the manifest untruthfulness of the dying declaration, is no valid objection to its admissibility, however much these detract from its credibility as evidence. The fact that the deceased accuses a person who could not possibly have been present when he was slain, does not exclude his statement as against others who could have been present.⁸

Declarations made by the deceased contradicting his dying declaration in respect to the party accused of the homicide and as to the cause and circumstances of the crime are admissible to impeach it, though they are not shown to have been made under a sense of impending death,⁹ and (as it is generally impossible to do so), it is never necessary that the attention of the deceased should have been called to the occasion and circumstances of the contradictory statements.¹⁰ A statute prescribing the mode of laying a founda-

⁵ *People v. Beach*, 87 N. Y. 508; *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042. On the question of the disconnected and fragmentary character of the statement, see *State v. Garrison*, 147 Mo. 548, 49 S. W. 508.

⁶ *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650; *Robbins v. State*, 8 Ohio St. 131; *People v. Murray*, 52 Mich. 288, 17 N. W. 843; *State v. Price*, 6 La. Ann. 691; *Commonwealth v. Carey*, 12 Cush. (Mass.) 246, 249; *State v. Nash*, 7 Iowa 347; *Woodside v. State*, 2 How. (Miss.) 655; *Walston v. Commonwealth*, 16 B. Mon. (Ky.) 15; *State v. Van Sant*, 80 Mo. 67; *Anthony v. State*, Meigs (Tenn.) 265, 277, 33 Am. Dec. 143; *Campbell v. State*, 11 Ga. 353; *Jones v. State*, 130 Ga. 274, 60 S. E. 840; *Burrell v. State*, 18 Tex. 713; *People v. Glenn*, 10 Cal. 32.

⁷ *Richards v. State*, 82 Wis. 172, 179, 51 N. W. 652; *State v. Patterson*, 45 Vt. 308, 313, 12 Am. 200n; *State v. Giroux*, 26 La. Ann. 582.

⁸ *White v. State*, 30 Tex. App. 652, 655, 18 S. W. 462.

⁹ *State v. Lodge*, 9 Houst. (Del.) 542, 33 Atl. 312; *Carver v. United States*, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. 228; *Morelock v. State*, 90 Tenn. 528, 18 S. W. 258; *Gregory v. State*, 140 Ala. 16, 37 So. 259; *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540; *State v. Mills*, 79 S. Car. 187, 60 S. E. 664; *McCorquodale v. State* (Tex. Cr. App.), 98 S. W. 879; *State v. Mayo*, 42 Wash. 540, 85 Pac. 251; *State v. Fuller* (Ore., 1908), 96 Pac. 456.

¹⁰ *People v. Lawrence*, 21 Cal. 368; *Carver v. United States*, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. 228.

tion for impeaching a witness by proof of contradictory statements does not apply to dying declarations.¹¹ On the other hand, evidence has been received to show that the deceased declarant had been convicted of the crime of grand larceny and that he had been incarcerated in the penitentiary, for the purpose of impeaching the credibility of the dying declaration.¹² Declarations of the deceased, not made in contemplation of death, have been received to corroborate his dying declaration.¹³

§ 112. **The form of the declaration.**—It is not necessary that the deceased should have been formally examined or questioned as though he were upon the witness stand. But, on the other hand, dying declarations elicited by persistent questioning or persuasion, or by the most urgent solicitation to tell the truth, are always receivable.¹⁴

Dying declarations which consist simply in the decedent identifying certain persons as those who killed him have been received. So, where several men were brought to the accused and he was asked if he could recognize his assailant among them, and he picked out the accused from a number of persons who were strangers to him, it was held that this was admissible.¹⁵

¹¹ State v. Fuller (Ore., 1908), 96 Pac. 456.

¹² Martin v. Commonwealth (Ky.), 78 S. W. 1104, 25 Ky. L. 1928.

¹³ State v. Blackburn, 80 N. Car. 474, 478; State v. Craine, 120 N. Car. 601, 27 S. E. 72.

¹⁴ Commonwealth v. Haney, 127 Mass. 455, 458; Anderson v. State, 79 Ala. 5; Jones v. State, 71 Ind. 66; State v. Wilson, 24 Kan. 189, 36 Am. 257; White v. State, 30 Tex. App. 652, 18 S. W. 462; North v. People, 139 Ill. 81, 28 N. E. 966; Long v. State, 48 Tex. Cr. App. 175, 88 S. W. 203; Phillips v. State, 50 Tex. Cr. App. 481, 98 S. W. 868; McCorquodale v. State (Tex. Cr. App.), 98 S. W. 879; State v. Ashworth, 50 La. Ann. 94, 23 So. 270; Park v. State, 126 Ga. 575, 55 S. E. 489. The fact that the accused was forcibly

taken before his dying victim will not, *it seems*, exclude a dying declaration identifying him. People v. Gardner, 144 N. Y. 119, 128, 38 N. E. 1003, 43 Am. St. 741, 28 L. R. A. 699n. The fact that the dying declarant was under oath while speaking does not exclude his statements. State v. Talbert, 41 S. Car. 526, 529, 19 S. E. 852; 1 Bicknell's Cr. Prac., 161; State v. Bonar, 71 Kan. 800, 81 Pac. 484.

Form of dying declaration usually immaterial—note, 86 Am. St. 642, 647; character of declaration, 86 Am. St. 647, 654; declaration in form of questions and answers, 86 Am. St. 644, 646; declaration should be complete in itself, 86 Am. St. 646.

¹⁵ State v. Roberts, 28 Nev. 350, 81 Pac. 100.

If the declarant had sufficient mental consciousness to know what he was saying, the fact that he was partially under the influence of a narcotic will not render his statement inadmissible.¹⁶ But the declaration must be complete in itself, and nothing should remain to be said by the declarant which will materially qualify, enlarge or restrict its meaning.¹⁷

A declaration which is complete in itself, is not incompetent because the deceased was interrupted while he was speaking or because he attended to other matters during the conversation.¹⁸ The fact also that included in the statement there are utterances which are incompetent may be disregarded if the statement itself is complete and contains the facts which are properly receivable.¹⁹ Nor need the dying declaration relate every fact which constitutes the *res gestæ* of the homicide, if the statement of the deceased regarding any particular detail is complete and apparently a full expression of what he meant to say regarding that detail.²⁰

In case the declaration was committed to writing by a witness who was present when it was made it is very proper to produce the writing. But whether the writing is evidence at all depends on a variety of circumstances. If it was signed by the deceased, or, he being physically unable to sign it, was assented to and adopted by him, it certainly is evidence to show the precise language used by him, no matter when or by whom it was prepared.²¹ It is not proper to limit the use of such a paper to refreshing the memory of a witness who heard the declaration, nor should the writing be excluded because not supplemented by the oath of a witness that it is strictly correct,²² or because it does not precisely reproduce the

¹⁶ *People v. Beverly*, 108 Mich. 509, 66 N. W. 379; *State v. Reed*, 137 Mo. 125, 38 S. W. 574; *Hays v. Commonwealth* (Ky.), 14 S. W. 833, 12 Ky. L. 611.

¹⁷ *Vass v. Commonwealth*, 3 Leigh (Va.) 786, 24 Am. Dec. 695; *State v. Murdy*, 81 Iowa 603, 47 N. W. 867.

¹⁸ *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270; *Park v. State*, 126 Ga. 575, 55 S. E. 489.

¹⁹ *State v. Bonar*, 71 Kan. 800, 81 Pac. 484.

²⁰ *State v. Patterson*, 45 Vt. 308, 313, 12 Am. 200n.

²¹ *Perry v. State*, 102 Ga. 365, 30 S. E. 903; *Heningburg v. State* (Ala., 1907), 45 So. 246.

²² *Turner v. State*, 89 Tenn. 547, 15 S. W. 838. Cf. *Commonwealth v. Haney*, 127 Mass. 455, 458; *Bennett v. State*, 47 Tex. Cr. App. 52, 81 S. W. 30; *Commonwealth v. Spahr*, 211 Pa. 542, 60 Atl. 1084; *State v. Doris* (Ore., 1908), 94 Pac. 44.

language of the oral declaration, if it was read to the deceased and he then stated that it was all he wanted to say.²³ But the circumstances of its preparation, and all questions as to whether the deceased understood the meaning and contents of the writing, are wholly for the consideration of the jury, to be considered in determining what weight they should give to it.²⁴ A statement added to the writing by another after the accused had signed it, though a part of the *res gestæ*, must be regarded as an oral declaration, and proved as such.²⁵

Granting that the writing is evidence, and that its sole use is not merely to refresh the memory, the question remains to be considered, is it the best or primary evidence of the oral declaration, so that its absence must be accounted for before the declaration can be proved by parol evidence? Upon this question the cases are divided. The original statements were oral, and the mere fact that they were written down as they were uttered gives the writing no greater value as evidence than the oral statement. On these grounds many authorities hold that the writing, even though signed and sworn to by the deceased, is not the best evidence of the declaration,²⁶ and some even limit its use to refreshing the memory of the witness. But this rule is not of universal recognition, and it has several times been held that the writing is primary evidence, so that its absence must be accounted for before its contents can be proved by parol.²⁷

²³ *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266; *Foley v. State*, 11 Wyo. 64, 72 Pac. 627.

²⁴ *Perry v. State*, 102 Ga. 365, 30 S. E. 903.

²⁵ *State v. Doris* (Ore., 1908), 94 Pac. 44.

²⁶ *State v. Whitson*, 111 N. Car. 695, 697, 698, 16 S. E. 332; *Darby v. State*, 92 Ala. 9, 15, 9 So. 429; *State v. Mathes*, 90 Mo. 571, 2 S. W. 800; *Commonwealth v. Haney*, 127 Mass. 455, 458; *Anderson v. State*, 79 Ala. 5, 8; *State v. Patterson*, 45 Vt. 308, 314, 12 Am. 200n; *State v. Sullivan*, 51 Iowa 142, 50 N. W. 572; *Kirby v. State*, 151 Ala. 66, 44 So. 38; *Sims v.*

State, 139 Ala. 74, 36 So. 138, 101 Am. St. 17; *State v. Clark* (W. Va., 1908), 63 S. E. 402; *Jarvis v. State*, 138 Ala. 17, 34 So. 1025. Where a dying declaration was made under oath to a justice of the peace which the justice reduced to writing as fully as he could, it was proper for him, in addition to reading his notes, to supply from his recollection the remainder of the declarant's statement. *Mitchell v. State*, 82 Ark. 324, 101 S. W. 763.

²⁷ *King v. State*, 91 Tenn. 67, 659, 20 S. W. 169; *People v. Glenn*, 10 Cal. 32; *State v. Parham*, 48 La. Ann. 1309, 20 So. 727; *People v. Callaghan*, 4 Utah 49, 6 Pac. 49; *Drake v. State*.

If the dying declaration was committed to writing by an official under some express statutory requirement, it partakes of the character of a public writing or record, and must be proved as such.

Where the written declaration is not read to or signed by the deceased, it is certainly not primary evidence, unless it be a record, as for example a statement taken by a coroner.²⁸

Indeed, it may be doubtful if a writing which was taken down from the lips of the deceased, but which was not signed by him, is competent at all. It may unquestionably be used, however, to refresh the memory of the witness who heard the declaration while he testifies orally to what he heard.²⁹ Thus, for example, a justice of the peace may testify to an oral dying declaration made to him and taken down by him in writing. It is not improper to permit him to read his notes to the jury, though they were never signed by the deceased, if the justice will swear that he knows them to be substantially correct.³⁰

That some statements were committed to writing, while others were not, does not exclude parol proof of those wholly oral when the writing can not be produced or its absence accounted for.³¹

§ 113. Declarations by signs—Mental condition of the declarant.—

The declaration is usually oral, though this is by no means indispensable. It may be made by signs, where the dying person is speechless, as by a nod, the pressure of the hand, or by pointing to visible persons or objects in answer to leading questions.³²

Under these circumstances, and also where the declaration is

25 Tex. App. 293, 7 S. W. 868; Collier v. State, 20 Ark. 36; Jones v. State, 71 Ind. 66; State v. Tweedy, 11 Iowa 350; Merrill v. State, 58 Miss. 65, 67; State v. Williams, 28 Nev. 395, 82 Pac. 353; State v. Clark (W. Va., 1908), 63 S. E. 402.

²⁸ State v. Sullivan, 51 Iowa 142, 50 N. W. 572; Fuqua v. Commonwealth, 118 Ky. 578, 81 S. W. 923, 26 Ky. L. 420.

²⁹ Anderson v. State, 79 Ala. 5; Sailsberry v. Commonwealth (Ky.), 107 S. W. 774, 32 Ky. L. 1085; Gardner v. State, 55 Fla. 25, 45 So. 1028.

³⁰ Mitchell v. State, 82 Ark. 324, 101 S. W. 763.

³¹ People v. Simpson, 48 Mich. 474, 12 N. W. 662; Rex v. Reason, 1 Str. 499, 500; State v. Walton, 92 Iowa 455, 61 N. W. 179, 181; State v. Schmidt, 73 Iowa 469, 35 N. W. 590; Underhill on Ev., p. 146. Otherwise if the writing is produced. Adams v. State (Tex. App., 1892), 19 S. W. 907. Cf. State v. Finley, 118 N. Car. 1161, 24 S. E. 495; State v. Doris (Ore., 1908), 94 Pac. 44.

³² "If the injured person had but the action of a single finger and with

offered in writing,⁸³ it must appear by independent evidence that the declarant was mentally conscious,⁸⁴ realized his dying condition,⁸⁵ possessed memory, consciousness and intelligence sufficient to know what he was doing and saying, and, where a declaration in writing is offered, that he understood clearly its contents.⁸⁶

These are all questions for the jury, to be determined upon a consideration of all the facts. And a non-professional witness may not testify that, in his opinion, the declarant was delirious at the time he made his dying statement unless he can state all the facts upon which his conclusion is based.⁸⁷

§ 114. Dying declarations made by children.—It is always necessary, in order that a dying declaration should be admitted, to show that the declarant, if living, would be a competent witness. If, therefore, it appears from the facts of the case that the deceased was a child of tender years, who was not possessed of sufficient memory or intelligence to comprehend the nature and religious sanction of an oath, or that he did not expect to be punished in a future state if he told a lie, the declaration should be rejected.⁸⁸

that pointed to the words yes or no in answer to questions in such a manner as to render it probable that he understood, and was at the time conscious that he could not recover, it is admissible." *Commonwealth v. Casey*, 11 Cush. (Mass.) 417, 422, 59 Am. Dec. 150; *Mockabee v. Commonwealth*, 78 Ky. 380, 382; *Walker v. State*, 139 Ala. 56, 35 So. 1011.

⁸³ *Tracy v. People*, 97 Ill. 101.

⁸⁴ *Mitchell v. State*, 71 Ga. 128. Expert testimony to show deceased was rational when he made his statement has been rejected. *Lyles v. State*, 48 Tex. Cr. App. 119, 86 S. W. 763.

⁸⁵ *People v. Shaw*, 63 N. Y. 36, 40.

⁸⁶ *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953, 956; *Binfield v. State*, 15 Neb. 484, 19 N. W. 607. See *Tracy v. People*, 97 Ill. 101, 108-110. The

credibility of testimony of a medical witness in relation to the condition of deceased at the time of making dying declarations is a question for the jury. *State v. Davis*, 134 N. Car. 633, 46 S. E. 722.

⁸⁷ *State v. Nowells*, 135 Iowa 53, 109 N. W. 1016.

⁸⁸ In *Rex v. Pike*, 3 C. & P. 598, the declaration of a four-year-old child was rejected because, while it was shown that she knew she would die, she did not have that idea of a future state which is needed to make such a declaration admissible. But in *Reg. v. Perkins*, 9 C. & P. 396, the declaration of a child was admitted upon it being shown that he had a proper conception of a future existence beyond the grave.

CHAPTER XI.

CONSCIOUSNESS OF GUILT.

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| § 115. Facts showing a consciousness of guilt. | § 120. Resistance to arrest. |
| 116. Falsehoods by accused or suspected persons. | 121. Fabricating or suppressing evidence. |
| 117. Demeanor subsequent to crime. | 122. Silence under accusations of guilt. |
| 118. The flight or attempted escape of the accused. | 123. Attendant circumstances explaining motives and reasons of silence. |
| 119. Explanation by accused of his flight or attempted escape. | 124. The accusing statement or question. |
| 119a. Declarations which are self-serving are rejected. | |

§ 115. **Facts showing a consciousness of guilt.**—Any statement or conduct of a person indicating a consciousness of guilt, where at the time or thereafter he is charged with or suspected of the crime, is admissible as a circumstance against him on his trial. Evidence of circumstances, which are part of a person's behavior subsequent to an event with which it is alleged or suspected he is connected with or implicated in, are relevant if the circumstances are such as would be natural and usual, assuming the connection or implication to exist. This rule of circumstantial evidence may be regarded as almost universally applicable. And sometimes, but not universally, evidence of actions and circumstances, inconsistent with such an assumption, is relevant as a basis for an inference that the person accused or suspected did not participate in the event. Under these rules evidence will be received to prove or disprove facts or circumstances which indicate a consciousness of guilt on the part of the accused, existing after the crime with which he is charged was committed.

His conduct and general demeanor, his language, oral or written, and his mental and physical condition, attitude and relations towards the crime, or his actions in the presence of those who dis-

covered the crime,¹ or who are engaged in detecting its perpetrator, are relevant.²

The time which has elapsed, between the time of the crime and the occurrence of the incriminating or accusatory actions relied on to connect the accused with the crime, is sometimes an important element. The circumstances of the conduct of the accused must not be so remote in time or extend over so long a period as to create a strong probability that they are the outcome of other motives than a consciousness of guilt.³ On the other hand the reception of this evidence, whether consisting of statements or events, never depends on its contemporaneous connection with the crime that is charged, or on its being a part of the *res gestæ*.⁴

§ 116. Falsehoods by accused or suspected persons.—Evidence that the accused told falsehoods, or avoided, or attempted to avoid, giving information of himself, his actions or his whereabouts, at or about the time of the crime either in describing it or his relation to it,⁵ as when he has given false testimony at a coroner's in-

¹ *People v. Pyckett*, 99 Mich. 613, 58 N. W. 621; *State v. Jacobs*, 106 N. Car. 695, 10 S. E. 1031; *Hart v. State*, 15 Tex. App. 202, 49 Am. 188n. See *Elliott Ev.*, § 2723.

² *McAdory v. State*, 62 Ala. 154; *People v. Stanley*, 47 Cal. 113, 17 Am. 401; *People v. Welsh*, 63 Cal. 167; *State v. Hill*, 134 Mo. 663, 36 S. W. 223.

³ *State v. Baldwin*, 36 Kan. 1, 12, 12 Pac. 318; *State v. Hogan*, 117 La. 863, 42 So. 352; *People v. Tubbs*, 147 Mich. 1, 110 N. W. 132; *Parnell v. State*, 50 Tex. Cr. App. 419, 98 S. W. 269.

⁴ *People v. Stanley*, 47 Cal. 113, 119, 17 Am. 401; *People v. Welsh*, 63 Cal. 167.

⁵ *State v. Williams*, 66 Iowa 573, 574, 24 N. W. 52; *Cathcart v. Commonwealth*, 37 Pa. St. 108, 113; *State v. Williams*, 27 Vt. 724, 726; *State v. Bradley*, 64 Vt. 466, 469, 24 Atl. 1053;

Hicks v. State, 99 Ala. 169, 171, 13 So. 375; *Huffman v. State*, 28 Tex. App. 174, 12 S. W. 588; *State v. Cronin*, 64 Conn. 293, 305, 29 Atl. 536; *Commonwealth v. Tolliver*, 119 Mass. 312; *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; *McCann v. State*, 13 S. & M. (Miss.) 471, 497 (denial of name); *Reg. v. Miller*, 18 Cox Cr. Cas. 54; *Commonwealth v. Johnson*, 162 Pa. St. 63, 29 Atl. 280; *Wilson v. United States*, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. 895; *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054; *People v. Cuff*, 122 Cal. 589, 55 Pac. 407; *People v. Moran*, 144 Cal. 48, 77 Pac. 777; *State v. Jennings*, 48 Ore. 483, 87 Pac. 524, 89 Pac. 421; *VanWyk v. People* (Colo., 1909), 99 Pac. 1009; *Logan v. Commonwealth* (Ky.), 29 S. W. 632, 16 Ky. L. 508; *State v. Benner*, 64 Me. 267; *State v. Lambert* (Me., 1908), 71 Atl. 1092.

quest,⁶ or before the grand jury,⁷ is always relevant to show a consciousness of guilt.⁸ Such evidence would seem to have greater relevancy, cogency and force if the falsehoods were uttered after their author knew he was suspected or accused than before. Extra judicial statements by the accused may be proved and their falsity may then be shown. It may be shown that when he was arrested the accused made false statements of his prior whereabouts to the officer who arrested him. It may be proved that the accused gave false reasons for his presence in the town where the crime was perpetrated.⁹

Conscious innocence has nothing to fear from the fullest revelation of the truth. The intentional fabrication of false, inconsistent or contradictory explanations of suspicious circumstances, or the employment of evasion, equivocation or falsehood to divert or stifle inquiry into the facts connected with the commission of the crime or with the connection of the accused with it, is always relevant and proper, for it may with reason be presumed that an evil intention prompted the effort to hide the truth.¹⁰

The false statements of the accused may be proved by the state, and their falsity may then be shown in various ways.¹¹ In the first place the falsity of the statements may be shown in a very satisfactory and convincing manner by direct proof that the re-

⁶ *Hays v. State*, 40 Md. 633; *Lovett v. State*, 60 Ga. 257, 260.

⁷ *State v. Broughton*, 7 Ired. (N. Car.) 96, 101, 45 Am. Dec. 507.

⁸ *State v. Lambert* (Me.), 71 Atl. 1092; *State v. Jennings*, 48 Ore. 483, 87 Pac. 524, 89 Pac. 421. So, too, it may be shown that the accused has sworn to a falsehood in an affidavit made and used to procure a continuance. *State v. Bishop*, 98 N. Car. 773, 4 S. E. 357. But it is only when the statement is relevant to the issue that it can be proved. Its falsity cannot be shown merely for the purpose of showing he perjured himself. *Farrell v. People*, 103 Ill. 17; *Burris v. State*, 38 Ark. 221.

⁹ *People v. Cuff*, 122 Cal. 589, 55 Pac. 407.

¹⁰ *People v. Conroy*, 97 N. Y. 62, 80; *Cathcart v. Commonwealth*, 37 Pa. St. 108, 113; *Commonwealth v. Twitchell*, 1 Brew. (Pa.) 551, 608; *Crawford v. State*, 112 Ala. 1, 21 So. 214; *United States v. Randall*, Deady (N. S.) 524, 27 Fed. Cas. 16118; *Reg. v. Thomas*, 9 Cox Cr. Cas. 376, 1 L. & C. 313, 33 L. J. M. C. 22, 9 L. T. (N. S.) 488, 12 W. R. 108; *State v. Lambert* (Me., 1908), 71 Atl. 1092.

¹¹ *People v. Arnold*, 43 Mich. 303, 5 N. W. 385, 38 Am. 182; *Smith v. State*, 29 Fla. 408, 10 So. 894; *Reg. v. Miller*, 18 Cox Cr. Cas. 54; *Burton v. State*, 107 Ala. 108, 18 So. 284; *People v. Evans* (Cal., 1895), 41 Pac. 444.

verse of the facts alleged in the statements is true. So, the falsity of a statement or explanation may be brought out by showing that the facts stated are absolutely inconsistent and irreconcilable with other facts proved or admitted, or that the particular statement in question is contradicted by other statements made by the prisoner, and finally by the inherent improbability of the facts asserted in the false statement.¹²

Testimony that the accused has been guilty of falsehood must always be somewhat intrinsically unreliable. As in the analogous cases of admissions and incriminating conduct, its force depends largely upon the temperament, education, experience and habits of life and business of the prisoner. If the evidence of the alleged falsehood is not satisfactory to the jury it is entitled to no weight. That the accused has lied should be established beyond cavil, as it is only circumstantial and collateral to the main issue.¹³

If it shall be proved to the reasonable satisfaction of the jury that statements made by the accused of material facts indicating clearly his guilt the jury are justified in discrediting all his testimony.¹⁴

§ 117. Demeanor subsequent to crime.—The movements, appearance and bearing of the accused and his behavior when charged with a crime or confronted with the consequences or with the scene or the surroundings of the crime with which he is charged are always relevant.¹⁵ So the conduct of the prisoner when an attempt was made to arrest him, shortly after the commission of the offense, was properly allowed to be proved to show his criminal

¹² Burrill on Cir. Ev., pt. 2, ch. 1, p. 491. "Truth is the reliance of innocence. Falsehood is the resort of crime. All true facts are consistent with each other. If the prisoner is innocent there is no reason for withholding a true fact. Still less is there for uttering a falsehood. Falsehood is evidence of crime. Every falsehood uttered by way of exculpation becomes an article of circumstantial evidence of greater or less inculpatory force." State v. Benner, 64 Me. 267, 285.

¹³ State v. Williams, 27 Vt. 724, 726; Weightnovel v. State, 46 Fla. 1, 35 So. 856.

¹⁴ People v. Jackson, 182 N. Y. 66, 74 N. E. 565.

¹⁵ Handline v. State, 6 Tex. App. 347; State v. Hill, 134 Mo. 663, 36 S. W. 223; People v. Weber, 149 Cal. 325, 86 Pac. 671; Knight v. State (Tex. Cr. App., 1909), 116 S. W. 56; Maddox v. State (Ala., 1909), 48 So. 689.

intent.¹⁶ It may be shown that shortly after the crime he drank to excess,¹⁷ or was very nervous, worried,¹⁸ excited,¹⁹ mentally pre-occupied,²⁰ and manifested fear and turned pale on being arrested for the crime;²¹ or, while in custody, that he attempted suicide,²² or showed a lack of feeling as the result of a homicide with which he is charged, when, from his near relation to the deceased, the manifestation of great and sorrowful emotion would naturally be expected. And it is not material whether the movements or conduct of the accused after the crime, which are proved to connect him with it, are or are not of part of the *res gestæ* of the crime itself.²³

It cannot be shown that the accused refused to allow his house to be searched without a warrant as his insistence upon an undoubted constitutional right is a circumstance perfectly consistent with innocence.²⁴

¹⁶ State v. Jones, 118 La. 369, 42 So. 967.

¹⁷ People v. O'Neill, 112 N. Y. 355, 363, 19 N. E. 796, aff'g 49 Hun (N. Y.) 422, 4 N. Y. S. 119.

¹⁸ State v. Ward, 61 Vt. 153, 194, 17 Atl. 483; State v. Bradley, 64 Vt. 466, 470, 24 Atl. 1053.

¹⁹ Miller v. State, 18 Tex. App. 232; Prince v. State, 100 Ala. 144, 14 So. 409, 411, 46 Am. St. 28.

²⁰ Noftsinger v. State, 7 Tex. App. 301.

²¹ State v. Baldwin, 36 Kan. 1, 12, 12 Pac. 318; Williams v. State (Ark., 1891), 16 S. W. 816, 818; Lindsay v. People, 63 N. Y. 143; State v. Nash, 7 Iowa 347; Bollen v. State, 48 Tex. Cr. App. 70, 86 S. W. 1025. Under certain circumstances it may be proved that an accomplice of the accused on trial had attempted to commit suicide. It must be shown that the accused either advised or knew of the suicidal intention of his accomplice. Proof that the accused had expressly advised the suicide and had supplied or attempted to supply

the means for the accomplishment of this end when both were in jail is conclusive of his connection with it and furnishes a sufficient basis for its admission as evidence. People v. Patrick, 182 N. Y. 131, 74 N. E. 843.

²² State v. Jagers (N. J., 1904), 58 Atl. 1014.

²³ Greenfield v. People, 85 N. Y. 75, 86, 39 Am. 636. Such evidence is not admissible if it refers to a date several months after the death. State v. Baldwin, 36 Kan. 1, 12 Pac. 318.

²⁴ Murdock v. State, 68 Ala. 567. "Such indications are by no means conclusive and must depend upon the mental characteristics of individuals. Innocent persons, appalled by a charge of crime, will sometimes exhibit great weakness and terror. Persons under a great weight of sorrow will sometimes manifest the greatest composure and serenity and shed no tears." Greenfield v. People, 85 N. Y. 75, 86, 39 Am. 636. Cf. People v. Giancoli, 74 Cal. 642, 644, 16 Pac. 510; also, Liles v. State, 30 Ala. 24, 25, 68 Am. Dec. 108.

But it may be shown that the accused threw his hands behind him and drew a pistol at the time of his arrest.^{24a} So it may be shown that the accused, when he was arrested, was pale and was trembling greatly and appeared as though he would fall to the ground.²⁵

It may be shown that the accused wrote to the prosecutor offering to take a whipping if he would let him off,²⁶ or that he offered to pay money to stifle the investigation or prosecution of the crime of which he is suspected.²⁷ The rule excluding evidence of compromises in civil suits does not apply to criminal proceedings.²⁸

§ 118. The flight or attempted escape of the accused.—The attempts of the accused to escape while confined in jail may be shown as circumstances proper to be considered, and to be given such weight as they are fairly entitled to, with the other evidence, in determining the guilt or innocence of accused. The prosecution may show by questions put to the accused on his cross-examination,²⁹ or by other witnesses, that he had attempted flight, or that he had, by concealment or by other means,³⁰ attempted to

^{24a} *Glass v. State*, 147 Ala. 50, 41 So. 727 (homicide).

²⁵ *Bain v. State*, 46 Tex. Crim. App. 96, 79 S. W. 814.

When recent possession of stolen goods admissible to show consciousness of guilt, *Elliott's Ev.*, § 2725.

²⁶ *State v. De Berry*, 92 N. Car. 800, 801.

²⁷ *State v. Soper*, 16 Me. 293, 295, 33 Am. Dec. 665; *Sanders v. State*, 148 Ala. 603, 41 So. 466; *State v. Wideman*, 68 S. Car. 119, 46 S. E. 769; *State v. Farr* (R. I., 1908), 69 Atl. 5.

²⁸ *Cf. State v. Wright*, 48 La. Ann. 1525, 21 So. 160.

²⁹ *Ryan v. People*, 79 N. Y. 593; *Manning v. State*, 79 Wis. 178, 48 N. W. 209; *Bell v. State*, 115 Ala. 25, 22 So. 526; *State v. Davis*, 6 Idaho 159, 53 Pac. 678; *Williams v. State*, 69

Neb. 402, 95 N. W. 1014; *State v. Taylor*, 70 Vt. 1, 39 Atl. 447, 67 Am. St. 648, 42 L. R. A. 673n; *United States v. Greene*, 146 Fed. 803. See *Elliott's Ev.*, § 2724.

³⁰ *Jamison v. People*, 145 Ill. 357, 34 N. E. 486; *Fox v. People*, 95 Ill. 71; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *Clarke v. State*, 8 Crim. L. Mag. 19; *People v. Petmecky*, 2 N. Y. Cr. 450; *McCann v. State*, 13 S. & M. (Miss.) 471, 475; *Commonwealth v. Brigham*, 147 Mass. 414, 18 N. E. 167; *Burris v. State*, 38 Ark. 221; *State v. Lambert* (Me. 1908), 71 Atl. 1092; *Shumway v. State* (Neb. 1908), 117 N. W. 407; *Kennedy v. State*, 71 Neb. 765, 99 N. W. 645; *State v. Baird*, 13 Idaho 29, 88 Pac. 233; *Carr v. State*, 45 Fla. 11, 34 So. 892; *State v. Rodgers* (Mont., 1909), 106 Pac. 3.

escape from arrest or custody;³¹ that he had offered a bribe to procure his escape,³² that he had requested a fellow prisoner or some other person to bring him tools for that purpose,³³ or that he was actually in possession of such tools,³⁴ and that the accused have fled and subsequently been arrested out of the state then denied his identity, gave an assumed name and refused to return

- ³¹ *Allen v. United States*, 164 U. S. 492, 41 L. ed. 528, 17 S. Ct. 154; *State v. Chase*, 68 Vt. 405, 35 Atl. 336; *State v. Evans*, 138 Mo. 116, 39 S. W. 462, 60 Am. St. 549; *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953; *Anderson v. State*, 104 Ind. 467, 472, 4 N. E. 63, 5 N. E. 711; *State v. Howell*, 117 Mo. 307, 23 S. W. 263; *State v. Minard*, 96 Iowa 267, 65 N. W. 147; *Williams v. State*, 24 Tex. App. 17, 32, 5 S. W. 655, 658; *People v. Ogle*, 104 N. Y. 511, 11 N. E. 53, 4 N. Y. Cr. 349; *Elmore v. State*, 98 Ala. 12, 13 So. 427; *State v. Harris*, 48 La. Ann. 1189, 20 So. 729; *State v. Palmer*, 65 N. H. 216, 20 Atl. 6; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202; *Commonwealth v. McMahon*, 145 Pa. St. 413, 22 Atl. 971; *State v. Foster*, 136 Mo. 653, 38 S. W. 721; *Ryan v. People*, 79 N. Y. 593; *People v. Ashmead*, 118 Cal. 508, 50 Pac. 681; *State v. Garrison*, 147 Mo. 548, 49 S. W. 508; *State v. Lambert* (Me. 1908), 71 Atl. 1092; *State v. Marks*, 70 S. Car. 448, 50 S. E. 14; *State v. Wills*, 106 Mo. App. 196, 80 S. W. 311; *George v. State*, 61 Neb. 669, 85 N. W. 840; *Woodruff v. State*, 72 Neb. 815, 101 N. W. 1114; *State v. Ralston* (Iowa, 1908), 116 N. W. 1058; *Andrews v. State* (Tex. Cr. App. 1904), 83 S. W. 188; *Commonwealth v. Bezek*, 168 Pa. St. 603, 32 Atl. 109; *Commonwealth v. McManiman*, 27 Pa. Super. Ct. 304; *Allen v. State*, 146 Ala. 61, 41 So. 624; *Bolton v. State*, 40 So. 409, 146 Ala. 691, without opinion; *State v. Death-erage*, 35 Wash. 326, 77 Pac. 504; *Sherrill v. State*, 138 Ala. 3, 35 So. 129; *Dickey v. State*, 86 Miss. 525, 38 So. 776; *State v. Paisley*, 36 Mont. 237, 92 Pac. 566; *State v. Chase*, 68 Vt. 405, 35 Atl. 336; *Brown v. State* (Tex. Cr. App., 1909), 124 S. W. 101.
- ³² *Whaley v. State*, 11 Ga. 123, 127. A letter written by the accused in which he states that the prosecution means to send him to prison, but that this could never be done, as he meant to break jail, is competent. *Bradford v. State*, 147 Ala. 95, 41 So. 462. The state may always be permitted to prove what was done by the sheriff or other officer to ascertain the whereabouts of the accused where it appears he has taken flight. *Bennett v. State*, 47 Tex. Crim. App. 52, 81 S. W. 30. But in the absence of proof of flight on the part of the accused it is improper to admit evidence that a statutory reward for the arrest of the accused was claimed and paid. *Boykin v. State*, 89 Miss. 19, 42 So. 601.
- ³³ *State v. Jackson*, 95 Mo. 623, 8 S. W. 749; *People v. Petmecky*, 2 N. Y. Cr. 450.
- ³⁴ *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *Clark v. Commonwealth* (Ky. 1896), 32 S. W. 131, 17 Ky. L. 540.

without a requisition.⁸⁵ The flight of the accused after the crime cannot be proved against another person who was not actually implicated in aiding or procuring the flight.⁸⁶ Nor can the flight of a third person, whose connection with the crime does not appear, be proved to show that the third person committed it.⁸⁷

An attempt by a prisoner in jail awaiting trial for two distinct crimes to escape is not relevant to show that he is guilty of either. It may be impossible to determine which charge he fled, or attempted to flee, to avoid.⁸⁸ He may have fled because conscious that he was guilty of the one for which he is not on trial.

It may usually be shown by proving the declarations or conduct of the accused before the crime that he was preparing for leaving town. The evidence of preparations for departure from the scene of the subsequent crime must not be too remote in point of time. Preparations on the day of the crime or on the day before are competent, particularly when it is apparent from the other evidence that the accused had the commission of the crime in contemplation as where he has made threats that he will commit the crime.⁸⁹

It cannot with correctness be said that the flight or the attempted flight of the accused before his arrest, taken alone, raises a legal presumption of guilt that an inference of guilt *must* be drawn therefrom,⁹⁰ or that his flight, *without regard to the mo-*

⁸⁵ Johnson v. State, 120 Ga. 135, 47 S. E. 510.

⁸⁶ People v. Stanley, 47 Cal. 113, 118, 17 Am. 401; State v. Ruby, 61 Iowa 86, 15 N. W. 848. But on the trial of the accessory evidence of the concealment and flight of a principal not yet convicted is admissible to establish the guilt of the principal. State v. Rand, 33 N. H. 216; Cummins v. People, 42 Mich. 142, 143, 3 N. W. 305; McIntyre v. State (Tex. 1895), 33 S. W. 347; People v. Cleveland, 107 Mich. 367, 65 N. W. 216. See *contra*, Smith v. People, 38 Colo. 509, 88 Pac. 453.

⁸⁷ Owensby v. State, 82 Ala. 63, 2 So. 764.

⁸⁸ People v. McKeon, 19 N. Y. S. 486, 487.

⁸⁹ Hocker v. Commonwealth (Ky.), 111 S. W. 676, 33 Ky. L. 944; Teague v. State, 120 Ala. 309, 25 So. 209.

⁹⁰ In Ryan v. People, 79 N. Y. 593, 19 Hun (N. Y.) 188, the court said: "The evidence that the defendant made an effort to keep out of the way of the sheriff was very slight, if any evidence of guilt. There are so many reasons for such conduct, consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it

tive which prompted it, is, in law, proof of guilt. At the most it is only one of a series of circumstances to be considered by the jury with the reasons that prompted it, tending to show guilt or by which an inference of guilt may be raised,⁴¹ and it has no probative force unless it satisfactorily appears that the accused fled to avoid arrest or imprisonment for the crime charged. Even then, its force is slight, depending on the efforts made, the means employed, and the motives and knowledge by which the act was accompanied. The departure of the accused may have been prompted by motives consistent with innocence. He may have feared arrest for a crime totally distinct from that for which he is indicted, or he may have apprehended violence at the hands of the police. An officer who goes on the witness stand to prove that the accused has left the state may state how long he has been looking for the accused, may relate the steps he has taken to ascertain his whereabouts and may testify to the answers to the inquiries made by him. But all this evidence is only competent where the officer is seeking to arrest him for the crime for which the accused is actually being tried. If the pursuit of the officer has for its object an arrest for another crime any evidence of the officers as to the length or character of the pursuit or as to its incidents and circumstances is inadmissible.⁴² It is unnecessary in proving incidents connected with the flight of the accused, to produce the witness who actually met him away from home. It

deserves, depending upon the surrounding circumstances." To the same effect, see, *Alberty v. United States*, 162 U. S. 499, 40 L. ed. 1051, 16 Sup. Ct. 864; *United States v. Greene*, 146 Fed. 803.

⁴¹ *Hickory v. United States*, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. 327; *State v. Rodman*, 62 Iowa 456, 17 N. W. 663; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *Starr v. United States*, 164 U. S. 627, 41 L. ed. 577, 17 Sup. Ct. 223; *People v. Giancoli*, 74 Cal. 642, 644, 16 Pac. 510; *Sylvester v. State*, 71 Ala. 17, 26, 72 Ala. 201, 206; *Fox v. People*, 95 Ill. 71, 76; *State v. Stentz*, 33

Wash. 444, 74 Pac. 588; *Smith v. State*, 106 Ga. 673, 32 S. E. 851, 71 Am. St. 286; *Sweatt v. State* (Ala. 1908), 47 So. 194. Flight, if shown, is not conclusive, nor does it raise a legal presumption of guilt, but is to be given the weight to which the jury think it entitled, under the circumstances shown. In this connection they may take into consideration the defendant's age, intelligence and financial ability to make a defense. *United States v. Greene*, 146 Fed. 803.

⁴² *People v. Vidal*, 121 Cal. 221, 53 Pac. 558; *Bennett v. State*, 47 Tex. Cr. App. 52, 81 S. W. 30.

is permissible for one who has made a search for the accused to testify that he inquired in various places and was told by persons there that the accused was not there or that he was there and was traveling under an assumed name. Indeed, the one who has done the searching may testify to what anybody told him of the whereabouts of the accused over the objection that such evidence is hearsay.⁴³

§ 119. Explanation by accused of his flight or attempted escape.—

The escape or attempt of the accused to escape from actual incarceration is never conclusive evidence of guilt. It depends upon his motive. His actions may have arisen from a consciousness of guilt, the fear of trial and the dread of punishment. But it is equally probable that they may have been prompted by the fear that, though innocent, his property will make it impossible for him to defend himself,⁴⁴ or, being unable to give bail, and suffering from illness, he may seek liberty in order to avoid the discomforts and privations of imprisonment.⁴⁵

The evidence of flight or escape should go to the jury, who are the sole judges of its weight and sufficiency,⁴⁶ and of the motives which prompted the flight.⁴⁷ It need not be shown that the accused actually anticipated an immediate arrest at the moment of his escape.⁴⁸ But the mere fact that the accused left the county is not relevant if it is not shown *prima facie* that he did so to avoid arrest,⁴⁹ and the motives of his departure may be inferred

⁴³ *People v. Colmey*, 188 N. Y. 573, 80 N. E. 1115; 25, 19 So. 403; *Miller v. State*, 110 Ala. 69, 20 So. 392; *White v. State*, 111 Ala. 92, 21 So. 330; *Ryan v. People*, 79 N. Y. 593, 19 Hun (N. Y.) 188; *Fox v. People*, 95 Ill. 71, 77; *State v. Baird*, 13 Idaho 29, 88 Pac. 233; *Evans v. State* (Tex. Cr. App. 1903), 76 S. W. 467; *State v. Adams* (Del.), 65 Atl. 510; *United States v. Greene*, 146 Fed. 803.

⁴⁴ *United States v. Greene*, 146 Fed. 803.
⁴⁵ *State v. Mallon*, 75 Mo. 355. The character of the offense ought to be considered in determining the motives that prompted the flight. An innocent man accused of a capital crime may flee or attempt to break jail, while, if the charge involved a misdemeanor only, he may be willing, though innocent, to stand trial and be punished if convicted.

⁴⁶ *Carden v. State*, 84 Ala. 417, 4 So. 823; *Thomas v. State*, 109 Ala. 427.

⁴⁷ *Elmore v. State*, 98 Ala. 12, 13 So. 427.

⁴⁸ *State v. Frederic*, 69 Me. 400, 403.
⁴⁹ *State v. King*, 78 Mo. 555; *State v. Marshall*, 115 Mo. 383, 22 S. W. 452, 453.

from the circumstances of his flight.⁵⁰ The means used to escape may be shown circumstantially,⁵¹ and, where the absence of the accused is shown, inquiries made for him at his abode or usual places of resort at home or abroad, by police officers or others, with the answers given, may be received as an exception to the hearsay rule.⁵²

The accused is not required to explain his flight or concealment by evidence proving beyond a reasonable doubt that his motives were consistent with innocence.⁵³ The fact of his flight is a circumstance whose meaning is for the jury alone to determine, and he may be permitted to show the rectitude of his motives in fleeing to enable them to determine its meaning.⁵⁴ He should be allowed to prove that, before the date of the crime, he had intended or had arranged to leave the state;⁵⁵ that his flight was caused by threats⁵⁶ or by actual mob violence,⁵⁷ if he fled so soon after the threats coming to his knowledge as to show they caused it;⁵⁸ that great public excitement existed in the neighborhood where he lived, creating apprehensions of vio-

⁵⁰ *Welch v. State*, 104 Ind. 347, 353, 3 N. E. 850.

⁵¹ *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202.

⁵² *People v. Ogle*, 104 N. Y. 511, 11 N. E. 53, 4 N. Y. Cr. 349; *Carden v. State*, 84 Ala. 417, 4 So. 823; *People v. Fine*, 77 Cal. 147, 19 Pac. 269; *State v. Shipley*, 171 Mo. 544, 74 S. W. 612; *State v. Lucey*, 24 Mont. 295, 61 Pac. 994.

⁵³ *Fox v. People*, 95 Ill. 71.

⁵⁴ It seems that where there is no question as to who committed the crime, and the only issue is the degree of the offense, the accused should not be allowed to explain the motives of his flight. *People v. Ah Choy*, 1 Idaho 317. See also, *State v. Melton*, 37 La. Ann. 77.

⁵⁵ *State v. Potter*, 108 Mo. 424, 22 S. W. 89. When he left the county

immediately after the crime it may be shown, to illustrate his motive in leaving that, prior to the crime, he had entered into a contract which would require him to remain. *Welsh v. State*, 97 Ala. 1, 12 So. 275.

⁵⁶ *Lewallen v. State*, 33 Tex. Cr. App. 412, 26 S. W. 832; *State v. Barham*, 82 Mo. 67; *Golden v. State*, 25 Ga. 527; *State v. Desmond*, 109 Iowa 72, 80 N. W. 214.

⁵⁷ *State v. Griffin*, 87 Mo. 608; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *Batten v. State*, 80 Ind. 394; *State v. Ma Foo*, 110 Mo. 7, 19 S. W. 222, 33 Am. St. 414; *Arnold v. State*, 9 Tex. App. 435. Cf. *Kennedy v. Commonwealth*, 78 Ky. 447; *Brown v. State*, 88 Miss. 166, 40 So. 737.

⁵⁸ *State v. McDewitt*, 69 Iowa 549, 29 N. W. 459.

lence on his part;⁵⁹ and that he was advised or warned by relatives and friends to flee,⁶⁰ because his life was menaced.

But evidence to show that the accused had an opportunity to escape, or to break jail, of which he did not avail himself;⁶¹ that he surrendered or offered to surrender himself to the authorities,⁶² or telegraphed to the sheriff to come and arrest him,⁶³ or when arrested out of the jurisdiction voluntarily returned,⁶⁴ is inadmissible unless perhaps to rebut any inference of guilt which may have been created by evidence that the accused has fled.⁶⁵ Such actions may have been prompted by the fear of recapture, or by his confidence that, though guilty, he would be acquitted because of the ability of his counsel, the insufficiency of the evidence against him, or through the employment of bribery, or perjury or political or social influence.⁶⁶ Where it is proved by the prosecution that the accused ran away after he had committed

⁵⁹ *State v. Phillips*, 24 Mo. 475; *Brown v. State*, 88 Miss. 166, 40 So. 737.

⁶⁰ *State v. Moncla*, 39 La. Ann. 868, 2 So. 814; *Walters v. State*, 17 Tex. App. 226, 50 Am. 128; *Arnold v. State*, 9 Tex. App. 435. See *Simmons v. State* (Ala. 1909), 48 So. 606.

⁶¹ *State v. Wilkins*, 66 Vt. 1, 28 Atl. 323; *People v. Rathbun*, 21 Wend. (N. Y.) 509, 518, 519; *People v. Montgomery*, 53 Cal. 576, 578; *Johnson v. State*, 94 Ala. 35, 10 So. 667; *Delaney v. State*, 148 Ala. 586, 42 So. 815; *Gardiner v. People*, 6 Park. Cr. (N. Y.) 155; *People v. Curtiss*, 118 App. Div. (N. Y.) 259, 103 N. Y. S. 395; *Thomas v. State*, 47 Fla. 99, 36 So. 161; *Lingerfelt v. State*, 125 Ga. 4, 53 S. E. 803; *State v. Wilcox*, 132 N. Car. 1120, 44 S. E. 625; *Commonwealth v. Hersey*, 2 Allen (Mass.) 173; *State v. Bickle*, 53 W. Va. 597, 45 S. E. 917; *Harvey v. State*, 35 Tex. Cr. App. 545, 34 S. W. 623; *Jones v. State* (Ga. 1909), 63 S. E. 1114; *Jenkins v. State* (Fla., 1909), 50 So. 582.

⁶² *State v. Marshall*, 115 Mo. 383, 22

S. W. 452; *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216; *Cole v. State*, 45 Tex. Cr. App. 225, 75 S. W. 527; *Pate v. State*, 150 Ala. 10, 43 So. 343; *Walker v. State*, 139 Ala. 56, 35 So. 1011; *Walker v. State*, 13 Tex. App. 618; *Upton v. State*, 48 Tex. Cr. App. 289, 88 S. W. 212; *State v. Moncla*, 39 La. Ann. 868, 2 So. 814; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Smith*, 114 Mo. 406, 21 S. W. 827; *Barnett v. State* (Ala., 1909), 51 So. 299.

⁶³ *Walker v. State*, 13 Tex. App. 618, 643.

⁶⁴ *State v. Taylor*, 134 Mo. 109, 35 S. W. 92. Cf. *State v. Good*, 132 Mo. 114, 33 S. W. 790; *United States v. Crow*, 1 Bond (U. S.) 51, 25 Fed. Cas. 14895.

⁶⁵ See *Brown v. State*, 150 Ala. 25, 43 So. 194. But see *contra*, *Crawford v. United States*, 30 App. D. C. 1.

⁶⁶ Defendant cannot be permitted to prove that his conduct in jail since his arrest has been good. *State v. Fontenot*, 48 La. Ann. 305, 19 So. 111; *Hill v. State*, 37 Tex. Cr. App. 415, 35 S. W. 660.

a murderous assault it is proper to prove that the accused went to the house of the witness to whom the accused then surrendered himself and by whom he was then taken to the sheriff.⁶⁷ Nor can the accused be permitted, unless his flight is shown in the first instance, to testify that he left the country because he was too poor to make a proper defense.^{67a}

It will be seen from the above illustrations that the defendant cannot be permitted to manufacture evidence in his own favor. Further illustrations may be found in the court refusing to permit the defendant to show that he appeared surprised or astonished when accused of having committed a crime,⁶⁸ or that he behaved himself in an orderly manner when in jail.⁶⁹ And while evidence that the accused offered to compromise the matter is always relevant, he will not be allowed to show that he refused to compromise.⁷⁰ So, evidence in a case of homicide that after the accused had inflicted the mortal wound, he endeavored to aid the deceased or went to procure a physician for him, has been rejected.⁷¹

§ 119a. Declarations which are self-serving are rejected.—The statements or declarations of the accused in his own favor which are independent of the *res gestæ* of the crime and which are simply narrative in their character are not relevant as a part of his defense.⁷²

⁶⁷ Allen v. State, 146 Ala. 61, 41 So. 624.

^{67a} Toliver v. State, 94 Ala. 111, 10 So. 428. The appeal bond of the accused and its forfeiture are admissible to prove his flight. State v. Wingfield, 34 La. Ann. 1200; Gilleland v. State, 24 Tex. App. 524, 7 S. W. 241.

⁶⁸ Campbell v. State, 23 Ala. 44.

⁶⁹ State v. Fontenot, 48 La. Ann. 305, 19 So. 111.

⁷⁰ Williams v. State, 52 Ala. 411.

⁷¹ State v. Whitson, 111 N. Car. 695, 16 S. E. 332; State v. Strong, 153 Mo. 548, 55 S. W. 78.

⁷² Walker v. State, 139 Ala. 56, 35

So. 1011; Linnehan v. State, 120 Ala. 293, 25 So. 6; Hill v. State (Ala. 1908), 46 So. 864; McCoy v. State, 46 Ark. 141; People v. Rodley, 131 Cal. 240, 63 Pac. 351; People v. Taylor, 4 Cal. App. 31, 87 Pac. 215; State v. Swift, 57 Conn. 496, 18 Atl. 664; West v. State, 53 Fla. 77, 43 So. 445; Park v. State, 126 Ga. 575, 55 S. E. 489; Sullivan v. State, 101 Ga. 800, 29 S. E. 16; Carle v. People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. 208; Spittorff v. State, 108 Ind. 171, 8 N. E. 911; State v. Schaffer, 70 Iowa 371, 30 N. W. 639; State v. Gillespie, 62 Kan. 469, 63 Pac. 742, 84 Am. St. 411; Commonwealth v. Cosseboom,

An exception, however, is made where the prosecution introduces in evidence declarations of the accused which tend to incriminate him. The accused may then introduce that portion of the conversation of which these declarations form a part which relates or is connected with what the accused said in the first instance, though it may be partly or wholly in his favor.⁷³ A part of the conversation may be proved by one witness and a part by another witness if the parts thus proved form a connected whole and have a legitimate bearing on the statement of the accused.⁷⁴

It has been held that the accused shall not be permitted to prove that he requested or demanded to be taken before the deceased for identification;⁷⁵ that he had declared he had done nothing wrong and wanted to come to court and stand his trial,⁷⁶ or that, being charged with a homicide, he stated after the crime that he had fired the first shot into a ditch on the banks of which the crime was committed.⁷⁷ But the accused may, however, prove that he denied an accusation of crime made in his presence and hearing.

§ 120. Resistance to arrest.—An innocent person has nothing to fear from an arrest, except perhaps the inconvenience of the situation and the often unpleasant notoriety connected with it. Even if he be ill-supplied with means to secure his acquittal when tried, the evidence against him may be so intrinsically weak that

155 Mass. 298, 29 N. E. 463; State v. Morrow, 48 Ind. 432; v. Long, 201 Mo. 664, 100 S. W. 587; Paulson v. State, 118 Wis. 89, 94 N. W. 771; State v. Napier, 65 Mo. 462; State v. Patterson, 63 N. W. 49; M'Kee v. People, 36 N. Y. 113, 3 Abb. Pr. N. S. 216, 34 How. Pr. (N. Y.) 230; State v. Ward, 103 N. Car. 419, 8 S. E. 814; Rudy v. Commonwealth, 128 Pa. St. 500, 18 Atl. 344; State v. Green, 61 S. Car. 12, 39 S. E. 185; Colquit v. State, 107 Tenn. 381, 64 S. W. 713; State v. Leuhrman, 123 Iowa 476, 99 N. W. 140; Glover v. State (Tex. Cr. App., 1909), 122 S. W. 396; Garner v. State, 6 Ga. App. 788, 65 S. E. 842.

⁷⁴ Fertig v. State, 100 Wis. 301, 75 N. W. 960.

⁷⁵ Walker v. State, 139 Ala. 56, 35 So. 1011.

⁷⁶ Linnehan v. State, 120 Ala. 293, 25 So. 6.

⁷⁷ Burns v. State, 49 Ala. 370; People v. Estrado, 49 Cal. 171 87 Pac. 215.

the grand jury will fail to indict. If indicted, at least in crimes of little magnitude, he may, by securing bail, be able to reduce to a minimum the annoyance and discomfort he suffers. Hence resisting arrest, and particularly assaulting or attempting to kill the officer who makes or attempts to make the arrest, is strong evidence of a consciousness of guilt;⁷⁸ and the fact that the arresting officer did not know the accused was charged with the crime for which he is tried will not exclude evidence of his resistance.⁷⁹

It may be shown that the accused assaulted a bystander who seized him on the occasion of the crime,⁸⁰ and the threats of the accused that he would kill any one who attempted to arrest him, or that he would die before he would surrender, are also relevant.⁸¹

§ 121. Fabricating or suppressing evidence.—Evidence to show that the accused has attempted to fabricate or procure false evidence,⁸² to destroy evidence against himself,⁸³ to corrupt the witnesses for the state,⁸⁴ or to procure their absence,⁸⁵ by threats of

⁷⁸ State v. Taylor, 118 Mo. 153, 24 S. W. 449, 451; State v. Moore, 101 Mo. 316, 14 S. W. 182; McKevitt v. People, 208 Ill. 460, 70 N. E. 693; Horn v. State, 102 Ala. 144, 15 So. 278; Commonwealth v. McManiman, 27 Pa. Super. Ct. 304; Jamison v. People, 145 Ill. 357, 34 N. E. 486; People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098; State v. Spaugh, 200 Mo. 571, 98 S. W. 55; State v. Taylor, 118 Mo. 153, 24 S. W. 449; State v. Moore, 117 Mo. 395, 22 S. W. 1086; Mitchell v. State, 52 Tex. Cr. App. 37, 106 S. W. 124; Ryan v. People, 79 N. Y. 593; People v. Moore, 26 Misc. (N. Y.) 168, 56 N. Y. S. 802; Williams v. Commonwealth, 85 Va. 607, 8 S. E. 470; State v. Lambert (Me. 1908), 71 Atl. 1092; People v. Haxer (Mich. 1906), 108 N. W. 90.

⁷⁹ State v. Grant, 79 Mo. 113, 136, 49 Am. 218. Cf. Russell v. State, 37

Tex. Cr. App. 314, 39 S. W. 674; State v. Marks, 70 S. Car. 448, 50 S. E. 14.

⁸⁰ State v. Sanders, 76 Mo. 35; Lyles v. State, 48 Tex. Cr. App. 119, 86 S. W. 763.

⁸¹ Horn v. State, 102 Ala. 144, 15 So. 278, 281; Ross v. State, 74 Ala. 532.

⁸² See Underhill on Evidence, § 229. Dickey v. State, 86 Miss. 525, 38 So. 776; Allen v. Commonwealth (Ky.), 82 S. W. 589, 26 Ky. L. 807; State v. Marren (Idaho, 1910), 107 Pac. 993.

⁸³ Cover v. Commonwealth, 6 Cent. 585; Commonwealth v. Brown, 23 Pa. Super. Ct. 470; State v. Constantine, 48 Wash. 218, 93 Pac. 317; Sims v. State, 146 Ala. 109, 41 So. 413.

⁸⁴ People v. Marion, 29 Mich. 31; Eacock v. State, 169 Ind. 488, 82 N. E. 1039; State v. Constantine, 48 Wash. 218, 93 Pac. 317.

⁸⁵ Collins v. Commonwealth, 12

violence,⁸⁶ or otherwise,⁸⁷ is always admissible as showing a consciousness of guilt, and is of particular value where the incriminating evidence is mainly circumstantial.⁸⁸

Thus, the state may prove that the accused attempted to compel a person who testifies against him to sign a paper purporting to be his affidavit. It may then be shown that the paper was not, in fact, an affidavit at all. The notary whose name is signed to it is competent to show that the witness did not sign the paper alleged to have been signed and did not swear to it, but that the notary wrote and signed the affidavit in the absence of the witness.⁹⁰ Attempts by persons other than the accused to bribe or to suppress testimony are admissible if the accused had knowledge of or was in any way connected with the attempts.⁹¹ It is for the jury to determine whether or not the accused had knowledge of, or was connected with, the attempts to bribe witnesses.⁹² And finally it may be shown as proving the guilt of the accused, that on a prior trial he attempted to corrupt a member of the jury.⁹³

But the intentional destruction or removal of written evidence, or of a witness from the jurisdiction, or the failure or neglect by

Bush (Ky.) 271; *State v. Barron*, 37 Vt. 57. Evidence that a third person paid to procure the absence of a witness is inadmissible if the accused is not privy thereto. *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *Commonwealth v. Robbins*, 3 Pick. (Mass.) 63; *State v. Hamilton* (Del.), 67 Atl. 836; *Crowell v. State*, 79 Neb. 784, 113 N. W. 262; *Reid v. State*, 20 Ga. 681; *Ward v. Commonwealth* (Ky.), 83 S. W. 649, 26 Ky. L. 1256; *Ezell v. State* (Tex.), 71 S. W. 283.

⁸⁶ *Adams v. People*, 9 Hun (N. Y.) 89, 95; *Commonwealth v. Smith*, 162 Mass. 508, 39 N. E. 111; *State v. Mathews*, 202 Mo. 143, 100 S. W. 420; *Fitts v. State*, 102 Tenn. 141, 50 S. W. 756; *State v. Rorabacher*, 19 Iowa 154.

⁸⁷ *Conway v. State*, 118 Ind. 482, 490, 21 N. E. 285.

⁸⁸ *Williams v. State*, 22 Tex. App. 497, 505, 4 S. W. 64; *State v. Mathews*, 202 Mo. 143, 100 S. W. 420; *Maxey v. State*, 76 Ark. 276, 88 S. W. 1009; *Love v. State*, 35 Tex. Cr. App. 27, 29 S. W. 790; *Whart. Cr. Ev.*, § 750. It may be proved that while the accused was in jail he threatened to kill a person who was sent to identify him. *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

⁸⁹ *Minor v. State*, 55 Fla. 77, 46 So. 297.

⁹⁰ *Rice v. State*, 51 Tex. Cr. App. 255, 103 S. W. 1156.

⁹¹ *Eacock v. State*, 169 Ind. 488, 82 N. E. 1039.

⁹² *Gassenheimer v. United States*, 26 App. D. C. 432; *People v. Marion*, 29 Mich. 31; *State v. Case*, 93 N. Car. 545, 53 Am. 471.

the accused to produce evidence, creates no legal presumption of his guilt or that the evidence, if produced, would be unfavorable to him, in the absence of proof of an intention to suppress the evidence.⁹⁴ The intention is always very material and the accused must be permitted to testify to his intent in doing any act which is suspicious or which *prima facie* appears to be a destruction or suppression of evidence. For example, he may be allowed to testify to his intent in removing documents which the prosecution states he has destroyed or concealed.⁹⁵

Whether the state may show that a person implicated with the accused, or a person who had a very full or a complete knowledge of all the facts of the crime had fled from the reach of process, in order to avoid testifying and refused to return, depends on circumstances. It must be shown that the accused had procured the absence of such person; or, at least, that he had some knowledge of his intention to leave, and that he made no effort to secure his attendance.⁹⁶

It has been held that a false theory of defense is some evidence of guilt. It is not material that the accused did not himself invent it, but adopted a scheme put forward by others. The court may, therefore, charge that the false theory of defense indicating a consciousness of guilt may justify the jury in convicting the prisoner, if the incriminating evidence, in connection with the false defense, satisfies them beyond a reasonable doubt of his guilt.⁹⁷

Evidence that the accused during his imprisonment was studying the law of his case is not admissible for the purpose of proving an intention on his part to fabricate a defense.⁹⁸

⁹⁴ To use the fact that he had offered and used false evidence as a circumstance against him, the jury must be satisfied beyond all question that he was guilty of fabricating it, *i. e.*, introducing it knowing it to be false. *State v. Ward*, 61 Vt. 153, 194, 17 Atl. 483; *State v. Magoon*, 68 Vt. 289, 35 Atl. 310; *Allen v. United States*, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. 154.

⁹⁵ *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260.

⁹⁶ *People v. Sharp*, 107 N. Y. 427, 463, 14 N. E. 319, 1 Am. St. 851; *Commonwealth v. Costello*, 119 Mass. 214; *Bloomer v. State*, 75 Ark. 297, 87 S. W. 438.

⁹⁷ *Pilger v. Commonwealth*, 112 Pa. St. 220, 230, 5 Atl. 309; *Bloomer v. State*, 75 Ark. 297, 87 S. W. 438.

⁹⁸ *Cole v. State*, 48 Tex. Cr. App. 439, 88 S. W. 341.

§ 122. **Silence under accusations of guilt.**—The silence of the accused as regards statements in his hearing which implicate him directly or indirectly may be proved with the statements,⁹⁹ and from his acquiescence the jury may infer that the statements are true and that they prove his guilt. Silence is assent as well as consent, and may, where a direct and specific accusation of crime is made, be regarded under some circumstances as a *quasi*-confession.

An innocent person will at once naturally and emphatically repel an accusation of crime, as a matter of self-preservation and self-defense, and as a precaution against prejudicing himself. A person's silence, therefore, particularly when it is persistent, will justify an inference that he is not innocent. The accused may have been silent when he was interrogated or accused before a magistrate, a coroner or police officers, which is termed judicial interrogation, or he may have been silent extra-judicially, *i. e.*, when accused or questioned by private persons before or after his arrest.

For silence to be equivalent to a confession, it must be shown that the accused heard and understand the specific charge against him,¹⁰⁰ and that he heard it under circumstances not only per-

⁹⁹ State v. Suggs, 89 N. Car. 527; Brailey, 134 Mass. 527; Bookser v. Smith v. State, 147 Ala. 692, 40 So. 959; Rains v. Commonwealth (Ky.), 92 S. W. 276, 29 Ky. L. 66; Davis v. State (Tex. 1908), 114 S. W. 366; State v. Worthen, 124 Iowa 408, 100 N. W. 330; O'Hearn v. State, 79 Neb. 513, 113 N. W. 130; Musfelt v. State, 64 Neb. 445, 90 N. W. 237; Watt v. People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403; Gilman v. People, 178 Ill. 19, 52 N. E. 967; Commonwealth v. Dewhirst, 190 Mass. 293, 76 N. E. 1052; Joiner v. State, 119 Ga. 315, 46 S. E. 412; State v. Johnson, 73 N. J. L. 199, 63 Atl. 12; Lyon v. Commonwealth (Ky.), 96 S. W. 857, 29 Ky. L. 1020; People v. Swaile (Cal. App., 1909), 107 Pac. 134.

¹⁰⁰ Brown v. Commonwealth, 86 Va. 935, 11 S. E. 799; Commonwealth v. (Ky.) 92 S. W. 940, 29 Ky. L. 187.

mitting but calling on him for a denial,¹ taking into consideration all the circumstances and the persons who were present.²

¹ *Ettinger v. Commonwealth*, 98 Pa. St. 338; *Surber v. State*, 99 Ind. 71, 73; *Conway v. State*, 118 Ind. 482, 485, 21 N. E. 285; *Jones v. State*, 107 Ala. 93, 18 So. 237; *State v. Good*, 132 Mo. 114, 33 S. W. 790; *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046; *People v. Young*, 108 Cal. 8, 41 Pac. 281; *Williford v. State*, 36 Tex. Cr. App. 414, 37 S. W. 761; *State v. Magoon*, 68 Vt. 289, 35 Atl. 310; *Loggins v. State*, 8 Tex. App. 434; *Commonwealth v. Brown*, 121 Mass. 69; *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *Brister v. State*, 26 Ala. 107, 116; *Slattery v. People*, 76 Ill. 217; *Watt v. People*, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403; *Williams v. State*, 42 Ark. 35; *Ford v. State*, 34 Ark. 649; *State v. Mullins*, 101 Mo. 514, 14 S. W. 625; *State v. Smith*, 30 La. Ann. 457; *State v. Carroll*, 30 S. Car. 85, 8 S. E. 433, 14 Am. St. 883; *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115; *Raymond v. State*, 154 Ala. 1, 45 So. 895; *O'Hearn v. State*, 79 Neb. 513, 113 N. W. 130; *Graham v. State*, 118 Ga. 807, 45 S. E. 616; *State v. Richardson*, 194 Mo. 326, 92 S. W. 649; *State v. Walker*, 78 Mo. 380; *People v. McCue*, 87 App. Div. (N. Y.) 72, 83 N. Y. S. 1088; *Lumpkin v. State*, 125 Ga. 24, 53 S. E. 810; *Jones v. State*, 2 Ga. App. 433, 58 S. E. 559; *Smith v. State*, 52 Tex. Cr. App. 344, 106 S. W. 1161; *People v. Hossler*, 135 Mich. 384, 97 N. W. 754, 10 Det. Leg. N. 798; *State v. Taylor*, 70 Vt. 1, 39 Atl. 447, 67 Am. St. 648, 42 L. R. A. 673n. If a confession is inadmissible because the accused was not cautioned, or because he was under

duress, his silence ought in like circumstances to be refused. *Fulcher v. State*, 28 Tex. App. 465, 473, 13 S. W. 750; *Nolen v. State*, 14 Tex. App. 474, 46 Am. 247n.

² Wharton thus broadly and liberally states this rule in *Cr. Ev.*, 8th ed., § 679. "If A., when in B.'s presence and hearing, makes statements which B. listens to in silence, interposing no objection, A.'s statement may be evidence against B., whenever B.'s silence is of such a nature as to lead to the inference of assent." In *Commonwealth v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672, the court says: "The admissibility of silence depends on whether he hears and understands the statement and comprehends its meaning; whether the truth of the facts embraced in this statement is within his own knowledge; whether he is in such a situation that he is at liberty to make a reply. * * * If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury and inconsistent with decorum and the rules of law * * * or if he is restrained by fear, or by doubts of his rights; by a belief that his security will be promoted by his silence." See also, *Kelley v. People*, 55 N. Y. 565, 574, 14 Am. 342. It is for the court to determine whether the proceedings are judicial. *People v. Willett*, 92 N. Y. 29, 33, 1 N. Y. Cr. 355. See also *State v. Baruth*, 47 Wash. 283, 91 Pac. 977; *Hanna v. State*, 46 Tex. Cr. App. 5, 79 S. W. 544; *Maloney v. State* (Ark., 1909), 121 S. W. 728.

And if it be proved that the accused, when he heard the incriminating statement, positively denied it, the statement cannot be proved.³

§ 123. Attendant circumstances explaining motives and reasons of silence.—The silence of the accused may spring from such a variety of motives, some of which may be consistent with innocence, that silence alone is very slight evidence of guilt; and, aside from the inferences which may arise from the attendant circumstances, should be received with caution as proof of guilt.⁴

The accused may always show the attending circumstances of his silence, and, if he shall show, to the satisfaction of the jury, that his silence was caused by reasons or prompted by motives consistent with his innocence, the accusatory statements and his silence should be disregarded. Thus, he may show his silence was caused by threats;⁵ that the statements made did not implicate him;⁶ that he had or that he supposed he had no right to reply,⁷ as when the accusations were made in a judicial or *quasi-judicial* proceeding,⁸ as a coroner's inquest.⁹ So he may prove that he had promised to be silent under accusations made at a family council;¹⁰ and generally that, under the circumstances, he may show that no oral reply would have been either natural, proper or expedient.¹¹

³ People v. Turner, 1 Cal. App. 420, 82 Pac. 397.

⁴ Underhill on Ev., p. 112; People v. Manasse, 153 Cal. 10, 94 Pac. 92.

⁵ Flanagan v. State, 25 Ark. 92.

⁶ Loggins v. State, 8 Tex. App. 434.

⁷ Commonwealth v. Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 672; Simmons v. State, 50 Tex. Cr. App. 527, 97 S. W. 1052.

⁸ Bell v. State, 93 Ga. 557, 19 S. E. 244; Kelley v. People, 55 N. Y. 565, 571, 14 Am. 342; Comstock v. State, 14 Neb. 205, 15 N. W. 355; Weaver v. State, 77 Ala. 26; People v. Hillhouse, 80 Mich. 580, 45 N. W. 484; State v. Mullins, 101 Mo. 514, 14 S. W. 625; Burrill on Cir. Ev., p. 482.

The refusal by defendant to testify at a preliminary examination cannot be proved against him. Broyles v. State, 47 Ind. 251, 253; State v. Smith, 30 La. Ann. 457; State v. Hale, 156 Mo. 102, 56 S. W. 881.

⁹ State v. Mullins, 101 Mo. 514, 14 S. W. 625; People v. Willett, 92 N. Y. 29, 1 N. Y. Cr. 355.

¹⁰ Slattery v. People, 76 Ill. 217.

¹¹ "Declarations made in the presence of a party to which he makes no reply are sometimes competent, as equivalent to a tacit admission by him. This depends on whether he heard and understood them, whether he is at liberty to reply, whether he is in custody, or under restraint or

The mental condition of the person who made the accusing statements which were not denied is very important. If the person making the incriminating statements was so intoxicated as not to realize what he was saying, they may be disregarded and the silence of the accused is not competent. If, on the other hand, the accused is intimidated by the conduct of the party making the statements, who was drunk and violent in his conduct, silence is not relevant.¹²

Upon the question whether the silence of the accused under accusations of crime made in his presence while he is under arrest or in custody, but which are not made in a judicial proceeding or investigation, where it would have been improper for him to speak, is admissible, the cases are inharmonious. Some cases hold that the mere fact of the accused being in custody or under arrest excludes any inference of acquiescence in others' statements from his silence, though he had the right and the opportunity to speak.¹³ But it may be noted that it has never been expressly held that the fact that the accused is under arrest excludes evidence of his acts and conduct other than mere silence.¹⁴ On the other hand, where the accused was identified by the injured person or by any other witness in jail,¹⁵ or in a station-house immediately after his arrest,¹⁶ or on being brought before

duress, and whether the statements are made by such persons and under such circumstances as naturally call for a reply." *Commonwealth v. Brailey*, 134 Mass. 527, 530; *Newman v. Commonwealth (Ky.)*, 88 S. W. 1089, 28 Ky. L. 81.

¹² *Jones v. State*, 2 Ga. App. 433, 58 S. E. 559.

¹³ *State v. Diskin*, 34 La. Ann. 919, 921, 44 Am. 448; *State v. Carter*, 106 La. 407, 30 So. 895; *State v. Estoup*, 39 La. Ann. 906, 3 So. 124; *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235, 46 Am. 672; *Commonwealth v. McDermott*, 123 Mass. 440, 25 Am. 120; *Commonwealth v. Walker*, 13 Allen (Mass.) 570; *Gardner v. State (Tex. 1896)*, 34 S. W. 945; *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470,

in which case statements of deceased in homicide were made in the presence and hearing of the accused. See also *State v. Weaver*, 57 Iowa 730, 11 N. W. 675; *State v. Epstein*, 25 R. I. 131, 55 Atl. 204; *Hauger v. United States*, 173 Fed. 54, 97 C. C. A. 372.

¹⁴ *Fulcher v. State*, 28 Tex. App. 465, 472, 13 S. W. 750; *Cordova v. State*, 6 Tex. App. 207; *Greenfield v. People*, 85 N. Y. 75, 39 Am. 636.

¹⁵ *Ettinger v. Commonwealth*, 98 Pa. St. 338.

¹⁶ *Kelley v. People*, 55 N. Y. 565, 573, 14 Am. 342; *Ackerson v. People*, 124 Ill. 563, 16 N. E. 847; *State v. Murray*, 126 Mo. 611, 29 S. W. 700; *Murphy v. State*, 36 Ohio St. 628; *Green v. State*, 97 Tenn. 50, 36 S. W. 700.

a magistrate in his private office, after the preliminary examination, solely for identification,¹⁷ it was held that, as it would have been proper for him to deny the identification, his silence was admissible. The statements identifying a person under such circumstances, though made to a police officer and not addressed directly to the accused, so far concern the latter that they challenge him to assert his innocence, and his assertion of this fact would be both natural and proper.¹⁸

But it has been held that a statement by the accused made by him in reply to a question by a police officer if he had anything to say to a confession of an accomplice, that he would make his statement at the proper time, and, that he would stand trial and tell his story then, is not such acquiescence as to render the confession admissible against the accused.¹⁹

The silence of the accused is not competent unless it shall clearly appear that the witness called to prove the statement and the silence would have heard a response had any been made.²⁰ The witness may be asked if he would have heard the defendant speak, if he had said anything.²¹

The mental or physical condition of the parties to the conversation is relevant to show whether the accused heard the statements. Deafness or an unconscious condition on the part of the accused when the statement is made may be shown. If the question whether the accused heard what was said is in issue, the jury may consider these facts in determining the value of the evidence of silence.²² Proof that the accused did not understand the language spoken by his accuser will exclude the statement and the silence of the accused as evidence. Statements made by the accuser of an incriminating character have been excluded though uttered in the presence of the accused where they were made through an interpreter.²³

¹⁷ *State v. Suggs*, 89 N. Car. 527, 530.

¹⁸ *Kelley v. People*, 55 N. Y. 565, 575, 14 Am. 342; *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834 (accusations by deceased against one accused of homicide).

¹⁹ *O'Hearn v. State*, 79 Neb. 513, 113 N. W. 130.

²⁰ *Williams v. State*, 42 Ark. 380.

²¹ *Maynard v. People*, 135 Ill. 416, 25 N. E. 740; *Raymond v. State*, 154 Ala. 1, 45 So. 895.

²² *State v. Marsh*, 70 Vt. 288, 40 Atl. 836.

²³ *State v. Epstein*, 25 R. I. 131, 55 Atl. 204.

§ 124. **The accusatory assertion or question.**—The statement to be proved should be directly or indirectly relevant to the guilt of the accused. It must refer to matters upon which he is likely to be informed,²⁴ as for example a statement by deceased that the accused had shot him while running and that “you will have to die some day and give an account of this.”²⁵

His silence will not be admissible against the accused if there were nothing in the statement which required or demanded a denial from him. So, vague comments on the crime, or rumors about the circumstances of it, not particularly pointing to or concerning the accused are not relevant against him, though he was silent when he heard them.²⁶

Every sane man is in a position to deny or affirm statements regarding his own acts. But it is both unfair and absurd to construe his silence as respects other men's acts, of which, probably, he had no knowledge, as an affirmation or approval of them, or of any inference which may be drawn therefrom.²⁷

The accusing declaration or question is not evidence because of the veracity, credibility or competency of its author. The assent of the accused makes it admissible, the statement being put in his mouth by the assent implied from his silence, and its truth, as it were, guaranteed by the acquiescence of the accused,

²⁴ Accusations by the wife of a man, whom defendant is alleged to have killed, that he had killed her husband, that he had told her so, and had told her he would kill her, too, if she revealed the crime, made in defendant's presence, to which he replied that he would answer to the magistrates, may be proved by any one who heard them. Such charges clearly call for a prompt denial. *Miller v. State*, 68 Miss. 221, 8 So. 273; *Rains v. Commonwealth (Ky.)*, 92 S. W. 276, 29 Ky. L. 66.

²⁵ *State v. Sudduth*, 74 S. Car. 498, 54 S. E. 1013.

²⁶ *Franklin v. Commonwealth*, 105 Ky. 237, 48 S. W. 986, 20 Ky. L. 1137; *Jones v. State*, 107 Ala. 93, 18 So. 237; *People v. Young*, 108 Cal. 8, 41

Pac. 281; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *Commonwealth v. Brown*, 121 Mass. 69; *People v. O'Brien*, 68 Mich. 468, 36 N. W. 225; *State v. Murray*, 126 Mo. 611, 29 S. W. 700; *People v. Smith*, 172 N. Y. 210, 64 N. E. 814; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *Ettinger v. Commonwealth*, 98 Pa. St. 338; *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046.

²⁷ *Grigsby v. State*, 4 Baxt. (Tenn.) 19; *Kelley v. People*, 55 N. Y. 565, 14 Am. 342. Hence, the admissions of the thief not made in the presence of the defendant are not receivable against the latter on the trial of an indictment for receiving stolen goods. *Dye v. State*, 130 Ind. 87, 29 N. E. 771; *Reilley v. State*, 14 Ind. 217.

because it contains facts which he was called upon, but failed, to deny.²⁸

Thus, for example, statements made in the presence of the accused which lead directly to the crime or connected him directly with it called for a denial by him and his failure to deny such statements render the statements admissible.²⁹

The incompetency of the person who makes the accusation as a witness against the accused will not keep out his statement.³⁰ Thus a statement made by the four-year-old son of the accused, in his presence and in the presence of a police officer, showing the circumstances of the crime, may be proved by the police officer with the fact of the silence of the accused.^{30a} But a statement by an accomplice of the accused made in his presence while in custody is not made admissible against the accused by his silence.³¹ A witness may testify that the declaration was made in the presence of the accused. He will not be permitted, however, to state his opinion that the accused must have heard it, for that is not for the witness to determine.³² The person who made the statement is not an indispensable witness, as the statement and the silence of the accused may be proved by anybody who was present and heard the conversation.³³ The cases are not harmonious upon the mode of proving that the accused heard and understood the declaration, or whether the judge or jury are to determine these facts.

On the one hand it is affirmed that the facts that he heard and understood may be inferred by the jury from evidence that the

²⁸ *Drumwright v. State*, 29 Ga. 430; *State v. Talmage*, 107 Mo. 543, 17 S. W. 990; *Johnson v. State*, 90 Miss. 317, 43 So. 435; *People v. Long*, 7 Cal. App. 27, 93 Pac. 387. An implicating letter, written by a person not produced, is admissible against the accused, though neither the signature of the writer nor the truth of the accusation is proved, if defendant refuses to deny or explain it. *People v. Lewis*, 16 N. Y. S. 881, 62 Hun (N. Y.) 622 (without opinion).

²⁹ *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834.

³⁰ *People v. McCrea*, 32 Cal. 98; *Richards v. State*, 82 Wis. 172, 51 N. W. 652.

^{30a} *Geiger v. State*, 25 Ohio C. C. 742.

³¹ *Merriweather v. Commonwealth*, 118 Ky. 870, 82 S. W. 592, 26 Ky. L. 793.

³² *People v. Holfelder*, 5 N. Y. Cr. 179; *State v. Khowry*, 149 N. Car. 454, 62 S. E. 638.

³³ *State v. Monfre*, 122 La. 251, 47 So. 543.

statement was made in his physical presence, or from his nearness and attitude as a listener.³⁴ On the other, it is held that this is not enough, and that affirmative evidence is required to show *prima facie* to the satisfaction of the court that the attention of the accused was attracted, and that he did actually and distinctly hear and understand, before the statement shall be permitted to go to the jury as his admission.³⁵ If it appears indubitably that the accused was asleep,³⁶ or was unconscious from intoxication or otherwise; or that the statement was in a language he did not understand,³⁷ so that he could not hear or understand, his silence is not competent.³⁸

³⁴ *State v. Perkins*, 3 Hawks (N. Car.) 377; *Simmons v. State*, 115 Ga. 574, 41 S. E. 983; *Commonwealth v. Galavan*, 9 Allen (Mass.) 271; *Hall v. State*, 132 Ind. 317, 321, 31 N. E. 536; *Commonwealth v. Brailey*, 134 Mass. 527, 530; *Commonwealth v. Sliney*, 126 Mass. 49, 50; *Richards v. State*, 82 Wis. 172, 51 N. W. 652; *State v. Johnson*, 73 N. J. L. 199, 63 Atl. 12; *Kelley v. People*, 55 N. Y. 565, 14 Am. 342; *People v. Bissert*, 172 N. Y. 643, 65 N. E. 1120, aff'g 71 App. Div. (N. Y.) 118, 75 N. Y. S. 630.

³⁵ *Hall v. State*, 132 Ind. 317, 31 N. E. 536, 537; *Long v. State*, 13 Tex. App. 211; *Williams v. State*, 42 Ark.

380; *Jones v. State*, 65 Ga. 147, 150; *People v. Ah Yute*, 54 Cal. 89; *Rose v. State*, 13 Ohio C. C. 342, 7 Ohio Cir. Dec. 226; *State v. Blackburn* (Del. O. & T., 1892), 75 Atl. 536.

³⁶ *Lanergan v. People*, 39 N. Y. 39, 5 Abb. Pr. N. S. (N. Y.) 113, 6 Park Cr. (N. Y.) 209.

³⁷ *Territory v. Big Knot on Head*, 6 Mont. 242, 11 Pac. 670.

³⁸ It seems that if the accused, though physically present, was intoxicated, it is for the jury to decide if he was qualified to hear and understand, and if he did, in fact, assent by silence. *State v. Perkins*, 3 Hawks (N. Car.) 377, 378; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730.

CHAPTER XII.

CONFESSIONS.

- § 125. Definition and classification.
- 126. Voluntary character of confessions.
- 127. Burden of proof to show voluntary character.
- 128. Circumstances under which confession becomes involuntary.
- 129. Confessions made while under arrest.
- 130. Effect of cautioning the accused.
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- 132. Confessions taken at the preliminary examination.
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- 134. Confessions of persons associated in a conspiracy.
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- § 138. When facts discovered admit parts of an involuntary confession.
- 139. Confessions procured by persons in authority.
- 140. Confession need not be spontaneous.
- 141. Confessions made by signs or gestures.
- 142. Confessions of treason.
- 143. Confessions made by young children.
- 144. Judicial confessions—Plea of guilty.
- 145. Confessions of persons not indicted.
- 146. The value of confessions as evidence.
- 147. Corroborations of extra judicial confessions.
- 147a. Credibility of confession and use of in favor of the accused.

§ 125. **Definition and classification.**—A confession is a statement made at any time by a person, admitting or suggesting the inference that he has committed, or participated in the commission of, a crime. The statement must be made voluntarily and without any fear by or promise to him before it will be admitted as evidence against him on a criminal trial.¹

¹ People v. Miller, 122 Cal. 84, 54 wealth (Ky.), 15 Ky. L. 835, 26 S. Pac. 523; Allred v. State, 126 Ga. W. 1; Taylor v. State, 37 Neb. 788, 537, 55 S. E. 178; Collins v. Common- 56 N. W. 623; State v. Porter, 32

A confession is distinguished from an admission by the fact that an admission is a statement of a fact not necessarily incriminating the accused person.² The necessity for drawing a line between the two classes of statements, confessions and admissions, arises from the fact that admissions are always admissible as an exception to the rule excluding hearsay irrespective of the motive or inducement which prompted them, provided they are made against the interest of the person making them, while confessions must be shown to be entirely unprompted, either by the motives of hope or fear. Thus a statement by the accused showing how the crime was committed by other persons, he being present, but denying that he took part in it,³ or a statement by the accused which admits the commission of the act which is charged against him, but which denies that it was done with a criminal intent,⁴ is an admission merely, and not a confession. An offer by the accused to compromise the charge against him by paying money is not a confession, but is admissible as an admission.⁵ The

Ore. 135, 49 Pac. 964, 966; *State v. Heidenreich*, 29 Ore. 381, 45 Pac. 755; *Runnels v. State*, 42 Tex. Cr. App. 555, 61 S. W. 479. "A confession in criminal law is the voluntary declaration by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the crime. The word confession is not the mere equivalent of the words, statements or declarations." *People v. Strong*, 30 Cal. 151. A confession of guilt is an acknowledgment of the criminal act or of the facts that constitute the crime. Statements of facts and circumstances that do not in effect or by inference admit the commission of a crime do not in general constitute a confession of guilt. *Daniels v. State* (Fla.), 48 So. 747. "A confession, in criminal law, is a voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act and the

share and participation he had in it." *Black's Law Dictionary*, aff'd in *Owens v. State*, 120 Ga. 296, 298, 48 S. E. 21; *Spicer v. Commonwealth* (Ky.), 51 S. W. 802, 21 Ky. L. 528; *State v. Brinkley* (Ore., 1909), 105 Pac. 708.

² *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533n.

³ *Jones v. State*, 120 Ala. 303, 25 So. 204; *Dumas v. State*, 63 Ga. 600; *Boston v. State*, 94 Ga. 590, 20 S. E. 98; *State v. Heidenreich*, 29 Ore. 381, 45 Pac. 755; *Bell v. State*, 93 Ga. 557, 19 S. E. 244; *People v. Elliott*, 8 N. Y. St. 223; *State v. Gilman*, 51 Me. 206, 225; *Burnett v. State* (Neb., 1910), 124 N. W. 927; *State v. Kneeland* (Mont., 1909), 104 Pac. 513.

⁴ *State v. Abrams*, 131 Iowa 479, 481, 108 N. W. 1041; *State v. Thomas*, 135 Iowa 717, 725, 109 N. W. 900; *Owens v. State*, 120 Ga. 296, 48 S. E. 21.

⁵ *Michaels v. People*, 208 Ill. 603, 70 N. E. 747; *State v. Richmond*, 138 Iowa 494, 116 N. W. 609.

statement of one accused of murder by poisoning, that he had given too much of a certain drug, at the same time protesting that it was done by mistake and that the homicide was unintentional is not a confession and should not be submitted to the jury on that theory.⁶

A confession, to be receivable as such, must be an admission by the accused that he is guilty of the precise crime with which he is charged. The prisoner's declaration that he is guilty of other similar crimes, while competent to show the existence of a criminal intent, never amounts to a confession of the crime for which he is indicted, nor do the rules and principles regulating confessions apply to such declarations.⁷

⁶ *State v. Thomas*, 135 Iowa 717, 725, 109 N. W. 900. "The distinction in all our cases is between the effect of admissions of fact from which the guilt of the accused may be inferred and the admission of guilt itself. Incriminating statements, to be the equivalent of a confession of guilt, must be so comprehensive as to include every fact necessary to be proved by the prosecution in order to establish the defendant's guilt. An admission of the main fact, from which the essential elements of the criminal act may be inferred, amounts to an admission of the crime itself. If the main fact is admitted with a qualifying exclusion of a necessary ingredient of the crime charged, the crime is not confessed. The qualification is a part of the admission, and both must be considered in interpreting the meaning of the statement. A crime consists in something more than the commission of an act. There must be a union of act and intention. One may admit that he took a horse from the stable of another and, at the same time, explain that he purchased the horse from a named person claiming to own the horse, and

that there was no criminal intent on his part. If the admission that he took the horse was without explanation, the intent to steal could be inferred from the act of taking. But where the taking is claimed to have been in good faith and with no intention to commit a crime, and because of a purchase from one whom, in good faith, he believed to be the true owner the admission made with such qualification cannot mean that he was intending to confess his guilt of the crime of horse stealing. An admission of a fact not in itself involving criminal intent is not a confession. The term confession is restricted to acknowledgment of guilt and is not a mere equivalent of words or statements." *Owens v. State*, 120 Ga. 296, 48 S. E. 21.

⁷ *Commonwealth v. Call*, 21 Pick. (Mass.) 515; *Hardtke v. State*, 67 Wis. 552, 558, 30 N. W. 723; *People v. Hickman*, 113 Cal. 80, 45 Pac. 175. Thus an offer to bribe the district attorney, coupled with an admission of having committed an indecent assault, cannot be construed as a confession of the crime of rape. *Hardtke v. State*, 67 Wis. 552, 558, 30 N. W. 723.

Confessions may be either judicial or extra-judicial; the former are confessions that are made at a preliminary examination, at the coroner's inquest or on the trial of the accused. Extra-judicial confessions are those made out of court to any person. A plea of guilty on a prior trial⁸ or on the preliminary examination⁹ is an extra-judicial confession and may be proved as such on a subsequent trial. It is evidence merely and not conclusive on the court. This is the rule where the plea was accepted by the court and for some reason sentence was not imposed on the plea of guilty, or, being imposed, it was never executed. But a plea of guilty which the court refused to receive is not subsequently admissible in evidence as a confession.¹⁰

Declarations by the accused of an intention to commit separate offenses from that charged are not confessions. *Kinchelow v. State*, 5 Humph. (Tenn.) 9, 12. If the admission by defendant of the commission of other crimes than that charged is so inseparably connected with the confession of the crime for which he is on trial that it cannot be severed, it may be received, the jury being warned that it is in no sense evidence of the crime charged. *Gore v. People*, 162 Ill. 259, 44 N. E. 500. An admission by the accused that he killed deceased because of facts which even, if true do not justify or excuse the killing is a confession. *Jones v. State*, 130 Ga. 274, 60 S. E. 840.

⁸ *Commonwealth v. Ervine*, 8 Dana (Ky.) 30.

⁹ *Green v. State* (Fla.), 24 So. 537; *State v. Briggs*, 68 Iowa 416, 424, 27 N. W. 358; *Commonwealth v. Brown*, 150 Mass. 330, 331, 23 N. E. 49.

¹⁰ *Commonwealth v. Lannan*, 13 Allen (Mass.) 563; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516, 519. A demurrer to the indictment can never be construed as a confession. The accused may always be allowed to

show why he pleaded guilty and to prove that he was not in fact guilty wherever a prior plea of guilty is used against him as a confession on a subsequent trial. In *State v. Porter*, 32 Ore. 135, 49 Pac. 964, the court said after quoting almost all the text writers. "From these authorities we take it that the admission of a fact, or a bundle of facts, from which quiet is directly deducible, or which within and of themselves impart guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result on other facts or circumstances to be established." An admission by the accused that he is in possession of property alleged to be stolen coupled with exculpatory declarations is not a confession of the larceny. *State v. Heidenreich*, 29 Ore. 381, 45 Pac. 755. So in *State v. Red*, 53 Iowa 69, 4 N. W. 831, the accused on trial for murder admitted he had in his possession jewelry of the victim, a woman. The action of the court in calling this admission a confession was held to be

§ 126. **Voluntary character of confessions.**—Before a confession, either judicial or extra-judicial, can be received as such, it must first be shown that it was in every respect freely and voluntarily made.¹¹ This means that the confession must not be obtained by

error. The test is, are the facts stated by the accused, assuming them to be true, consistent with his innocence? If they are, his statement is an admission only and the rules of law relating to confessions do not apply to it. The admission may create a presumption against the accused which it will require evidence to remove. But unless the guilt of the accused is the sole and necessary resultant condition proceeding from or growing out of the facts admitted, the statement, however criminating, is merely an admission and not a confession.

Confessions in criminal cases, 6 Am. St. 242, 251; admissibility in evidence, 6 Am. St. 242, 251; question of admissibility for court, 6 Am. St. 249; whole confession must be admitted, 6 Am. St. 251; confession elicited by questions, 18 L. R. A. (N. S.) 799-801; presumption as to voluntariness, 18 L. R. A. (N. S.) 857; presumption as to character of, 18 L. R. A. (N. S.) 783; determination of character of confession, 18 L. R. A. (N. S.) 777-794; confession without proof of *corpus delicti*, 6 Am. St. 252; reason for exclusion of confession, 18 L. R. A. (N. S.) 772; collateral inducement for confession, 6 Am. St. 249; statements made in sleep as confession, 6 Am. St. 249; subsequent confessions, 18 L. R. A. (N. S.) 857-859; effect of language assuming guilt addressed to accused, 18 L. R. A. (N. S.) 802; confession induced by hope or fear, 18 L. R. A. (N. S.) 804-832; promise of accused to turn state's evidence, 6 Am. St. 251;

extrinsic facts ascertained through inadmissible confession, 6 Am. St. 250, 251; confession in prosecution for bribery, Elliott Ev., § 2907; in prosecution for counterfeiting, Elliott Ev., § 2957; in prosecution for homicide, Elliott Ev., § 3034; in prosecution for perjury, Elliott Ev., § 3088; in prosecution for rape, Elliott Ev., § 3103.

¹¹ *People v. Ward*, 15 Wend. (N. Y.) 231; *Commonwealth v. Taylor*, 5 Cush. (Mass.) 605, 610; *Commonwealth v. Morey*, 1 Gray (Mass.) 461, 463; *Commonwealth v. Preece*, 140 Mass. 276, 277, 5 N. E. 494; *Collins v. State*, 24 Tex. App. 141, 5 S. W. 848; *State v. Chambers*, 45 La. Ann. 36, 38, 11 So. 944; *Ross v. State*, 67 Md. 286, 289, 10 Atl. 218; *Nicholson v. State*, 38 Md. 140, 153; *People v. Taylor*, 93 Mich. 638, 641, 53 N. W. 777; *Smith v. State*, 88 Ga. 627, 629, 15 S. E. 675; *State v. Carson*, 36 S. Car. 524, 531, 532, 15 S. E. 588; *State v. Jones*, 54 Mo. 478, 479; *State v. Kinder*, 96 Mo. 548, 10 S. W. 77; *People v. Soto*, 49 Cal. 67; *People v. Fox*, 121 N. Y. 449, 24 N. E. 923, aff'd 50 Hun (N. Y.) 604, 3 N. Y. S. 359; *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676; *Fife v. Commonwealth*, 29 Pa. 429, 436; *Alfred v. State*, 37 Miss. 296, 306; *State v. Chisenhall*, 106 N. Car. 676, 680, 11 S. E. 518; *Walker v. State*, 136 Ind. 663, 668, 36 N. E. 356; *State v. Poole*, 42 Wash. 192, 84 Pac. 727; *State v. Daly*, 210 Mo. 664, 109 S. W. 53; *McAlpine v. State*, 117 Ala. 93, 23 So. 130; *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135; *State v. Berry*, 50 La. Ann. 1309.

any sort of threat or violence nor by any promise, either direct or implied, however slight the hope or fear produced thereby, nor by the exertion of any influence. And while circumstances are usually invoked to determine whether the confession is voluntary, yet as a safe general rule, it may be said that the statement will be presumed to be voluntary, unless it appears that it was inspired by a threat or a menace or procured by promises or inducements or the expectation of some hope or benefit.¹² A basis must be laid for the admission of the confession by ascertaining whether the prisoner had been told that it would be advantageous for him to confess, or whether any threat or promise had been made to him in connection with the crime, which was sufficient to make the confession involuntary. If the confession is the result of the pressure of a promise of some benefit, or was procured by a threat, it will be excluded. In other words, the fact that accused was influenced by hope or fear to make a confession is regarded as creating so strong a presumption that the confession is untrue, that the law rejects it as worthless.

The preliminary question, was the confession voluntary? bearing directly upon its competency as evidence, must be, according to the majority of the cases, decided by the court as a mixed question of law and fact.¹³ And the court may hear evidence

24 So. 329; *Mitchell v. State* (Miss. 1898), 24 So. 312; *Pearsall v. Commonwealth* (Ky. 1906), 92 S. W. 589, 29 Ky. L. 222; *Watts v. State*, 99 Md. 30, 57 Atl. 542; *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506; *People v. Brasch*, 193 N. Y. 46, 53, 85 N. E. 809; *Fouse v. State* (Neb.) 119 N. W. 478; *Morris v. State*, 146 Ala. 66, 41 So. 274. See, also, *Underhill on Ev.*, § 89. "Voluntary is not always used in contradistinction to compulsory. In many cases voluntary means proceeding from the spontaneous operation of the party's own mind, free from the influence of any extraneous disturbing cause." *People v. McMahon*, 15 N. Y. 384, 386; *State v. Bohanon*, 142 N. Car. 695, 55 S. E. 797.

¹² *Anderson v. State*, 133 Wis. 601, 114 N. W. 112.

¹³ *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *Ford v. State*, 75 Miss. 101, 21 So. 524; *Hunter v. State*, 74 Miss. 515, 21 So. 305; *Palmer v. State*, 136 Ind. 393, 396, 36 N. E. 130; *Brown v. State*, 71 Ind. 470, 473; *State v. Patterson*, 73 Mo. 695, 706; *State v. Kinder*, 96 Mo. 548, 550, 10 S. W. 77; *Brister v. State*, 26 Ala. 107, 129; *Simmons v. State*, 61 Miss. 243, 257; *Redd v. State*, 69 Ala. 255, 259; *People v. Fox*, 50 Hun (N. Y.) 604, 3 N. Y. S. 359, 24 N. E. 923, aff'g 121 N. Y. 449; *Thomas v. State*, 84 Ga. 613, 618, 10 S. E. 1016; *Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. 634; *People*

from both sides to show the circumstances under which the confession was made.^{13a} And as the question is one wholly for the court to determine, the witness who testifies to what was said and to the circumstances should not be permitted to state that the confession was voluntary.¹⁴ The court must be allowed a considerable measure of discretion in determining this question. No particular threat or promise producing a confession can safely be said as matter of law to render the confession inadmissible. for the effect of the threat or promise may be neutralized by other facts and conditions. The admissibility of confessions so largely depends upon the special circumstances of each case that it is difficult, if not impossible, to formulate any rule which will embrace all the cases. And as the question is addressed in the first instance to the judge, and since his discretion must be controlled by all the attendant circumstances the courts have wisely foreborne to mark with absolute precision the limits of admission and exclusion.¹⁵ But numerous authorities hold that in case a conflict of evidence or room for doubt exists as to the voluntary nature of the confession, the court ought to submit the confession to the jury with an instruction that they may determine from

v. Howes, 81 Mich. 306, 401, 45 N. W. 961; Burton v. State, 107 Ala. 108, 18 So. 284; People v. Siemsen, 153 Cal. 387, 95 Pac. 863; Draughn v. State, 76 Miss. 574, 25 So. 153; Commonwealth v. Antaya, 184 Mass. 326, 68 N. E. 331; State v. Berberick (Mont. 1909), 100 Pac. 209; State v. Blodgett, 50 Ore. 329, 92 Pac. 820; State v. Sherman, 35 Mont. 512, 90 Pac. 981, 119 Am. St. 869; Hintz v. State, 125 Wis. 405, 104 N. W. 110; State v. Landers, 21 S. Dak. 606, 114 N. W. 717; State v. Stibbens, 188 Mo. 387, 87 S. W. 460. It is the duty of the court to hear all the preliminary evidence before deciding to admit or reject the confession. People v. Rogers, 192 N. Y. 331, 85 N. E. 135, and Underhill on Ev., § 89. And the court may and perhaps should, on request, examine the witnesses on

this point, out of the hearing of the jurors. Anderson v. State, 72 Ga. 98; State v. Kinder, 96 Mo. 548, 550, 10 S. W. 77; State v. Kelly, 28 Ore. 225, 42 Pac. 217, 52 Am. St. 777; Holland v. State, 39 Fla. 178, 22 So. 298. It has been held error not to determine this before the confession is submitted to the jury. Smith v. State, 88 Ga. 627, 629; Ellis v. State, 65 Miss. 44, 47, 3 So. 188, 7 Am. St. 634; King v. State, 40 Ala. 314; Brown v. State, 71 Ind. 470, 473; Nolen v. State, 8 Tex. App. 585; Commonwealth v. Culver, 126 Mass. 464, 466.

^{13a} Zuckerman v. People, 213 Ill. 114, 72 N. E. 741.

¹⁴ Jones v. State (Ala.), 47 So. 100.

¹⁵ Hopt v. People, 110 U. S. 574, 583, 28 L. ed. 262, 4 Sup. Ct. 202, 207.

the evidence whether it was or was not free and voluntary and that if they believe from all the evidence that it was induced by threats or promises, or was not free and voluntary, they must reject it from their consideration, though they may believe it to be true.¹⁶

§ 127. **Burden of proof to show voluntary character.**—The cases are not harmonious upon the question whether the prosecution has the burden of proof to show the free and voluntary character of the confession. Many of the cases sustain the affirmative of this proposition, and require the state to show before the confession is received in evidence by some evidence that it was freely and voluntarily made.¹⁷ Other authorities sustain, at least in the absence of evidence to the contrary, the very reasonable theory that a confession, like most of the acts and utterances which are the result of human agency, is presumed to have been voluntary until the contrary is shown.¹⁸ This view casts the burden of

¹⁶ *Commonwealth v. Preece*, 140 Mass. 276, 5 N. E. 494; *Commonwealth v. Piper*, 120 Mass. 185, 188; *People v. Barker*, 60 Mich. 277, 298, 27 N. W. 539, 1 Am. St. 501n; *Stallings v. State*, 47 Ga. 572; *Thomas v. State*, 84 Ga. 613, 618, 10 S. E. 1016; *People v. Kurtz*, 42 Hun (N. Y.) 335, 345, 3 N. Y. St. 715; *People v. Howes*, 81 Mich. 396, 401, 45 N. W. 961; *Wilson v. United States*, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. 895; *People v. Cassidy*, 133 N. Y. 612, 30 N. E. 1003, 44 N. Y. St. 869; *Commonwealth v. Shew*, 190 Pa. St. 23, 42 Atl. 377; *Kennon v. State*, 46 Tex. Cr. App. 359, 82 S. W. 518; *State v. Foster*, 136 Iowa 527, 114 N. W. 36; *People v. White*, 176 N. Y. 331, 68 N. E. 630; *Johnson v. State*, 49 Tex. Cr. App. 314, 94 S. W. 224; *State v. Stebbens*, 188 Mo. 387, 87 S. W. 460; *Commonwealth v. Hudson*, 185 Mass. 402, 70 N. E. 436; *State v. Westcott*, 130 Iowa 1, 104 N. W. 341; *Clay v. State*, 15

Wyo. 42, 86 Pac. 17, 544; *State v. Von Kutzleben*, 136 Iowa 89, 113 N. W. 484; *Johnson v. State*, 89 Miss. 773, 42 So. 606.

¹⁷ *People v. Soto*, 49 Cal. 67; *People v. Swetland*, 77 Mich. 53, 60, 43 N. W. 779; *Nicholson v. State*, 38 Md. 140, 153; *Barnes v. State*, 36 Tex. 356, 363; *State v. Johnson*, 30 La. Ann. 881; *Amos v. State*, 83 Ala. 1, 3 So. 749, 3 Am. St. 682; *Travers v. United States*, 6 App. D. C. 450; *Johnson v. State*, 48 Tex. Cr. App. 423, 88 S. W. 223; *State v. Stallings*, 142 Ala. 112, 38 So. 261; *Jackson v. State*, 83 Ala. 76, 3 So. 847; *Smith v. State*, 74 Ark. 397, 85 S. W. 1123; *State v. Storms*, 113 Iowa 385, 85 N. W. 610, 86 Am. St. 380. See exhaustive note in 6 Am. St. 244, 245; admission as affecting burden of proof and right to open and close, 61 L. R. A. 562n.

¹⁸ *Rufer v. State*, 25 Ohio St. 464, 470; *State v. Patterson*, 73 Mo. 695, 705; *People v. Cassidy*, 133 N. Y.

proving that the confession was involuntary upon the accused. In any case it is his right to show by preliminary evidence that the confession was not voluntary, and it is the duty of the court, in determining the competency of the confession, not only to consider the evidence for the state, showing the confession was voluntary, but the evidence elicited by the accused to prove the contrary in his favor as well.¹⁹

A refusal, before the confession is admitted, to allow counsel for the prisoner to cross-examine the witness as to the voluntary character of the confession;²⁰ or to allow the accused to testify, and to explain his mental condition when it was made;²¹ or to

612, 613, 30 N. E. 1003, 44 N. Y. St. 869; *State v. Howard*, 35 S. Car. 197, 14 S. E. 481; *Williams v. State*, 19 Tex. App. 276; *Commonwealth v. Culver*, 126 Mass. 464, 465; *Eberhart v. State*, 47 Ga. 598, 608; *State v. Davis*, 34 La. Ann. 351, 353; *Jenkins v. State*, 119 Ga. 431, 46 S. E. 628; *Sanchez v. State*, 46 Tex. Cr. App. 179, 78 S. W. 504; *Thurman v. State*, 169 Ind. 240, 82 N. E. 64; *State v. Armstrong*, 203 Mo. 554, 102 S. W. 503; *State v. Washing*, 36 Wash. 485, 78 Pac. 1019; *State v. Icenbice*, 126 Iowa 16, 101 N. W. 273; *Richardson v. State*, 145 Ala. 46, 41 So. 82; *Campbell v. State*, 150 Ala. 70, 43 So. 743; *Stoddard v. State*, 132 Wis. 520, 112 N. W. 453; *Braham v. State*, 143 Ala. 28, 38 So. 919; *Smith v. State*, 142 Ala. 14, 39 So. 329.

¹⁹ *State v. Fidment*, 35 Iowa 541; *Geiger v. State*, 25 Ohio C. C. 742.

²⁰ *Rufer v. State*, 25 Ohio St. 464, 471; *State v. Miller*, 42 La. Ann. 1186, 1188, 8 So. 309, 21 Am. St. 418; *People v. Fiori*, 123 App. Div. (N. Y.) 174, 185, 108 N. Y. S. 416; *Willis v. State*, 43 Neb. 102, 61 N. W. 254, 205; *State v. Hill*, 65 N. J. L. 626, 47 Atl. 814, 815; *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408; *People*

v. Fox, 121 N. Y. 449, 24 N. E. 923; *People v. White*, 176 N. Y. 331, 350, 68 N. E. 630.

²¹ *Simmons v. State*, 61 Miss. 243, 258; *Jackson v. State*, 83 Ala. 76, 78, 3 So. 847; *Palmer v. State*, 136 Ind. 393, 397, 36 N. E. 130; *State v. Kinder*, 96 Mo. 548, 10 S. W. 77, 78; *Lefevre v. State*, 50 Ohio St. 584, 588, 35 N. E. 52. When a confession is offered by the state in a criminal case, it is the right of the counsel of the prisoner, before it is admitted, to cross-examine the witness who purposes to testify to it as to circumstances surrounding the making of it, and the defense may also call, at the same time, independent witnesses and examine them, going thoroughly into the whole matter, as to how the confession came to be made, the parties present, the physical condition and state of mind of the prisoner at the time it was made, and then the court, with all these facts before it, is to pass upon its admission. *State v. Hill*, 65 N. J. L. 626, 47 Atl. 814, 815. In *Willis v. State*, 43 Neb. 102, 61 N. W. 254, on page 255, it is said: "In the trial of a criminal case, where the state calls a witness for the purpose of proving a confession made by the prisoner,

show by the evidence of others that it was improperly obtained, is reversible error.²²

§ 128. Circumstances under which confession becomes involuntary.

—It is very difficult, if not impossible, to lay down any general rule by which the amount or degree of duress or improper influence which will destroy the voluntary character of a confession can be regulated or measured.²³

The statement that a confession which has been extorted by threats or procured by promises is not voluntary, and hence is inadmissible as likely to be untrue, is not difficult to understand. But it is very difficult to ascertain what language used to the prisoner would, under the particular circumstances of each case, constitute such a threat or promise. The sex, age, disposition, education, experience, character, intelligence and previous training of the prisoner are elements to be considered in determining whether the confession was or was not free and voluntary.²⁴ For it is well known that a determined, courageous and experienced

before the witness is allowed to detail such information it is the privilege of defendant's counsel, and the better practice, to cross-examine the witness as to the circumstances under which the confession proposed to be detailed was given. Counsel cannot wait until the witness has answered and then move to strike the statement from the record if the answer is responsive to the inquiry."

²² *Commonwealth v. Culver*, 126 Mass. 464, 466, 467. That the defendant may himself testify to the involuntary character of the confession, see *State v. Kinder*, 96 Mo. 548, 551, 10 S. W. 77; *People v. Fiori*, 123 App. Div. (N. Y.) 174, 185, 108 N. Y. S. 416. A witness who testifies to facts showing a confession was voluntary may be impeached by proof that on a prior occasion he had stated the contrary. *State v. Peter*, 14 La.

Ann. 521. When confession is voluntary, see note in 18 L. R. A. (N. S.) 758, 768.

²³ In *Hopt v. People*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. 202, the court says: "The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases, as the question is necessarily addressed in the first instance to the judge, and since his discretion must be controlled by all attendant circumstances, the courts have wisely forbore to mark with absolute precision the limits of admission and exclusion."

²⁴ *Williams v. State*, 103 Ala. 33, 15 So. 662; *State v. Fredericks*, 85 Mo. 145; *Cain v. State*, 18 Tex. 387.

man is not so susceptible to threats, or to promises of immunity, as a feeble woman, or a person of weak intellect or will power.²⁵

Aside from the circumstances of the accused as determining the voluntary nature of the confession, many things are held, as matter of law, to render a confession involuntary. Thus, if there is an express promise that a confession will benefit the accused, or a threat, though somewhat vague and indefinite in character, the confession will be involuntary. This was held in a case where the chief of police told the accused that he would go to the penitentiary and advised him that he had better confess, saying that it would do the accused good if he would admit that he was at the place of the crime.²⁶

So, also, confessions made while the accused is in bodily fear of his life, are involuntary, though it may be difficult, under the circumstances, to connect the fear with the confession; thus statements made by the accused while he was in custody, with a howling mob around him, are not admissible as confessions.²⁷

A statement made by the accused while or after bystanders were placing or had placed a rope around his neck and had threatened to hang him or had whipped him or otherwise physically ill-treated him, is involuntary, and inadmissible.²⁸ So, it has been held that a confession made in reply to the charge by a police officer that the accused had been lying to him and that he had better tell the truth is inadmissible.²⁹

So, where the father of the accused threatened the accused with a shotgun and said to him "You are my prisoner, I have a right to arrest you, you shall go and tell the sheriff, county attorney and coroner's jury all about the crime and you will get clear. If you don't, you will get convicted," it was held that the confession thus obtained was involuntary.³⁰ And, though a witness in testifying to a confession swears that no promise or threat had been employed, it may be shown by other evidence that

²⁵ *Biscoe v. State*, 67 Md. 6, 7, 8 Atl. 571.

²⁶ *Maxwell v. State* (Miss. 1906), 40 So. 615.

²⁷ *Bruner v. United States*, 4 Ind. Ter. 580, 76 S. W. 244.

²⁸ *Edmonson v. State*, 72 Ark. 585,

82 S. W. 203; *Jackson v. State*, 50 Tex. Cr. App. 302, 97 S. W. 312.

²⁹ *West v. United States*, 20 App. D. C. 347.

³⁰ *State v. Force*, 69 Neb. 162, 95 N. W. 42.

threats or promises were used sufficient to keep out the confession.⁸¹

§ 129. **Confessions made while under arrest.**—The mere fact that the defendant was under arrest, or was in the charge of armed police officers when he made his confession,⁸² or was handcuffed and chained,⁸³ or tied,⁸⁴ (if he is not tied in such a manner as

⁸¹ *Hardin v. State*, 66 Ark. 53, 48 S. W. 904, 907.

⁸² *Cox v. People*, 80 N. Y. 500, 515; *Willis v. State*, 93 Ga. 208, 19 S. E. 43; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *People v. Druse*, 103 N. Y. 655, 656, 8 N. E. 733, 1 Silv. Ct. App. 182, 5 N. Y. Cr. 19, 3 N. Y. St. 617; *Allen v. State*, 12 Tex. App. 190; *State v. Sopher*, 70 Iowa 494, 497, 30 N. W. 917; *Pierce v. United States*, 160 U. S. 355, 40 L. ed. 454, 16 Sup. Ct. 321; *State v. Jones*, 47 La. Ann. 1524, 18 So. 515; *Jackson v. Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. 795, 66 Am. St. 336; *State v. McClain*, 137 Mo. 307, 38 S. W. 906; *Williams v. State*, 37 Tex. Cr. App. 147, 38 S. W. 999; *Carr v. State*, 81 Ark. 589, 99 S. W. 831; *State v. Worthen*, 124 Iowa 408, 100 N. W. 330, 331; *People v. Walker*, 140 Cal. 153, 73 Pac. 831, 833; *State v. Berry*, 50 La. Ann. 1309, 24 So. 325; *Commonwealth v. Williams*, 171 Mass. 461, 50 N. E. 1035; *State v. Trusty*, 1 Penn. (Del.) 319, 40 Atl. 766; *Carpenter v. Commonwealth* (Ky.), 92 S. W. 552, 29 Ky. L. 107; *State v. Banusik* (N. J. 1906), 64 Atl. 994; *Hamilton v. State*, 147 Ala. 110, 41 So. 940; *State v. Henderson*, 74 S. Car. 477, 55 S. E. 117; *State v. Exum*, 138 N. Car. 599, 50 S. E. 283; *Ivey v. State*, 4 Ga. App. 828, 62 S. E. 565; *State v. Jones*, 145 N. Car. 466, 59 S. E. 353; *Brown v. State*, 3 Ga. App. 479, 60 S. E. 216; *Gibson v. State*, 47 Tex. Cr. App.

489, 83 S. W. 1119; *Reeves v. State*, 47 Tex. Cr. App. 340, 83 S. W. 803; *Follis v. State*, 51 Tex. Cr. App. 186, 101 S. W. 242; *Fonseca v. State*, 48 Tex. Cr. App. 28, 85 S. W. 1069; *State v. Church*, 199 Mo. 605, 98 S. W. 16; *Pearsall v. Commonwealth* (Ky.), 92 S. W. 589, 29 Ky. L. 222; *State v. Armstrong*, 203 Mo. 554, 102 S. W. 503; *State v. Robertson*, 111 La. 35, 35 So. 375; *McNish v. State*, 47 Fla. 69, 36 So. 176; *Williams v. State*, 48 Fla. 65, 37 So. 521; *State v. Rugero*, 117 La. 1040, 42 So. 495; *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *Stevens v. State*, 138 Ala. 71, 35 So. 122; *State v. Davis*, 6 Idaho 159, 53 Pac. 678; *State v. Icenbice*, 126 Iowa 16, 101 N. W. 273; *State v. Westcott*, 130 Iowa 1, 104 N. W. 341; *State v. Smith* (N. Car.), 50 S. E. 859; *State v. Blodgett*, 50 Ore. 329, 92 Pac. 820. *Contra*, *Binkley v. State*, 51 Tex. Cr. App. 54, 100 S. W. 780. Confession by one illegally imprisoned, 6 Am. St. 244n, or by one under restraint, 18 L. R. A. (N. S.) 795-798n.

⁸³ *State v. Whitfield*, 109 N. Car. 876, 877, 13 S. E. 726; *Young v. State*, 68 Ala. 569; *State v. George*, 5 Jones (N. Car.) 233; *Hathaway v. Commonwealth* (Ky.), 82 S. W. 400, 26 Ky. L. 630; *United States v. Nardello*, 4 Mackey (D. C.) 503; *Dunmore v. State*, 86 Miss. 788, 39 So. 69. *Contra*, *Nolen v. State*, 14 Tex. App. 474, 480, 46 Am. 247n.

⁸⁴ *State v. Rogers*, 112 N. Car. 874,

to produce pain or extort a confession), or in prison,⁸⁵ will not make a confession involuntary. But the confession of a prisoner, a boy eighteen years of age, made while he was in the hands of a large armed mob which had placed a rope about his neck, was rejected as involuntary.⁸⁶

The practice of taking the accused immediately after his arrest before the prosecuting attorney and then and there obtaining a confession from him is not to be commended. Any confession made under such circumstances, however, is not inadmissible if it is voluntary.⁸⁷

The prosecuting attorney is not a magistrate, and the hearing

876, 17 S. E. 297; *State v. Patterson*, 73 Mo. 695, 707.

⁸⁵ *Commonwealth v. Smith*, 119 Mass. 305, 311; *People v. Rogers*, 18 N. Y. 9, 14, 72 Am. Dec. 484; *Murphy v. People*, 63 N. Y. 590, 597; *Ward v. People*, 3 Hill (N. Y.) 395; *Cox v. People*, 80 N. Y. 500, 515, 19 Hun (N. Y.) 430, 436. If by statute a confession is inadmissible because at the time the defendant is in jail, it is immaterial that he is confined for another crime than that then being tried. *Neiderluck v. State*, 21 Tex. App. 320, 328, 17 S. W. 467; *Nicks v. State*, 40 Tex. Cr. App. 1, 48 S. W. 186. The fact that the prisoner was held without process, or otherwise in illegal custody, does not exclude the confession. *Balbo v. People*, 80 N. Y. 484, 499, 19 Hun (N. Y.) 424; *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *Green v. State*, 40 Fla. 191, 23 So. 851.

⁸⁶ *State v. Young*, 52 La. Ann. 478, 27 So. 50; *State v. Revells*, 34 La. Ann. 381, 384, 44 Am. 436. A deputy marshal may testify to a voluntary confession. *Perovich v. United States*, 205 U. S. 86, 51 L. ed. 722, 27

Sup. Ct. 456. The confession of the accused made while he is in jail to another prisoner who is also in the same jail, and before whom the accused was brought that he might be identified, was received in *Clay v. State*, 15 Wyo. 42, 86 Pac. 17. "The fact that the prisoner was tied during his preliminary examination would not in itself constitute a valid objection to the evidence, unless it appeared that he was tied in such a manner as to produce pain, or to tend to induce or extort from him a confession. *State v. Cruse*, 74 N. Car. 491. We do not commend the practice, however, if such there be, of keeping the prisoner shackled or tied while before the committing magistrate on the preliminary examination. The law should be the same there as upon the trial. The dictates of humanity would require that, unless there should be some strong reason to the contrary, he should be freed from such physical restraint." *State v. Rogers*, 112 N. Car. 874, 17 S. E. 297.

⁸⁷ *State v. Stibbens*, 188 Mo. 387, 87 S. W. 460.

before him is not a judicial hearing under a statute which entitles the accused to counsel and a warning.³⁸ The suspicious character of a confession thus procured may be modified, if not wholly removed, when the accused is advised, at the hearing before the prosecuting attorney, of his right to counsel and to remain silent and is warned that his statements may be used against him.³⁹ The same rule applies to all statements made by the accused after his arrest to persons having him in custody, for, however strong the testimony of the police officials is that a confession was free and voluntary, a suspicion and a doubt of its voluntary character remain which persist until it shall be clearly shown that the accused was not threatened and that he was fully advised of his rights. The evidence showing that he was advised of his rights ought, under such circumstances, to be affirmative, for in spite of the presumption that every one knows the law, it must be shown that the accused was warned and that he was informed as to his legal rights to remain silent while under arrest.⁴⁰

§ 130. Effect of cautioning the accused.—Aside from statute the fact that a confession, which is otherwise admissible, is made without the accused having been cautioned by the court or by the person to whom the confession is made that what he says may be used against him, does not render it incompetent.⁴¹

The statute in Texas requires that the accused shall be cautioned, and a confession made while the prisoner is in jail, in custody, or under arrest, is inadmissible where it is not shown that the accused was cautioned that what he said might be used against him unless the fruits of the crime are discovered in pursuance of and as a result of the confession.⁴²

³⁸ *People v. Randazzio*, 194 N. Y. State, 46 Tex. Cr. App. 461, 80 S. W. 147, 87 N. E. 112. 1008; *McDaniel v. State*, 46 Tex. Cr.

³⁹ *State v. Berberick* (Mont.), 100 App. 560, 81 S. W. 301; *Vaughn v. State*, 51 Tex. Cr. App. 180, 101 S. W. Pac. 209.

⁴⁰ *Daniels v. State* (Fla.), 48 So. 747. 445.

⁴¹ *Reg. v. Arnold*, 8 C. & P. 621, 622; ⁴² *Curry v. State*, 50 Tex. Cr. App. *Reg. v. Priest*, 2 Cox Cr. Cas. 378; 158, 94 S. W. 1058; *Vaughn v. State*, *Simon v. State*, 36 Miss. 636, 639; 51 Tex. Cr. App. 180, 101 S. W. 445; *State v. Hand*, 71 N. J. L. 137, 58 Atl. *McKinney v. State*, 40 Tex. Cr. App. 641; *Commonwealth v. Mosler*, 4 Pa. 372, 50 S. W. 708; *Morales v. State*, *St. 264*; *State v. Baker*, 58 S. Car. 111, 36 Tex. Cr. App. 234, 36 S. W. 435, 36 S. E. 501; *State v. Workman*, 15 846; *Alanis v. State* (Tex. Cr. App.), *S. Car. 540, 545*. See also *Parker v.* 81 S. W. 709; *Black v. State*, 46 Tex.

The fact that the accused is cautioned that what he says will be committed to writing and may or might be used on his trial as evidence against him, does not render a voluntary confession inadmissible.⁴³

Under the Texas statute not only must the accused be cautioned, but it must appear from the evidence that the confession was made within such a time after the caution was given that its effect had not disappeared from the mind of the accused.⁴⁴ The length of the period required depends upon the facts and circumstances of each case and is a question for the court. The effect of the caution will be presumed to continue for a reasonable period, and a confession made a day or two after the caution or warning was given has been accepted.⁴⁵

As to the language to be used in cautioning the accused, it is not necessary that the words of the statute shall be precisely followed. The simplest and plainest language is advisable. Any language conveying to his mind the fact that the statement he makes incriminating himself may or will be offered in evidence against him at his trial is usually sufficient.⁴⁶

But a warning that anything he may say can be used either for or against him does not comply with the statute, and renders the confession inadmissible.⁴⁷

Cr. App. 590, 81 S. W. 302; *White v. State* (Tex. Cr. App.), 38 S. W. 169.

⁴³ *Reg. v. Holmes*, 1 C. & K. 248, 1 Cox Cr. Cas. 9; *Reg. v. Attwood*, 5 Cox Cr. Cas. 322, 323; *Calloway v. State*, 103 Ala. 27, 15 So. 821; *Maples v. State*, 3 Heisk. (Tenn.) 408, 411, 413; *State v. Church*, 199 Mo. 605, 98 S. W. 16; *Rizzolo v. Commonwealth*, 126 Pa. St. 54, 72, 17 Atl. 520; *Commonwealth v. Johnson*, 217 Pa. 77, 66 Atl. 233; *United States v. Kirkwood*, 5 Utah 123, 13 Pac. 234; *State v. Carr*, 37 Vt. 191.

⁴⁴ *Binkley v. State*, 51 Tex. Cr. App. 54, 100 S. W. 780.

⁴⁵ *Maddox v. State*, 41 Tex. 205; *Adams v. State*, 35 Tex. Cr. App. 285, 33 S. W. 354, 356; *Baldwin v. State* (Tex. Cr. App.), 28 S. W. 951;

Baker v. State, 25 Tex. App. 1, 8 S. W. 23, 8 Am. St. 427.

⁴⁶ *State v. DeGraff*, 113 N. Car. 638, 18 S. E. 507, 508; *State v. Rogers*, 112 N. Car. 874, 17 S. E. 297, 298; *Ransom v. State* (Tex. Cr. App. 1902), 70 S. W. 960.

⁴⁷ *Perry v. State*, 42 Tex. Cr. App. 540, 61 S. W. 400; *Pryor v. State*, 40 Tex. Cr. App. 643, 51 S. W. 375; *Guin v. State* (Tex. 1899), 50 S. W. 350. The silence of the accused after the caution has been given him cannot be used against him as a confession. *Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165. So generally his conduct indicating guilt occurring after he has been cautioned is not admissible. *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750. Generally, unless there is ar

If it plainly appear that a confession is voluntary, it is not necessary, at least in the absence of suspicious circumstances, to prove that from the moment of the prisoner's arrest to that of his confession no improper inducement was offered.⁴⁸ A voluntary confession will be received, though it may appear that immediately after his apprehension the accused had been threatened, but without effect, in order to procure a confession.⁴⁹ It must be shown that the promise or threat has been withdrawn.

Even though an original confession may have been obtained by such means as will exclude it, a subsequent confession of the same or of like facts may and should be admitted, if the court shall believe from the length of time intervening, or from any other facts in evidence, that the improper influence has been removed.⁵⁰ The influence of the threat or promise under which the first confession has been made and because of which the confession will be excluded will be presumed to continue to the time of a subsequent confession unless it is affirmatively shown to have been removed.⁵¹ This presumption must be overcome before the

express statute requiring a caution, mere admissions not constituting confessions are received without the caution being given. *People v. Simpson*, 48 Mich. 474, 12 N. W. 662; *Roessel v. State*, 62 N. J. L. 216, 41 Atl. 408.

⁴⁸ *Hopt v. People*, 110 U. S. 574, 584, 28 L. ed. 262, 4 Sup. Ct. 202.

⁴⁹ *McAdory v. State*, 62 Ala. 154; *Sarah v. State*, 28 Ga. 576; *State v. Chambers*, 39 Iowa 179; *Walker v. State*, 7 Tex. App. 245, 263, 32 Am. 595; *State v. Jones*, 54 Mo. 478, 480; *People v. Jim Ti*, 32 Cal. 60, 63; *State v. Potter*, 18 Conn. 166, 179; *Commonwealth v. Howe*, 132 Mass. 250; *Commonwealth v. Crocker*, 108 Mass. 464; *Lynes v. State*, 36 Miss. 617; *People v. MacKinder*, 80 Hun (N. Y.) 40, 29 N. Y. S. 842, 9 N. Y. Cr. 267; *Moore v. Commonwealth*, 2 Leigh (Va.) 701; *State v. Gregory*, 50 N. Car. 315.

⁵⁰ *State v. Guild*, 10 N. J. L. 163, 18 Am. 404; *Simon v. State*, 36 Miss.

636, 639; *Hardy v. United States*, 3 App. D. C. 35; *State v. Carr*, 37 Vt. 191, 195; *United States v. Nardello*, 4 Mackey D. C. 503; *State v. Hash*, 12 La. Ann. 895, 896; *Levison v. State*, 54 Ala. 520; *State v. Willis*, 71 Conn. 293, 41 Atl. 820; *State v. Foster*, 136 Iowa 527, 114 N. W. 36; *Dixon v. State*, 116 Ga. 186, 42 S. E. 357; *Andrews v. People*, 33 Colo. 193, 79 Pac. 1031; *State v. Howard*, 17 N. H. 171; *State v. Fisher*, 51 N. Car. 478; *Jackson v. State*, 39 Ohio St. 37; *Thompson v. Commonwealth* 20 Gratt. (Va.) 724.

⁵¹ *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Williams v. State*, 69 Ark. 599, 65 S. W. 103, 105; *State v. Lowhorne*, 66 N. Car. 638; *State v. Hash*, 12 La. Ann. 895, 986; *State v. Drake*, 82 N. Car. 592; *Murray v. State*, 25 Fla. 528, 6 So. 498; *State v. Brown*, 73 Mo. 631; *Robinson v. People*, 159 Ill. 115, 42 N. E. 375;

later confession can be received as evidence. And evidence to overcome or rebut it must be clear, strong and satisfactory.⁵²

§ 131. **Confessions under oath.**—The admissions or incriminating statements of the accused are not to be rejected solely because they were made under oath. A distinction is made between declarations made under oath before the accused was arrested, or before suspicion attached to him, and declarations made subsequently to his arrest. The former, though in fact confessions, are not rejected. Thus the testimony of the accused, if it was voluntarily given as a witness on a prior trial of himself;⁵³ or

Commonwealth v. Knapp, 10 Pick. (Mass.) 477, 486, 20 Am. Dec. 534; *Thompson v. Commonwealth*, 20 Gratt. (Va.) 724, 731; *Commonwealth v. Harman*, 4 Pa. 269; *Simon v. State*, 37 Miss. 288, 295; *Coffee v. State*, 25 Fla. 501, 512, 6 So. 493, 23 Am. St. 525; *Redd v. State*, 69 Ala. 255, 260; *State v. Jones*, 54 Mo. 478, 480; *State v. Chambers*, 39 Iowa 179; *State v. Drake*, 82 N. Car. 592; *State v. Wintzingerode*, 9 Ore. 153; *Thompson v. Commonwealth*, 20 Gratt. (Va.) 724; *United States v. Chapman*, 4 Am. Law J. (N. S.) 440, 25 Fed. Cas. 14783; *Reason v. State* (Miss. 1909), 48 So. 820; *State v. Wood* (La. 1909), 48 So. 438.

⁵² *Porter v. State*, 55 Ala. 95; *Commonwealth v. Cullen*, 111 Mass. 435, 437; *State v. Lowhorne*, 66 N. Car. 638; *State v. Carr*, 37 Vt. 191, 195; *Commonwealth v. Phillips*, (Ky.), 82 S. W. 286, 26 Ky. L. 543; *Mathis v. Commonwealth* (Ky.), 13 S. W. 360, 11 Ky. L. 882; *State v. Washington*, 40 La. Ann. 669, 4 So. 864; *State v. Drake*, 113 N. Car. 624, 628, 18 S. E. 166; *Reg. v. Doherty*, 13 Cox C. C. 23. It is a well-settled rule that if promises or threats have been used, it must be made to appear that their influence has been entirely

done away with before subsequent confessions can be deemed voluntary and therefore admissible. *State v. Drake*, 113 N. Car. 624, 628, 18 S. E. 166, and see *Coffee v. State*, 25 Fla. 501, 512, 6 So. 493, 23 Am. St. 525, for a full citation of cases. It is sufficient to exclude the latest confession if it may have proceeded from prior existing motives. *Commonwealth v. Cullen*, 111 Mass. 435, 437.

⁵³ *People v. McMahon*, 15 N. Y. 384, 392; *Commonwealth v. Reynolds*, 122 Mass. 454, 458; *Williams v. Commonwealth*, 29 Pa. St. 102, 110; *People v. Kelley*, 47 Cal. 125; *Dickerson v. State*, 48 Wis. 288, 293, 4 N. W. 321; *State v. Oliver*, 55 Kan. 711, 41 Pac. 954; *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 788, 9 L. R. A. (N. S.) 533n; *Miller v. People*, 216 Ill. 309, 74 N. E. 743; *State v. Finch*, 71 Kan. 793, 81 Pac. 494 (testimony at coroner's inquest). See notes in 41 Am. St. 522-524, 18 L. R. A. (N. S.) 872. In *State v. Broughton*, 7 Ired. (N. Car.) 96, 45 Am. Dec. 507, which is quoted with approval in *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, on p. 788, 9 L. R. A. (N. S.) 533n, the court said, the accused having testified before the grand jury that had indicted him, "The coun-

another person⁵⁴ for the crime with which he is now charged, may be used against him.

A different rule is applicable to sworn statements made after the accused is under suspicion. Generally the accused is not sworn upon the preliminary examination. If his statement is taken under oath it will be rejected if offered as a confession, upon the ground that its free and voluntary character has been destroyed by adding to the existing embarrassments of his position, the apprehension of a possible punishment for perjury.⁵⁵

The rule that a confession by the accused is competent, though given under oath, is applicable to those very numerous cases in which a person, being tried upon a charge of homicide, has testified as a witness at the coroner's inquest. The mere fact that at the time of the inquest he was suspected of the homicide will not exclude his incriminating statements voluntarily made if it appears that he knew he could decline to answer if he wished to do so and he was not under arrest at the time.⁵⁶ They may be

used for the prisoner took the further ground here that it was incompetent to prove the evidence of the prisoner, because it was in the nature of a confession, which, compelled by an oath, was not voluntary. It is certainly no objection to the evidence, merely, that the statement of the prisoner was given by him, as a witness under oath. He might have refused to answer questions, when he could not do so without criminating himself, and the very ground of that rule of law is that his answers are deemed voluntary and may be used afterwards to criminate or charge him in another proceeding, and such is clearly the law."

"*People v. McMahon*, 15 N. Y. 384, 390; *Burnett v. State*, 87 Ga. 22, 13 S. E. 552; *People v. Mitchell*, 94 Cal. 550, 555, 29 Pac. 1106; *People v. Gallagher*, 75 Mich. 512, 525, 42 N. W. 1063; *Harris v. State*, 37 Tex. Cr. App. 441, 36 S. W. 88; *People v. Cokahnour*, 120 Cal. 253, 52 Pac.

505; *State v. Lewis*, 39 La. Ann. 1110, 3 So. 343; *People v. Burt*, 51 App. Div. (N. Y.) 106, 64 N. Y. 417; *State v. Vaigneur*, 5 Rich. (S. Car.) 391; *Dickerson v. State*, 48 Wis. 288, 4 N. W. 321.

"*People v. Gibbons*, 43 Cal. 557; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *Schoeffler v. State*, 3 Wis. 823, 839, 841; *United States v. Bascadore*, 2 Cranch C. C. 30, 24 Fed. Cas. 14536; *Angling v. State*, 137 Ala. 17, 34 So. 846, and see *Underhill on Evidence*, page 131; *Steele v. State*, 76 Miss. 387, 24 So. 910. But the confession of a person who voluntarily goes before a magistrate and confesses will be received. *People v. McGloin*, 91 N. Y. 241, 246; *Commonwealth v. Clark*, 130 Pa. St. 641, 650, 18 Atl. 988.

"*State v. David*, 131 Mo. 380, 33 S. W. 28; *Wilson v. State*, 110 Ala. 1, 20 So. 415, 55 Am. St. 17; *Jenkins v. State*, 35 Fla. 737, 18 So. 182, 48 Am. St. 267; *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573; *People v.*

subsequently used against him as a confession, and are to go to the jury for what they are worth, though the accused was not cautioned that they might be used against him. If, however, he is under arrest, or if he has been indicted, or formally charged with the crime, he stands in the position of a prisoner on trial. He is then entitled to the same privilege of declining to testify and warning, that what he says may be used against him, so far as his sworn statement is concerned, as a prisoner at the preliminary examination. He cannot, directly or indirectly, be compelled to testify against himself.⁶⁷

§ 132. Confessions taken at the preliminary examination.—The preliminary examination of an accused person has for its main objects the perpetuation of the testimony against him, the ascertainment if he shall be held to await the action of the grand jury, and if so, whether he shall be admitted to bail. When the accused is brought before the justice, the latter must, as soon as

Chapleau, 121 N. Y. 266, 24 N. E. 469; *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. 709; *People v. Kent*, 41 Misc. (N. Y.) 191, 83 N. Y. S. 948, 17 N. Y. Cr. 461; *People v. McGloin*, 91 N. Y. 241; *State v. Finch*, 71 Kan. 793, 81 Pac. 494; *State v. Taylor*, 36 Kan. 329, 13 Pac. 550; *Anderson v. State*, 133 Wis. 601, 114 N. W. 112; *People v. Martinez*, 66 Cal. 278; *State v. Coffee*, 56 Conn. 399, 16 Atl. 151; *Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165; *Emery v. State*, 92 Wis. 146, 65 N. W. 848; *Reg. v. Wiggins*, 10 Cox Cr. Cas. 562; *McMeans v. State* (Tex.), 114 S. W. 837; *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193n.

⁶⁷ *Adams v. State*, 129 Ga. 248, 58 S. E. 822, 17 L. R. A. (N. S.) 468; *State v. Senn*, 32 S. Car. 392, 402, 11 S. E. 292; *State v. Carroll*, 85 Iowa 1, 51 N. W. 1159; *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721, 9 How. Pr. (N. Y.) 155; *Teachout*

v. People, 41 N. Y. 7, 13; *People v. Mondon*, 103 N. Y. 211, 214, 8 N. E. 496, 57 Am. 709, 2 N. Y. St. 713, 4 N. Y. Cr. 552; *Clough v. State*, 7 Neb. 320, 340. Cf. *People v. McMahon*, 15 N. Y. 384; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *State v. Matthews*, 66 N. Car. 106. But where he voluntarily appeared and was properly cautioned, it was held otherwise in *State v. Leuth*, 5 Ohio C. C. 94; *State v. Mullins*, 101 Mo. 514, 14 S. W. 625; *Emery v. State*, 92 Wis. 146, 65 N. W. 848. See *Underhill on Evidence*, § 93. And what the accused voluntarily says on his preliminary examination, as when he asks for the aid of counsel or requests an adjournment, may, though not amounting to a confession of guilt, be proved against him if relevant on his trial. *State v. Fooks*, 65 Iowa 196, 452, 21 N. W. 561, 773; *Gonzales v. State*, 12 Tex. App. 657.

possible, examine the witnesses for and against him under oath. The accused must be present when this evidence is received, though the examining magistrate may exclude all witnesses except the one who is testifying. The accused may be sworn at his own request, and examined as a witness in his own behalf, under the restrictions which apply to the examination of defendants in criminal trials. He should, in justice to himself, be informed of his right to refrain from testifying. He should be told that he need not answer any questions, and that his silence or express refusal to answer incriminating questions cannot be used against him on his trial.⁵⁸ After thus having been warned, anything he may say in the nature of a confession and which is not under oath, may be used against him on his trial.⁵⁹ And where, having been instructed as to his right to remain silent at the preliminary examination, if he so desires, he voluntarily goes on the witness stand and, under oath, testifies to his version of the facts in the case, anything he may say of an incriminating nature under such circumstances, though he is under oath, may be used against him subsequently as his confession.⁶⁰

⁵⁸ The failure of an examining magistrate to inform the accused of the statute, permit him to waive making a statement and also that his waiver cannot be used against him on his trial excludes his statement as an involuntary confession. *State v. Hatcher*, 29 Ore. 309, 44 Pac. 584, 588; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399. "The result of these several provisions is, that now an accused person, with his consent, may become a witness either for or against himself at the preliminary examination before the magistrate; and if he voluntarily becomes a witness under such circumstances as to render it clear that his testimony was purely voluntary, and free from restraint or undue influence, there can be no reason why it may not be given in evidence against him on his subsequent trial for the offense. If

his voluntary unsworn statement may be proved against him as a confession, his voluntary testimony under oath, given in a proceeding in which he elects and is authorized to testify ought to stand upon at least as favorable a footing." *People v. Kelley*, 47 Cal. 125.

⁵⁹ *State v. Bruce*, 33 La. Ann. 186; *State v. Needham*, 78 N. Car. 474; *State v. Hatcher*, 29 Ore. 309, 44 Pac. 584, 585; *Shaw v. State*, 32 Tex. Cr. App. 155, 22 S. W. 588, 590.

⁶⁰ *Green v. State*, 40 Fla. 474, 24 So. 537; *Daniels v. State* (Fla. 1909), 48 So. 747; *People v. Butler*, 111 Mich. 483, 485, 69 N. W. 734; *Steele v. State*, 76 Miss. 387, 394, 24 So. 910; *State v. Lewis*, 73 Mo. App. 619, 621; *State v. Needham*, 78 N. Car. 474; *Commonwealth v. Clark*, 130 Pa. St. 641, 650, 18 Atl. 988; *Preston v. State*, 41 Tex. Cr. App.

This is the general rule in most states, but there are exceptions either by statute or by judicial decision. Thus, in some of the states, it is expressly required that the accused shall be cautioned on his preliminary examination that anything he may say may subsequently be used against him. Generally, it will have to be shown that the accused has been properly advised of his right to have counsel, of his right to decline to testify at all, or, if he sees fit to testify, then as to his right to refuse to answer incriminating questions. If a statute requires that the accused shall be informed of his right to waive making a statement, anything he may say will be inadmissible against him if the record does not show that he was warned.⁶¹

Where a person against whom a charge is being investigated by the grand jury, voluntarily appears and testifies, his confession thus obtained is subsequently admissible on his trial.⁶² But if the accused is compelled to go before the grand jury and is compelled to answer over his objections, anything he may admit is subsequently not admissible as his confession.⁶³

300, 53 S. W. 127, 881; *State v. Lyts*, 25 Wash. 347, 65 Pac. 530; *State v. Glass*, 50 Wis. 218, 221, 6 N. W. 500, 36 Am. 845; *Wilson v. United States*, 162 U. S. 613, 624, 40 L. ed. 1090, 16 Sup. Ct. 895.

⁶¹ *State v. Hatcher*, 29 Ore. 309, 44 Pac. 584; *People v. Butler*, 111 Mich. 483, 69 N. W. 734; *Ford v. State*, 75 Miss. 101, 21 So. 524; *State v. Melton*, 120 N. Car. 591, 26 S. E. 933; *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *State v. May*, 62 W. Va. 129, 57 S. E. 366. The admissibility of the statements of the accused made upon his preliminary examination is a deduction from the modern statutory legislation making the accused a competent witness in his own behalf. If the accused were not permitted to go on the stand of his own free will and if not being a competent witness for himself he is summoned as a witness by the prosecu-

tion on the trial of another person it is only fair to exclude what he may say of an incriminating character because he is, against his will, compelled to tell the truth by his oath, and this is a sort of compulsion. It is quite otherwise where the accused voluntarily testifies to exculpate himself and instead of wholly accomplishing this purpose only involves himself in greater guilt. *State v. Glass*, 50 Wis. 218, 221, 6 N. W. 500, 36 Am. 845.

⁶² *State v. Carroll*, 85 Iowa 1, 51 N. W. 1159; *Grimsinger v. State*, 44 Tex. Cr. App. 1, 69 S. W. 583; *Giles v. State*, 43 Tex. Cr. App. 561, 67 S. W. 411; *Thomas v. State*, 35 Tex. Cr. App. 178, 32 S. W. 771; *United States v. Kirkwood*, 5 Utah 123, 13 Pac. 234.

⁶³ *State v. Clifford*, 86 Iowa 550, 53 N. W. 299, 41 Am. St. 518. See note in 9 L. R. A. (N. S.) 533.

§ 133. Mode of proving confessions made at the preliminary examination.—The signature of the accused to his statement which has been committed to writing is not indispensable, unless it is required by statute.⁶⁴ But, as it is useful as a means of identification, it should be obtained whenever possible. If he signs the writing voluntarily he waives all objections to its admission as evidence (except, perhaps, the objection that he was sworn), and this is so, though it is in a language not understood by him, if its contents were translated to him.⁶⁵

The writing which purports to contain the preliminary examination of the accused must be properly identified. If the accused has not signed the writing at all, or if he has only affixed his mark thereto, it must appear to the satisfaction of the court (necessarily by parol evidence) that it was read to him and that he assented to or acquiesced in it.⁶⁶ The record of the examination, if otherwise admissible, should be produced as the best evidence,⁶⁷ and when produced, it is conclusive of the fact that everything material that was said or done has been accurately stated.⁶⁸ But when an informal examination only has been had, or if the details of a regular and formal examination have not

⁶⁴ *Lambe's Case*, 2 Leach C. C. 625, 629; *State v. Haworth*, 24 Utah 398, 68 Pac. 155.

⁶⁵ *Commonwealth v. Coy*, 157 Mass. 200, 212, 32 N. E. 4; *State v. Demarest*, 41 La. Ann. 617, 6 So. 136. In a case of a confession made through an interpreter the prosecution should show, before the confession is admitted, that the interpretation is true, correct and full. It is proper to require the interpreter so to testify. *State v. Abbato*, 64 N. J. L. 658, 47 Atl. 10.

⁶⁶ *Harris v. State*, 6 Tex. App. 97; *State v. Mullins*, 101 Mo. 514, 14 S. W. 625; *State v. Schmidt*, 136 Mo. 644, 38 S. W. 719; *Angling v. State*, 137 Ala. 17, 34 So. 846. Letters constituting a confession of homicide found near the bodies, written on the

letterheads of the accused and signed with his name, are admissible without proof of the handwriting. *State v. Soper*, 148 Mo. 217, 49 S. W. 1007. As to the admission of an unsigned letter which dropped in the room of the accused, see *State v. Dilley*, 44 Wash. 207, 87 Pac. 133.

⁶⁷ *State v. Branham*, 13 S. Car. 389; *Wright v. State*, 50 Miss. 332, 335; *State v. Eaton*, 3 Harr. (Del.) 554; *Williams v. State*, 38 Tex. Cr. App. 128, 41 S. W. 645; *Bailey v. State*, 26 Tex. App. 706, 9 S. W. 270. As to a presumption that a confession was committed to writing, see *Wright v. State*, 50 Miss. 332, 335; *Underhill on Ev.*, §§ 36, 146, 147, 232.

⁶⁸ *Robinson v. State*, 87 Ind. 292, 293.

been committed to writing,⁶⁹ or if the record is inadmissible because of a lack of jurisdiction,⁷⁰ or irregularities⁷¹ apparent on its face, or for any other material or substantial reason, parol evidence of what the prisoner voluntarily said on the preliminary examination will be received.⁷² So a coroner may testify orally to what was said on a preliminary examination prior to the final inquest.⁷³ So, too, parol evidence of an extra-judicial confession is never incompetent merely because the judicial examination of the prisoner was taken down in writing,⁷⁴ or because the prisoner himself has committed a prior confession to writing.⁷⁵ A prosecuting attorney who heard a confession may testify orally to it. His oral testimony is the best evidence, though the confession was taken down by a stenographer in his presence. The writing may be used, however, to refresh the memory of the witness.⁷⁶

The practice is, in reading a written confession to the jury, to omit the names of accomplices of the accused jointly indicted but separately or jointly tried, but it is not error to read all the con-

⁶⁹ *State v. Suggs*, 89 N. Car. 527, 530.

⁷⁰ See *Underhill on Ev.*, § 232, as to presumptions of jurisdiction. *State v. Hatcher*, 29 Ore. 309, 44 Pac. 584; *Luera v. State* (Tex. 1895), 32 S. W. 898. Incriminating interlineations with pen and ink in a typewritten transcript signed by the accused may justly be regarded with suspicion, and if unexplained as to time and sources ought to exclude the confession. *United States v. Williams*, 103 Fed. 938.

⁷¹ *Wright v. State*, 50 Miss. 332; *Guy v. State*, 9 Tex. App. 161.

⁷² *Wright v. State*, 50 Miss. 332, 335; *Guy v. State*, 9 Tex. App. 161; *Stevens v. State* (Tex. 1896), 38 S. W. 167; *Hightower v. State*, 58 Miss. 636; *Willis v. United States*, 6 Ind. Ter. 424, 98 S. W. 147; *Austin v. Commonwealth*, 124 Ky. 55, 98 S. W. 295, 30 Ky. L. 295; *Miller v. People*, 216 Ill. 309, 74 N. E. 743. But such evidence is inadmissible to show

what the prisoner said if the magistrate states that he refused to say anything. The record cannot be contradicted by parol. *Rex v. Walter*, 7 C. & P. 267.

⁷³ *People v. Strotto*, 191 N. Y. 42, 83 N. E. 573.

⁷⁴ *State v. Smith*, 9 Houst. (Del.) 588, 33 Atl. 441; *State v. Rover*, 13 Nev. 17; *Commonwealth v. Dower*, 4 Allen. (Mass.) 297; *State v. Wells*, 1 N. J. L. 424, 1 Am. Dec. 211; *Griminger v. State*, 44 Tex. Cr. App. 1, 69 S. W. 583.

⁷⁵ *State v. Head*, 38 S. Car. 258, 16 S. E. 892; *State v. Leuth*, 5 Ohio C. C. 94. The fact that the prisoner desired to waive a preliminary examination will not, if he has been properly cautioned, render any statements he may make inadmissible. *Shaw v. State*, 32 Tex. Cr. App. 155, 22 S. W. 588; *People v. Giro* (N. Y., 1910), 90 N. E. 432.

⁷⁶ *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506.

fession, including all names, if the court shall instruct the jury that the confession is not evidence against any one except the person making it.⁷⁷

§ 134. Confessions of persons associated in a conspiracy.—A confession or incriminating statement uttered by a person engaged with others in a conspiracy to commit a crime, made in the prosecution of the common enterprise, and during its existence, is admissible against any or all of those associated together.⁷⁸ When the common undertaking is consummated or abandoned the community of interest ceases. A confession of any participant made thereafter is receivable only against him. Usually the existence of the conspiracy must be proved before the confession will be received. But sometimes, though this is not the general rule, the confession may be received as evidence on a promise by the prosecution to establish the conspiracy subsequently.⁷⁹

§ 135. Artifice or deception used.—A free and voluntary confession is not inadmissible because it was subsequently retracted,⁸⁰ or because it was originally obtained by an artifice practiced on the accused by officers having him in charge, or by other persons, if the means employed were not calculated to cause him to make an untrue statement.⁸¹ The question, how was the confession ob-

⁷⁷ *Rex v. Clewes*, 4 C. & P. 221; *Howson v. State*, 73 Ark. 146, 83 S. W. 933; *State v. Brinte*, 4 Penn. (Del.) 551, 58 Atl. 258.

⁷⁸ See *post*, § 492, *et seq.*

⁷⁹ See cases cited in § 494, *post*. *State v. Reed*, 49 La. Ann. 704, 21 So. 732; *Sorenson v. United States*, 143 Fed. 820, 74 C. C. A. 468.

⁸⁰ *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550.

⁸¹ *People v. McMahon*, 15 N. Y. 384; *Early v. Commonwealth*, 86 Va. 921, 927, 928, 11 S. E. 795; *Hardy v. United States*, 3 App. D. C. 35; *People v. McGloin*, 91 N. Y. 241; *State v. Staley*, 14 Minn. 105, 113; *State v. Fredericks*, 85 Mo. 145, 149; *King v. State*, 40 Ala. 314; *Burton v. State*,

107 Ala. 108, 18 So. 284; *State v. Westcott*, 130 Iowa 1, 104 N. W. 341; *State v. Harrison*, 115 N. Car. 706, 20 S. E. 175; *State v. Hopkirk*, 84 Mo. 278; *People v. White*, 176 N. Y. 331, 68 N. E. 630; *Commonwealth v. Cressinger*, 193 Pa. 326, 44 Atl. 433. See exhaustive notes in 18 L. R. A. (N. S.) 840, 6 Am. St. 249. A confession, otherwise admissible, will not be rejected because it was made to a detective who was locked in a cell with the prisoner, or, who, in the guise of a friend, obtained the confession from him. *State v. Brooks*, 92 Mo. 542, 576, 5 S. W. 257, 330; *Heldt v. State*, 20 Neb. 492, 495, 30 N. W. 626, 57 Am. 835n; *Osborn v. Commonwealth* (Ky.), 20 S. W. 223, 14

tained? is of minor importance. The main point to be considered is, was the confession probably true?⁸² The real question always turns, not so much upon the means used in obtaining the confession, as upon the motives which prompted the prisoner to make it.⁸³ The cases, however, are not harmonious, and in the most recent cases it has been held that a confession procured by a person who, by falsely representing himself to be an attorney, obtained the confidence of the prisoner, was inadmissible.⁸⁴ A man who

Ky. L. 246. A confession procured from a prisoner by telling him an accomplice has confessed, which statement is untrue, is not inadmissible on that account. *State v. Jones*, 54 Mo. 478, 481. So an appeal to the superstitious nature of an old and infirm woman by promising her a charm which would prevent detection, will not exclude a confession elicited thereby. *State v. Harrison*, 115 N. Car. 706, 20 S. E. 175.

⁸² *People v. McMahon*, 15 N. Y. 384, 387, 390.

⁸³ So a confession contained in a letter given to a jailer or other person for mailing to a friend or a witness for the accused, but which was retained by him and opened and handed to the prosecuting officials, should be received. *Rex v. Derrington*, 2 C. & P. 418; *State v. Renaud*, 50 La. Ann. 662, 23 So. 894. "While we do not sanction the deception practiced by one of the officers in charge of the defendant, the court could not exclude the confessions made to him on that account. Deception was used in order to induce the defendant to tell the truth. No inducement was held out to him to confess guilt unless there was guilt. The confession to the under-sheriff was made to him, not as a public officer, but as a supposed friend. It is not sufficient to exclude a confes-

sion by a prisoner, as we have held, 'that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put to him, or that it was made under the hope or promise of a benefit of a collateral nature.' (*Cox v. People*, 80 N. Y. 500, 515.) Confessions induced by the use of decoy letters, by the false assertion that some of the accomplices of the prisoner were in custody or made to a detective disguised as a confederate or upon the promise that they will not be disclosed, have been received in evidence with the sanction of courts of high authority. * * * Cautious and hesitating as courts have always been in regard to confessions made by a person when under arrest to those in authority over him, they have not gone so far as to exclude them, simply because they were procured by deception, provided they were voluntarily made. They are careful, however, to leave the credibility of the witness who practiced the deception and the circumstances under which the confessions were made to the consideration of the jury." By Vann, J., in *People v. White*, 176 N. Y. 331, 349, 68 N. E. 630.

⁸⁴ *Cotton v. State*, 87 Ala. 75, 6 So. 306; *Tines v. Commonwealth* (Ky.), 77 S. W. 363, 25 Ky. L. 1233.

will deliberately ingratiate himself into the confidence of another for the purpose of betraying that confidence, and, with words of friendship upon his lips, seek by every means in his power to obtain an admission which can be tortured into a confession of guilt which he may blaze to the world as a means of accomplishing the downfall of one for whom he professes great friendship, cannot be possessed of a very high sense of honor or moral obligation.⁸⁵ Hence, it is doubtful if anything is really gained in the administration of justice from the admission of such evidence. A person who may overhear the remarks of a prisoner made to himself or to another person, as his wife, or an attorney, or spiritual adviser, who is incompetent as a witness to privileged communications, may testify to what he has heard.⁸⁶

A confession constituting a part of a prayer may be proved by one who overheard it, though he may not be able to prove the whole prayer.⁸⁷ A confession made to another prisoner, under the erroneous impression that one prisoner cannot testify against the other, is not for that reason inadmissible.⁸⁸

§ 136. Confessions by intoxicated persons.—Confessions made while the accused is intoxicated are not thereby rendered inadmissible. This is the rule, even where the intoxication was produced by liquor given to him by the officers having him in charge for the sole purpose of procuring a confession.⁸⁹ Some of the recent cases,

⁸⁵ *Heldt v. State*, 20 Neb. 492, 497, 498, 30 N. W. 626, 57 Am. 835n.

⁸⁶ *Rex v. Simons*, 6 C. & P. 540. But not to incriminating declarations made during sleep, for the declarant is then unconscious of what he is saying. *People v. Robinson*, 19 Cal. 40.

⁸⁷ *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814.

⁸⁸ *State v. Mitchell*, Phil. (N. Car.) L. 447. A confession to a fellow prisoner in jail, procured by the latter's spiritual exhortation and reading the Bible to the accused, is not to be rejected because the witness is himself a grossly irreligious

man. *Stafford v. State*, 55 Ga. 591, 596.

⁸⁹ *Eskridge v. State*, 25 Ala. 30; *Jefferds v. People*, 5 Park. Cr. (N. Y.) 522, 561; *Rex v. Spilsbury*, 7 C. & P. 187; *South v. People*, 98 Ill. 261, 265; *Lester v. State*, 32 Ark. 727, 730; *People v. Ramirez*, 56 Cal. 533, 38 Am. 73; *State v. Grear*, 28 Minn. 426, 10 N. W. 472, 41 Am. 296; *State v. Berry*, 50 La. Ann. 1309, 24 So. 329; *State v. Feltes*, 51 Iowa 495, 1 N. W. 755; *State v. Hopkirk*, 84 Mo. 278; *Leach v. State*, 99 Tenn. 584, 42 S. W. 195; *State v. Hogan*, 117 La. 863, 42 So. 352; *Lienpo v. State*, 28 Tex. App. 179, 12 S. W.

however, reject confessions thus obtained because of the trick practiced. But the general rule has been sustained, even where the accused was suffering from *delirium tremens*,⁹⁰ if he was mentally and physically able to describe past events and to state his own participation in the crime.⁹¹ The jury are not bound to believe the prisoner's confession made when sober, nor to reject a contradictory confession made when he was drunk,⁹² for, if the court has ruled that the confession was voluntary, the physical or mental condition of the accused is merely one element for the jury in determining what reliance, if any, is to be placed upon the confession.⁹³

But the mental and physical condition of the accused when making the confession is always relevant. Hence, the accused may show his intoxication to determine the credit and weight of the confession, by his own testimony,⁹⁴ by cross-examining the witness who is called to prove the confession, or by other witnesses.⁹⁵

The intoxication of the accused at the time of making a confession may be considered by the jury in diminishing the value of the confession as evidence. The old proverb *in vino veritas* has never been a rule of law. It is by no means of universal application. Indeed, the contrary is often seen, for with men of a boastful disposition, intoxication is apt to result in false and exaggerated statements of their past achievements.⁹⁶

The accused may be permitted to show that what purports to be his confession was simply boastful statements made with a

588; *People v. Kent*, 41 Misc. (N. Y.) 191, 83 N. Y. S. 948, 17 N. Y. Cr. 461 (drugs). See note in 6 Am. St. 249. (Mass.) 110; *People v. Kent*, 41 Misc. (N. Y.) 191, 83 N. Y. S. 948, 17 N. Y. Cr. 461.

⁹⁰ *State v. Feltes*, 51 Iowa 495, 1 N. W. 755.

⁹¹ *White v. State*, 32 Tex. Cr. App. 625, 25 S. W. 784; *Eskridge v. State*, 25 Ala. 30, 33; *People v. Farrington*, 140 Cal. 656, 74 Pac. 288; *State v. Hogan*, 117 La. 863, 42 So. 352.

⁹² *Finch v. State*, 81 Ala. 41, 50, 1 So. 565; *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325; *People v. Hogan*, 117 La. 863, 42 So. 352.

⁹³ *Commonwealth v. Howe*, 9 Gray

⁹⁴ *Jefferds v. People*, 5 Park Cr. (N. Y.) 522, 547; *State v. Berry*, 50 La. Ann. 1309, 24 So. 329; *People v. Kent*, 41 Misc. (N. Y.) 191, 83 N. Y. S. 948, 17 N. Y. Cr. 461.

⁹⁵ *State v. Feltes*, 51 Iowa 495, 1 N. W. 755.

⁹⁶ *State v. Berry*, 50 La. Ann. 1309, 24 So. 329; *State v. Grear*, 28 Minn. 426, 10 N. W. 472, 41 Am. 296; *State v. Bryan*, 74 N. Car. 351; *White v. State*, 32 Tex. Cr. App. 625, 25 S. W. 784.

humorous intention, while he was intoxicated, and when he has done this, the prosecution may prove by witnesses who overheard him speaking that he appeared to be perfectly sincere while speaking."⁹⁷

§ 137. Admissions receivable though involuntary.—The rule that a confession procured by a threat or a promise is inadmissible does not apply to admissions⁹⁸ not involving the existence of a criminal intent,⁹⁹ if the influence exerted did not amount to duress, or to an illegal and undue degree of compulsion.¹⁰⁰ Some cases hold that it is not material that the involuntary admission, when connected with other evidence, proves, or tends to prove, the guilt of the defendant. So long as it does not, taken by itself, directly admit or suggest his guilt, that it was voluntary in its character need not be shown.¹ But the cases are not harmonious, and it seems logical that all the declarations of the defendant from which guilt may be inferred should come under the rule.²

⁹⁷ *Horn v. State*, 12 Wyom. 80, 73 Pac. 705.

⁹⁸ An admission as applied to a criminal case is a statement of defendant of facts pertinent to the issues and tending in connection with proof of other facts to prove his guilt, but which of itself is insufficient to authorize conviction. *Ransom v. State*, 4 Ga. App. 826, 59 S. E. 101.

⁹⁹ *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *McLain v. State*, 18 Neb. 154, 161, 24 N. W. 720; *Underhill on Ev.*, § 75; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997; *Fuller v. State*, 127 Ga. 47, 55 S. E. 1047; *Hutchinson v. State* (Ga. App.), 63 S. E. 597; *Watson v. State*, 52 Tex. Cr. App. 85, 105 S. W. 509; *People v. Jan John*, 144 Cal. 284, 77 Pac. 950; *People v. Moran*, 144 Cal. 48, 77 Pac. 777; *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Scalapio*, 143 Cal. 343, 76 Pac. 1098; *State v. Barrington*, 198 Mo. 23, 95

S. W. 235; *Burgess v. State*, 148 Ala. 654, 42 So. 681.

¹⁰⁰ The rule in civil cases that admissions made to bring about a compromise are inadmissible does not apply in criminal cases. *State v. Soper*, 16 Me. 293, 295, 33 Am. Dec. 665; *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533n; *Richburger v. State*, 90 Miss. 806, 44 So. 772. *Contra*, *Mill v. State*, 3 Ga. App. 414, 60 S. E. 4. Admissibility of confessions, see note in 73 Am. St. 942-946.

¹ *People v. Velarde*, 59 Cal. 457; *State v. Red*, 53 Iowa 69, 74, 4 N. W. 831; *People v. Parton*, 49 Cal. 632; *Ferguson v. State*, 31 Tex. Cr. App. 93, 19 S. W. 901; *People v. McCallam*, 103 N. Y. 587, 596, 9 N. E. 502, 3 N. Y. Cr. 189, 5 N. Y. Cr. 143, 4 N. Y. St. 291, 25 Wkly. Dig. 210.

² *Marshall v. State*, 5 Tex. App. 273, 293; *Quintana v. State*, 29 Tex. App. 401, 407, 16 S. W. 258, 25 Am. St. 730; *Commonwealth v. Myers*,

§ 138. **When facts discovered admit parts of an involuntary confession.**—The main reason for rejecting confessions uttered under the influence of hope or fear is the great probability that the prisoner has been influenced by his expectation of punishment, or of immunity, to speak what is not true. If, however, the existence of extraneous facts is discovered through the statements of the accused, no reason exists for rejecting those parts of the confession which led to the discovery, and which, though not voluntarily made or obtained by improper means or for any reason inadmissible have been corroborated convincingly by the facts discovered. The proper order of proof is for the facts discovered to be proved, and then to receive as much of the confession as leads up to and as relates strictly to such facts.³

It is no objection to the proof of the facts which are discovered that their discovery was brought about by means of a confession.⁴

160 Mass. 530, 36 N. E. 481; *Murphy v. People*, 63 N. Y. 590, 596. In *Rex v. Warickshall* (1783), 1 Leach Cr. L. 298, 300, which is a leading case, the court said: "This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false." This case also holds, though the modern rule is otherwise, that no part of the confession can be received, but the facts though obtained by a confession must be satisfactorily proved without divulging their source. Hence, it cannot be legally known whether the fact had been confessed or not.

³ *Murphy v. State*, 63 Ala. 1; *Rice v. State*, 3 Heisk. (Tenn.) 215, 223-228; *State v. Crank*, 2 Bailey (S. Car.) 66, 23 Am. Dec. 117n; *Daniels*

v. State, 78 Ga. 98, 6 Am. St. 238n; *State v. Vaigneur*, 5 Rich. (S. Car.) 391; *Commonwealth v. Knapp*, 9 Pick. (Mass.) 496, 511, 20 Am. Dec. 491; *State v. Height*, 117 Iowa 650, 91 N. W. 935, 94 Am. St. 323n, 59 L. R. A. 437; *United States v. Richard*, 2 Cranch C. C. 439, 27 Fed. Cas. 16154; *Laros v. Commonwealth*, 84 Pa. 200; *People v. Hoy Yen*, 34 Cal. 176; *Done v. People*, 5 Park. Cr. (N. Y.) 364, 396; *Gregg v. State*, 106 Ala. 44, 17 So. 321; *State v. Middleton*, 69 S. Car. 72, 48 S. E. 35; *Smith v. State*, 53 Tex. Cr. App. 643, 111 S. W. 939; *Jones v. State*, 50 Tex. Cr. App. 329, 96 S. W. 930; *State v. Ruck*, 194 Mo. 416, 92 S. W. 706; *State v. Hutchings*, 30 Utah 319, 84 Pac. 893; *Commonwealth v. Phillips* (Ky.), 82 S. W. 286, 26 Ky. L. 543; *Whitney v. Commonwealth* (Ky.), 74 S. W. 257, 24 Ky. L. 2524.

⁴ *State v. Moran*, 131 Iowa 645, 109 N. W. 187; *Rusher v. State*, 94 Ga. 363, 21 S. E. 593, 47 Am. St. 175; *Taylor v. Commonwealth* (Ky.), 42 S. W. 1125, 19 Ky. L. 836; *State v.*

Sometimes, however, the order of proof has been reversed, and the court has allowed the language of the prisoner to be proved before receiving evidence of the facts discovered.⁵

Thus, for illustration, it may properly be proved in a prosecution for homicide that the victim's remains,⁶ or his clothing,⁷ or the weapon with which he was killed,⁸ were actually found at a particular time and place as the result of a statement by the accused which was itself inadmissible, as a confession. So, in a larceny trial, it may be proved that the stolen property was discovered as the result of an inadmissible confession; and then as much of the confession as disclosed the hiding place of the stolen property and whatever the accused said in conducting persons there or in pointing out or describing it, or which is in any way connected with the discovery is admissible, though these statements were the result of promises or threats.⁹

§ 139. Confessions procured by persons in authority.—A distinction is made by many of the cases between those confessions which are procured by threats made or promises offered by some person who is so related to the accused as to be able to exercise authority over him, and consequently had both the power and the opportunity to fulfill the threat or promise; and confessions made in response to promises by persons having no power whatever over the

George, 15 La. Ann. 145; Walrath v. State, 8 Neb. 80; Duffy v. People, 26 N. Y. 588, 590, 5 Park. Cr. (N. Y.) 321.

⁵ Duffy v. People, 5 Park. Cr. (N. Y.) 321, 26 N. Y. 588, 590; Reg. v. Gould, 9 C. & P. 364; Deathridge v. State, 1 Sneed (Tenn.) 75, 80, 81; Jordan v. State, 32 Miss. 382. But in South Carolina the statements of the accused made where, by reason of threats, stolen property was recovered, have been rejected, although it was allowed to be proved that the stolen property had been found because the accused had pointed out its hiding place. State v. Middleton, 69 S. Car. 72, 48 S. E. 35.

⁶ State v. Motley, 7 Rich. (S. Car.) 327.

⁷ State v. Willis, 71 Conn. 293, 41 Atl. 820; Spearman v. State, 34 Tex. Cr. App. 279, 30 S. W. 229.

⁸ Commonwealth v. James, 99 Mass. 438.

⁹ State v. Mortimer, 20 Kan. 93; Rector v. Commonwealth, 4 Ky. L. 323; State v. Garvey, 28 La. Ann. 925, 26 Am. 123; Belote v. State, 36 Miss. 96, 72 Am. Dec. 163; Fielder v. State, 40 Tex. Cr. App. 184, 49 S. W. 376; Banks v. State, 84 Ala. 430, 4 So. 382; State v. Winston, 116 N. Car. 990, 21 S. E. 37.

prisoner, and, consequently, unable to perform what they promised to do. In the former case it was conclusively presumed that the confession was forced and involuntary.¹⁰ Hence, where the inducement to confess proceeded from the prosecuting witness, or his wife, or from the district attorney, or some member of a coroner's jury, or from a police officer or magistrate, the confession was rejected as presumably extorted by fear or prompted by hope of immunity.

Upon the question whether any presumption was to be recognized where a confession was made in response to a promise or threat by one having no power whatever over the prisoner, and who was, for that reason, unable to fulfill the threat or promise, the authorities are divided. Some of the cases hold that a threat or promise made by such a person creates a conclusive presumption that the confession was not free and voluntary.¹¹ But other authorities hold, and these perhaps are in the majority, that the threat or promise must proceed from some one in authority, and who has the power to carry it into execution, or it must be made in the presence and with the implied approval of such a person, to justify the court in drawing an inference that the confession was involuntary.¹²

These distinctions, however, when tested by the actual circumstances of each case, prove of very little value. The question always is, was the will of the prisoner actually subjugated and overcome, so that the confession is not the free product of his own will but forced from his lips by the superior will of another? This is a question of mixed law and fact, to be answered by the

¹⁰ *State v. Carson*, 36 S. Car. 524, 532, 15 S. E. 588; *Clayton v. State*, 31 Tex. Cr. App. 489, 21 S. W. 255; *Hoover v. State*, 81 Ala. 51, 1 So. 574; *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55; *People v. Thompson*, 84 Cal. 598, 24 Pac. 384; *Green v. State*, 88 Ga. 516, 15 S. E. 10, 30 Am. St. 167n; *Collins v. Commonwealth* (Ky.), 25 S. W. 743, 15 Ky. L. 691; *Commonwealth v. Myers*, 160 Mass. 530, 36 N. E. 481; *State v. York*, 37 N. H. 175; *People v. McMahon*, 15 N. Y. 384. Exhaustive notes on confessions, see 2 Am. St. 243-247, 18 L. R. A. (N. S.) 843-855.

¹¹ *State v. Revells*, 34 La. Ann. 381, 44 Am. 436; *Commonwealth v. Knapp*, 9 Pick. (Mass.) 496, 500, 20 Am. Dec. 491, and see cases cited in *Underhill on Evidence*, p. 136, n. 1.

¹² *Smith v. Commonwealth*, 10 Gratt. (Va.) 734; *Early v. Commonwealth*, 86 Va. 921, 927, 928, 11 S. E. 795; *Commonwealth v. Morey*, 1 Gray (Mass.) 461, 463; *Searcy v. State*, 28 Tex. App. 513, 13 S. W. 782, 19 Am. St. 851.

court or the jury according to the facts and circumstances of each particular case. No presumption should be recognized based upon the official position of the person who heard the confession, though this may be taken into consideration with the other facts. Doubtless the fact that the person who obtained a confession by the use of a promise or a threat did not possess the power and authority to carry either into effect, if known to the prisoner at the time of making the confession, would nullify the effect intended to be produced upon his mind, and the confession would be regarded as his free act.¹³

§ 140. Confessions need not be spontaneous.—A confession, in other respects admissible, is not inadmissible because it is not the spontaneous utterance of the prisoner. The fact that the confession was obtained by the employment of persistent questioning does not alone exclude it,¹⁴ but the practice of eliciting a confession by putting question after question to the accused is clearly not conducive to the procurement of truth, and the mode in which the confession was elicited may always be considered by the jury to determine whether they shall believe it.

This is well illustrated by the methods employed by police officers and other in practicing upon the accused after his arrest what is known in police circles as the "third degree." This usually consists in subjecting the accused, after his arrest and while in custody, to a continuous and rigid examination accompanied with intimidation by threats and other means. The length of this

¹³ *Commonwealth v. Tuckerman*, 10 Gray (Mass.) 173, 190; *State v. Fortner*, 43 Iowa 494; *McAdory v. State*, 62 Ala. 154, 161; *Ulrich v. People*, 39 Mich. 245, 250; *Underhill on Evidence*, p. 136. In 3 Russell on Crimes, p. 393, the author says: "The result of the cases seems to be, that a confession is not inadmissible, although made after an exhortation, or admonition, or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution or examination of the prisoner; for a

promise made by a person who interferes without any authority of this kind is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess that he is guilty of a crime of which he is innocent." *People v. Piner* (Cal. App., 1909), 105 Pac. 780.

¹⁴ *State v. Penney*, 113 Iowa 691, 84 N. W. 509; *Young v. State*, 90 Md. 579, 45 Atl. 531; *Cox v. People*, 80 N. Y. 500; *Aiken v. State* (Tex.), 64 S. W. 57; *Tidwell v. State*, 40 Tex. Cr. App. 38, 47 S. W. 466, 48 S. W. 184; *United States v. Matthews*, 26 Fed. Cas. 15741b.

process and the manner of its application depend largely upon the character of the official who administers it and upon that of the accused to whom it is administered.

Where, on the one hand, the police official is sufficiently hardened and brutalized by his past experience and the accused is a determined and courageous person, it is likely to continue for some lengthy period without results, but where the accused is weak and nervous or feeble in mind or body, the carrying out of this method of modern torture will generally result in producing statements in answer to leading questions which can readily be twisted into a confession.

The worthlessness as evidence of such statements needs but to be stated in order to be appreciated. Their probative force, or rather lack of force, is well recognized by all who have had any experience of human nature. They carry no weight, usually, in the minds of the average jurymen, but, in all probability, police officials will continue to procure so-called confessions by this method until the end of time.

As matter of law, the fact that confessions are obtained by questions which assume the guilt of the accused, does not exclude them if they are in all respects voluntary confessions and provided always that in putting the question which assumes that the prisoner is guilty, no unfair advantage amounting to compulsion or duress was exercised over him.¹⁵

A voluntary confession is not inadmissible because the person to whom it was made promised under oath that he would not reveal it,¹⁶ or it was procured by the use of falsehood,¹⁷ as, for ex-

¹⁵ *Hardy v. United States*, 3 App. D. C. 35; *People v. Wentz*, 37 N. Y. 303; *People v. McGloin*, 91 N. Y. 241, 246; *State v. Turner*, 122 La. 371, 47 So. 685; *State v. Berry*, 50 La. Ann. 1309, 24 So. 329; *Birkenfeld v. State*, 104 Md. 253, 65 Atl. 1; *State v. Banusik* (N. J.), 64 Atl. 994; *State v. Blodgett*, 50 Ore. 329, 92 Pac. 820; *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863; *Cox v. People*, 80 N. Y. 500; *McClain v. Commonwealth*, 110 Pa. 263, 269, 1 Atl. 45; *Murphy v. People*, 63 N. Y. 590, 597; *State v. Brinte*, 4 Pen. (Del.) 551, 58 Atl. 258; *State v. Barrington*, 198 Mo. 23, 95 S. W. 235.

¹⁶ *State v. Darnell*, 1 *Houst.* (Del.) 321.

¹⁷ *State v. Darnell*, 1 *Houst.* (Del.) 321; *Commonwealth v. Knapp*, 9 *Pick.* (Mass.) 496, 20 *Am. Dec.* 491; *Cox v. People*, 80 N. Y. 500, 515.

¹⁸ *Burton v. State*, 107 Ala. 108, 18 So. 284; *Sanders v. State*, 113 Ga. 267, 38 S. E. 841; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 *Am. St.* 501n; *State v. Rush*, 95 Mo. 199, 8

ample, by telling the accused that his accomplice had made a confession implicating the accused.

Nor should an admissible confession be rejected because it was the result of some benefit having no connection with the crime confessed.¹⁸ Thus, a confession which has been induced by a promise that the prisoner may see his wife, who was confined in another cell,¹⁹ or have his shackles removed, and permit him to associate with other prisoners,²⁰ or be permitted to take exercise, or be released from a rigorous confinement, or to protect him from others alleged to be implicated in the crime,²¹ should be received.²²

§ 141. Confessions made by signs or gestures.—Under this head we may group direct admissions of guilt in the form of affirmative gestures, nods or signs made in response to leading questions or to questions which assume the guilt of the person addressed. Can a witness who saw the incriminating gesture testify that it was made, the question which called it out being also proved, in a case where he would be precluded from testifying to an express confession because the circumstances rendered it involuntary?

An affirmative nod in response to a direct accusation of crime is no less a confession than an oral statement. If the accusation is coupled with a threat or a promise, evidence of the nod or gesture should be rejected as an attempt to accomplish by indirection what cannot be done directly. Actions speak louder than

S. W. 221; *Heldt v. State*, 20 Neb.

492, 30 N. W. 626, 57 Am. 835n;

Commonwealth v. Goodwin, 186 Pa.

218, 40 Atl. 412, 65 Am. St. 852;

Commonwealth v. Wilson, 186 Pa.

St. 1, 40 Atl. 283.

¹⁸ *Stone v. State*, 105 Ala. 60, 17 So.

114; *Price v. State*, 114 Ga. 815, 40

S. E. 1015; *State v. Fortner*, 43 Iowa

494; *State v. Hopkirk*, 84 Mo. 278;

State v. Wentworth, 37 N. H. 196;

Cox v. People, 80 N. Y. 500.

¹⁹ *Rex v. Lloyd*, 6 C. & P. 393.

²⁰ *State v. Tatro*, 50 Vt. 483; *State*

v. Cruse, 74 N. Car. 491.

²¹ *Hunt v. State*, 135 Ala. 1, 33 So. 329.

²² "On the whole the authorities seem to be in favor of the proposition that the inducement must be of a temporal nature. Whether or no it must have reference to the charge, has scarcely been fully discussed. It is certainly possible to conceive cases in which a much stronger inducement might be held out to a prisoner than one having reference to an escape from a charge not involving any very serious consequences." *Roscoe Crim. Ev.*, 46.

words. Expressive gestures often manifest more clearly the emotion of the mind than the most forcible and vehement language. A direct confession by an act is therefore inadmissible whenever the spoken or written word would be excluded.²²

§ 142. Confessions of treason.—Because of the statutory requirement under which the testimony of two witnesses to an overt act was necessary to convict one of the crime of treason, it was at one time doubted whether an extra-judicial confession was admissible against one on trial for the commission of that crime.²⁴ It is now the law that while no one can be convicted of treason upon his confession not made in open court, that is, by a plea of guilty to the indictment, his extra-judicial confession may be received against him. The making of the confession and the confession itself must, to be admissible, be proved by two witnesses.²⁵

§ 143. Confessions made by young children.—Where a young child possesses sufficient mental capacity, or is of such an age as will render him responsible for the criminal consequences of his actions, his confession is admissible, under the same circumstances which will admit the confession of an adult or mature person.²⁶

It is enough to show that he is reasonably intelligent and old enough to understand the character and effect of what he says and to comprehend his situation generally.²⁷

And a child, under the age of fourteen years, may, if clearly and fully shown to be able to distinguish between right and wrong as respects the particular circumstances of the case under con-

²² *Nolen v. State*, 14 Tex. App. 474, 483, 46 Am. 247n; *Roscoe Cr. Ev.*, p. 51; 1 *Greenleaf on Evidence*, § 282. The distinction between the admissibility of evidence of facts discovered through an involuntary confession which is not admissible, and an act not admissible because itself constituting an involuntary confession, should not be overlooked. See *ante*, §§ 137, 138.

²⁴ *Underhill on Evidence*, § 98.

²⁵ 1 *East P. C.*, 131-133, 1 *Burr's Trial* 196.

²⁶ *Commonwealth v. Smith*, 119 Mass. 305, 311; *Earp v. State*, 55 Ga. 136; *Stage's Case*, 5 *City Hall Rec.* (N. Y.) 177.

²⁷ *Birkenfeld v. State*, 104 Md. 253, 65 Atl. 1; *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Grayson v. State*, 40 Tex. Cr. App. 573, 51 S. W. 246; *Rex v. Thornton*, 1 *Moody C. C.* 27.

sideration, be convicted of murder or other felony upon his extra-judicial confession, if the *corpus delicti* be otherwise proved.²⁸

But a confession by a stupid negro boy twelve years of age made to white men by whom he was privately examined is inadmissible where he was without friends or counsel to advise him.²⁹

§ 144. Judicial confessions: plea of guilty.—As will be subsequently pointed out, the jury may convict the accused upon his extra-judicial confession, only in case they shall believe that it is corroborated by independent proof of the *corpus delicti*. But a judicial confession in the shape of a plea of guilty by the accused, he having sufficient capacity to understand the nature and meaning of his act, made in the hearing of the court and the jury, is equivalent to a conviction and is conclusive on the jury. The court must pronounce judgment and sentence as in a case of a verdict of guilty rendered by the jury.³⁰

The accused has an absolute right to plead guilty and, in the absence of a statute to the contrary, the court is bound to accept the plea even in capital cases.³¹ In some states, there are statutes which provide that no plea of guilty shall be accepted in capital cases and such a statute is constitutional.³²

Where no such statute prevails, the prisoner may, if sane, be convicted at once and sentenced to death or imprisonment.³³ The judge may in his discretion permit a plea of guilty to be with-

²⁸ *Martin v. State*, 90 Ala. 602, 8 So. 858, 861, 24 Am. St. 844; *Rex v. Thornton*, 1 Moody C. C. 27; *Commonwealth v. Smith*, 119 Mass. 305, 311; *Bartley v. People*, 156 Ill. 234, 40 N. E. 831; *Commonwealth v. Preece*, 140 Mass. 276, 5 N. E. 494. But cf. *Ford v. State*, 75 Miss. 101, 21 So. 524.

²⁹ *Owsley v. Commonwealth*, 125 Ky. 384, 101 S. W. 366, 31 Ky. L. 5; *Ford v. State*, 75 Miss. 101, 21 So. 524.

³⁰ *State v. Branner*, 149 N. Car. 559, 63 S. E. 169; *Green v. Commonwealth*, 12 Allen (Mass.) 155; *People v. Luby*, 99 Mich. 89, 57 N. W.

1092, 4 Bl. Comm. (Tucker) 329, 1 Chitty Cr. Law 429, 2 Hale Pleas. Cr. 225. The court may hear evidence to determine the punishment. *State v. Branner*, 149 N. Car. 559, 63 S. E. 169.

³¹ *State v. Branner*, 149 N. Car. 559, 63 S. E. 169.

³² *State v. Genz*, 57 N. J. L. 459, 31 Atl. 1037.

³³ *Dantz v. State*, 87 Ind. 398, 399; *Commonwealth v. Brown*, 150 Mass. 330, 23 N. E. 49; *Sellers v. People*, 6 Ill. 183; *State v. Cowan*, 7 Ired. (N. Car.) 239; *State v. Branner*, 149 N. Car. 559, 63 S. E. 169.

drawn at any time before judgment,⁸⁴ and a plea of not guilty to be substituted in its place.⁸⁵

In order that the plea of guilty may be accepted, and a judgment and sentence pronounced thereupon, the plea must be entirely voluntary and given under circumstances which would permit the introduction in evidence of a confession made out of court. It must be shown to have been uninfluenced by fear or by hope. It must not be the result of misrepresentation or over-persuasion; it must also be shown not to have been the outcome of ignorance or of a misconception of the rights of the accused.⁸⁶

The burden of proof is on the state to satisfy the court that the plea of guilty was voluntary and that the accused understood the nature of the plea. Ordinarily, this will be presumed from the absence of any circumstances showing compulsion, but the matter is regulated by statutes in some states. In Michigan, it is provided where a defendant pleads guilty, that the court, before pronouncing sentence, must investigate and satisfy itself that the plea was made with a full knowledge of the consequences and without undue influence.⁸⁷

If the prisoner had, and acted under, proper legal advice, the discretion of the court is not abused if the judge shall refuse to allow a plea of guilty to be withdrawn after sentence.⁸⁸

If, however, the refusal to permit the plea of guilty to be withdrawn results in gross and manifest injustice to the prisoner, as would be the case where he, by mistake, pleads guilty to the wrong indictment,⁸⁹ or, being of foreign birth and training, he was densely ignorant of the language and of the judicial institutions

⁸⁴ Reg. v. Sell, 9 C. & P. 346; Kro-
lage v. People, 224 Ill. 456, 79 N. E.
570; State v. Hortman, 122 Iowa 104,
97 N. W. 981; Rex v. Plummer,
(1902) 2 K. B. 339, 71 Law J. K. B.
805, 86 Law T. 836, 51 Wkly. Rep.
137, 66 J. P. 647.

⁸⁵ People v. McCrory, 41 Cal. 458.

⁸⁶ Gardner v. People, 106 Ill. 76;
Monahan v. State, 135 Ind. 216, 34
N. E. 967; State v. Yates, 52 Kan.
566, 35 Pac. 200; Green v. Common-
wealth, 12 Allen (Mass.) 155; State
v. Stephens, 71 Mo. 535; Swang v.

State, 2 Coldw. (Term.) 212, 88 Am.
Dec. 593; O'Brien v. State (Tex.),
35 S. W. 666.

⁸⁷ People v. Lepper, 51 Mich. 196,
16 N. W. 377; People v. Lewis, 51
Mich. 172, 16 N. W. 326.

⁸⁸ Clark v. State, 58 N. J. L. 383, 34
Atl. 3; People v. Lennox, 67 Cal. 113,
114, 7 Pac. 260; Commonwealth v.
Hagarman, 10 Allen (Mass.) 401;
United States v. Bayaud, 23 Fed. 721;
Krolage v. People, 224 Ill. 456, 79 N.
E. 570.

⁸⁹ Davis v. State, 20 Ga. 674, 676.

of the jurisdiction,⁴⁰ or where his plea was caused by his erroneous belief, based upon a remark by the judge that the lowest sentence would be imposed,⁴¹ or where there is any doubt of the sanity of the prisoner,⁴² or he pleads guilty under duress, and because of the intimidation and threats of being lynched by a mob,⁴³ the conviction should be reversed.

But the mere fact that the punishment is greater than the accused anticipated that he would receive if he pleaded guilty,⁴⁴ or that the district attorney or other prosecuting official was permitted to offer evidence of facts and circumstances to aggravate the guilt of the accused and to increase his punishment, is not sufficient to justify permitting a voluntary plea of guilty to be withdrawn.⁴⁵

A statute which requires the judge to satisfy himself that a plea of guilty was freely made, uninfluenced by fear or the delusive hope of pardon, with full knowledge of the charge and without undue influence, must be strictly observed with a view of protecting the accused against unscrupulous persons who might extort a plea of guilty from him through his ignorance or by false promises.⁴⁶

⁴⁰ *Gardner v. State*, 106 Ill. 76.

⁴¹ *State v. Stephens*, 71 Mo. 535, 537.

⁴² *Commonwealth v. Battis*, 1 Mass. 95; *Burton v. State*, 33 Tex. C1. App. 138, 25 S. W. 782; *People v. Scott*, 59 Cal. 341; *DeLoach v. State*, 77 Miss. 691, 27 So. 618. In moving to amend the record after a conviction by striking out a plea entered by mistake, it must be shown when the mistake was first discovered. The accused must be free from laches. The testimony of the accused that a mistake has been made is insufficient to justify the amendment. *McKevitt v. People*, 208 Ill. 460, 70 N. E. 693.

⁴³ *Sanders v. State*, 85 Ind. 318, 320-334, 44 Am. 29.

⁴⁴ *Mastronada v. State*, 60 Miss. 86.

⁴⁵ *Mounts v. Commonwealth*, 89 Ky. 274, 12 S. W. 311, 11 Ky. L. 474.

⁴⁶ *People v. Lepper*, 51 Mich. 196, 199, 16 N. W. 377; *Coleman v. State*, 35 Tex. Cr. App. 404, 33 S. W. 1083; *Frosh v. State*, 11 Tex. App. 280. When a statute prescribes certain absolutely essential preliminaries are to be observed before the plea of guilty can be accepted, these prerequisites must be made manifest by the record and cannot be supplied by inference or intendment. *Saunders v. State*, 10 Tex. App. 336, 339; *Coleman v. State*, 35 Tex. Cr. App. 404, 33 S. W. 1083. The court should question the friends of the accused and his counsel. *Henning v. People*, 40 Mich. 733. This may be done in open court and in presence of the prosecuting attorney. *People v. Lewis*, 51 Mich. 172, 16 N. W. 326.

A plea of guilty is only a confession of guilt in the manner and form as charged in the indictment. It admits the facts charged and no others. It does not admit that the facts stated in the indictment constitute a crime. Hence a conviction on a plea of guilty should be reversed where no legal crime is actually charged in the indictment,⁴⁷ or where the crime to which the accused pleads guilty is not the offense described in the indictment.⁴⁸

But a plea of guilty waives formal defects in the indictment upon which a plea in abatement might be based.⁴⁹

§ 145. Confessions of persons not indicted.—The incriminating statements of a third person that he committed the crime for which the accused is on trial are hearsay. Such persons must be produced as witnesses.⁵⁰

Accordingly evidence on a trial for homicide that a person who was present when the deceased was killed then stated that he and not the accused had shot the deceased, is properly excluded unless the person whose statement is offered shall be produced as a witness.⁵¹

The prisoner may, of course, disprove his guilt by proving the guilt of some other person.⁵² But he cannot do that by introducing the extra-judicial confession or declaration of that person that he intended to commit, or that he had committed, the crime. The extra-judicial declaration is never conclusive upon the declarant. He may, if he be subsequently indicted because of this so-called confession, demonstrate its falsity and absolve himself. To receive such statements as exculpatory proof would be to open wide the door for the practice of fraud whereby the acquittal of the real criminal would be assured.⁵³

⁴⁷ *Crow v. State*, 6 Tex. 334, 355; *Fletcher v. State*, 12 Ark. 169; *Fatrick v. State* (Wyo., 1908), 98 Pac. 588; *Commonwealth v. Kennedy*, 131 Mass. 584; *Boody v. People*, 43 Mich. 34, 4 N. W. 349; *State v. Levy*, 119 Mo. 434, 24 S. W. 1026; *Moore v. State*, 53 Neb. 831, 74 N. W. 319.

⁴⁸ *State v. Queen*, 91 N. Car. 659, 660.

⁴⁹ *Carper v. State*, 27 Ohio St. 572.

⁵⁰ *Rhea v. State*, 10 Yerg. (Tenn.)

257; *Welsh v. State*, 96 Ala. 92, 96, 11 So. 450; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *State v. Fletcher*, 24 Ore. 295, 33 Pac. 575, 577; *State v. Haynes*, 71 N. Car. 79, 84; *State v. Bishop*, 73 N. Car. 44.

⁵¹ *Selby v. Commonwealth* (Ky.), 80 S. W. 221, 25 Ky. L. 2209.

⁵² *Brown v. State*, 120 Ala. 342, 25 So. 182; *McDonald v. State* (Ala., 1910), 51 So. 629.

⁵³ *Greenfield v. People*, 85 N. Y. 75, 90, 39 Am. 636; *Daniel v. State*, 65

But if it is alleged by the state that the third person was an accessory, his confession that he was the principal is admissible in favor of one who, being tried as the principal, claims he is not.⁵⁴

§ 146. The value of confessions as evidence.—The evidential value of confessions and their character, cogency and force as proof of crime are subjects that have elicited much discussion. Some, basing their views upon the natural presumption that a man will not voluntarily incriminate himself by uttering falsehoods, regard confessions as of considerable, if not of paramount value, in determining the guilt of the accused.⁵⁵

Still it is usually very necessary that some degree of care should be used in receiving the confession, and much caution employed by the jury in ascertaining its weight and sufficiency. Its credibility is entirely for their determination, and though they may believe it to have been wholly free and voluntary, they may, and indeed must, scrutinize the confession closely, keeping in view the peculiar circumstances in which it was made. For it must be remembered that though it may have been voluntary the accused was, at the time he made it, embarrassed by the present rigors of his arrest and confinement in prison and menaced with the fear of death or a term of imprisonment in the future. Such

Ga. 199; *State v. Beaudet*, 53 Conn. 536, 540, 4 Atl. 237, 55 Am. 155; *Smith v. State*, 9 Ala. 990; *West v. State*, 76 Ala. 98, 99; *State v. Gee*, 92 N. Car. 756, 760; *People v. Gillespie*, 111 Mich. 241, 69 N. W. 490. Defendant will not be permitted to show that a third person whose connection with the crime does not appear fled on the night it was committed. *Owensby v. State*, 82 Ala. 63, 64, 2 So. 764.

⁵⁴ *Pace v. State* (Tex., 1893), 20 S. W. 762. The admissions and declarations of a person who has been injured by the accused in the perpetration of the crime, either in person or property, are not competent evidence in favor of the accused, except for the purpose of impeaching the

testimony of the injured person, in case he shall testify as a witness, unless they form a part of the *res geste* of some relevant act. *Williams v. State*, 52 Ala. 411; *State v. Maitremme*, 14 La. Ann. 830; *Commonwealth v. Densmore*, 12 Allen (Mass.) 535; *People v. McLaughlin*, 44 Cal. 435.

⁵⁵ *People v. Borgetto*, 99 Mich. 336, 58 N. W. 328. See, also, *Commonwealth v. Shaffer*, 178 Pa. 409, 35 Atl. 924; *People v. Bennett*, 37 N. Y. 117, 93 Am. Dec. 551; *Mercer v. State*, 17 Ga. 146; *Lipsey v. People*, 227 Ill. 364, 81 N. E. 348. Admissibility of confessions, see note, 6 Am. St. 242, 243; against whom admissible, 6 Am. St. 251.

circumstances are not in general conducive to the calmness and deliberation which are necessary to secure a truthful and accurate narrative of past events of a stirring nature in which the speaker was the principal actor and participant.⁵⁶

From the moment of his arrest an accused person is surrounded by shrewd and experienced police officials, whose daily business it is to deal with hardened criminals, and whose interest it is, not to secure the acquittal of the innocent, but to bring the guilty to justice. The fact that a person under arrest is subsequently proved to be innocent of the crime charged, is often regarded as showing a lack of judgment or experience on the part of the officials causing or procuring his arrest. Hence it commonly happens that detectives, policemen and others entrusted with the detection and apprehension of criminals assume that every one who is placed under arrest is guilty of the crime charged. Such a mental attitude often leads to a wilful, and sometimes even to an unconscious and involuntary suppression, of those facts which indicate that the prisoner is innocent, and to an exaggeration of those which point to guilt.⁵⁷

* Nobles v. State, 98 Ga. 73, 26 S. E. 64. In *Commonwealth v. Tucker-man*, 10 Gray (Mass.) 173, 190, the court said: "It is not because of any breach of good faith in admitting them, nor because they are extorted illegally, but the reason is that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced by the hope of advantage, or fear of injury, to state things which are not true. The influence which is to exclude the party's confession must be external influence, and not the mere operation of his own mind." *Graham v. State*, 118 Ga. 807, 45 S. E. 616; *State v. Adams* (Del.), 65 Atl. 510.

⁵⁷ *Priest v. State*, 10 Neb. 393, 400, 2 N. W. 468, 1 Green. on Ev., § 219. "It is a rule of law that the confessions of parties charged with crime should be acted upon by courts

and juries with great caution. * * * The wisdom of this rule cannot be questioned, for the reason that notwithstanding the confessions of persons accused of crime have been held to be evidence of the very highest character, upon the theory that no man would acknowledge that he had committed a grave crime unless he was actually guilty, but experience teaches that this theory is a fallacy, for it is a fact that numbers of persons have confessed that they were guilty of the most heinous crimes, for which they suffered the most horrible punishments and yet they were innocent. In the sixteenth and seventeenth centuries, in enlightened England, men and women confessed that they were guilty of witchcraft—communion with evil spirits and suffered at the stake therefore, and at this day men through fear of per-

So, too, the accused may confess that he is guilty in order to divert suspicion from another, or to enable some other person to escape, and when he is himself placed on trial repudiate all he has said, and conclusively prove his innocence by unimpeachable evidence. A confession made to free another from suspicion or arrest is not, for that reason, inadmissible, particularly where the suspected person testifies that the accused substantially acknowledged the facts confessed in his hearing.⁵⁸ Such cases are, however, admittedly rare, and can hardly, with justice, be invoked to impeach confessions made under ordinary circumstances rendering them admissible.

§ 147. **Corroboration of extra-judicial confessions.**—A naked confession is one which is not corroborated by independent proof of the *corpus delicti*. Upon such a confession made in open court, as, for example, by a plea of guilty, a conviction of any crime, and sentence may be had. But in the case of all extra-judicial confessions it is the rule that the *corpus delicti* must be proved by additional evidence before a conviction upon the naked confession alone will be upheld.⁵⁹

sonal punishment, or through hope of averting such punishment, confess that they are guilty of crime, without the slightest foundation in truth for such confession, and for these reasons we say, that the theory that men will not confess to the commission of crimes of which they are innocent, is a fallacy." *Coffee v. State*, 25 Fla. 501, 512, 6 So. 493, 23 Am. St. 525.

"*People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *State v. Grant*, 22 Me. 171, 174.

"*Harden v. State*, 109 Ala. 50, 19 So. 494; *Bartley v. People*, 156 Ill. 234, 40 N. E. 831; *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; *Attaway v. State*, 35 Tex. Cr. App. 403, 34 S. W. 112; *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *Laughlin v. Commonwealth (Ky.)*, 37 S. W. 590, 18 Ky. L. 640; *Pitts v. State*, 43 Miss.

472, 480; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672n; *South v. People*, 98 Ill. 261; *State v. Laliyer*, 4 Minn. 368; *Johnson v. State*, 59 Ala. 37; *State v. Keeler*, 28 Iowa 551; *Stringfellow v. State*, 26 Miss. 157, 165; *Priest v. State*, 10 Neb. 393, 399, 6 N. W. 468; *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676, 15 N. Y. St. 526, 28 Wkly. Dig. 545; *Holland v. State*, 39 Fla. 178, 22 So. 298; *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *Willard v. State*, 27 Tex. App. 386, 11 S. W. 453, 11 Am. St. 197; *People v. Lane*, 49 Mich. 340, 13 N. W. 622; *People v. Ranney*, 153 Mich. 293, 116 N. W. 999, 15 Det. Leg. N. 442; *State v. Abrams*, 131 Iowa 479, 108 N. W. 1041; *State v. Banusik (N. J.)*, 64 Atl. 994; *Allen v. State*, 4 Ga. App. 458, 61 S. E. 840; *Jones v. State*, 2 Ga. App. 433, 58 S. E. 559; *Smith v.*

There have been, however, some apparent exceptions to this general rule. They are early cases and most of them were decided in England where the probative value of extra-judicial confessions was particularly during the latter part of the eighteenth and the early part of the nineteenth century regarded with very much greater favor than it is at the present time, in either England or America. So, also, the American cases sustaining the exceptions are all early cases and have been either expressly or by implication overruled in the more recent decisions.⁶⁰

The corroborative evidence must, independently of the confession, prove or tend to prove that a crime has been committed and that the accused committed it or was connected with it.⁶¹ The *corpus delicti* need not be proved beyond all reasonable doubt independently of the confession itself.⁶²

State, 125 Ga. 296, 54 S. E. 127; Owen v. State, 119 Ga. 304, 46 S. E. 433; Bines v. State, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33n; Marshall v. State, 84 Ark. 88, 104 S. W. 934; Ex parte Patterson, 50 Tex. Cr. App. 271, 95 S. W. 1061; People v. Brasch, 193 N. Y. 46, 85 N. E. 809; Wilson v. State (Ga.), 64 S. E. 112; Boyd v. State, 4 Ga. App. 58, 60 S. E. 801; Burk v. State, 50 Tex. Cr. App. 185, 95 S. W. 1064; Rucker v. State, 2 Ga. App. 140, 58 S. E. 295; State v. Rogoway, 45 Ore. 601, 78 Pac. 987; Williams v. State, 125 Ga. 741, 54 S. E. 661; State v. Knowles, 185 Mo. 141, 83 S. W. 1083; Green v. Commonwealth (Ky.), 83 S. W. 638, 26 Ky. L. 1221; Holland v. Commonwealth (Ky.), 82 S. W. 596, 26 Ky. L. 790; People v. Fallon, 149 Cal. 287, 86 Pac. 689; People v. Eldridge, 3 Cal. App. 648, 86 Pac. 832; State v. Marselle, 43 Wash. 273, 86 Pac. 586; Griffiths v. State, 163 Ind. 555, 72 N. E. 563; McAllister v. State, 2 Ga. App. 654, 656, 58 S. E. 1110; United States v. Boese, 46 Fed. 917,

919. Evidence of the finding of a body showing marks of violence sufficient to cause death, and of weapons or articles stained with blood near it, sufficiently proves that a murder has been committed to sustain a conviction based on an extra-judicial confession. Paul v. State, 65 Ga. 152, 155; People v. Deacons, 109 N. Y. 374, 378, 16 N. E. 676, 15 N. Y. St. 526, 28 Wkly. Dig. 545.

⁶⁰ White v. State, 49 Ala. 344; Stephen v. State, 11 Ga. 225; State v. Cowan, 7 Ired. (N. Car.) 239; Rex v. Tippet, R. & R. 509; Reg. v. Unkles, Ir. R. 8 C. L. 50.

⁶¹ State v. Jacobs, 21 R. I. 259, 43 Atl. 31; People v. Ranney, 153 Mich. 293, 116 N. W. 999, 15 Detroit Leg. N. 442; Commonwealth v. Killion, 194 Mass. 153, 80 N. E. 222.

⁶² People v. Jones, 123 Cal. 65, 55 Pac. 698; People v. Harris, 114 Cal. 575, 46 Pac. 602; Gantling v. State, 41 Fla. 587, 26 So. 737; Sanders v. State, 118 Ga. 329, 45 S. E. 365; State v. Coats, 174 Mo. 396, 74 S. W. 864; People v. Fanning, 131 N. Y. 659, 30

The meaning of this is that the evidence offered in corroboration need not be sufficient alone, aside from the confession to convince the jury of the guilt of the accused beyond all reasonable doubt, but if the evidence of the *corpus delicti* considered with the confession of the accused, the jury believe beyond a reasonable doubt that the prisoner is guilty a conviction will be sustained.⁶³

§ 147a. Credibility of confession and use of in favor of the accused.

—The witness called to prove an oral confession need not repeat the exact words of the accused.⁶⁴ But it is absolutely essential that he should remember the substance of what was said in the conversation⁶⁵ and be able to state it accurately. And unless it shall affirmatively appear that the witness thoroughly understood the language in which the prisoner spoke,⁶⁶ the confession should be rejected.

The burden of proving that the language of the accused was properly interpreted in the case of an alleged confession by one who speaks no English is upon the prosecution. If the confession is taken down in the English language, reading it and re-interpreting it back to the prisoner added to the oath of the interpreter as to the correctness of his interpretation, are usually sufficient.⁶⁷

The interpreter need not be chosen by the accused. He may be a person chosen by the prosecuting attorney and his evidence is not hearsay but is competent, provided he will swear that he correctly interpreted the questions and answers.⁶⁸

The confession may be given in evidence for the accused as

N. E. 569, 8 N. Y. Cr. 363, 43 N. Y. St. 771; State v. Jacobs, 21 R. I. 259, 43 Atl. 31.

*Davis v. State, 141 Ala. 62, 37 So. 676; Flower v. United States, 116 Fed. 241, 53 C. C. A. 271; State v. Knapp, 70 Ohio St. 380, 71 N. E. 705. *State v. Berberick (Mont.), 100 Pac. 209; State v. Desroches, 48 La. Ann. 428, 19 So. 250; State v. Avery, 31 La. Ann. 181.

*Berry v. Commonwealth, 10 Bush (Ky.) 15; Kendall v. State, 65 Ala. 492.

*State v. Buster, 23 Nev. 346, 47 Pac. 194; People v. Gelabert, 39 Cal. 663, 665. Cf. People v. Thoms, 3 Park. Cr. (N. Y.) 256.

*State v. Banusik (N. J.), 64 Atl. 994.

*People v. Randazzio, 194 N. Y. 147, 87 N. E. 112.

well as against him.⁶⁹ The whole of what was said should be put in evidence by the prosecuting officer, and if he shall refuse or neglect to do so, the accused has the right to prove the part omitted which may be favorable to him,⁷⁰ and the confession may be partly or wholly rejected by the jury if it is not believed by them.⁷¹

The jury are bound to consider the confession in the light of all the circumstances of the case. They should not separate it from the other evidence and determine its credibility independently of all the other evidence. They must consider it in connection with all the facts of the case, and having done this, they may believe such parts of it as they find sufficiently corroborated

⁶⁹ Conner v. State, 34 Tex. 659, 662; Rex v. Clewes, 4 C. & P. 221, 223, 226.

⁷⁰ People v. Gelabert, 39 Cal. 663, 665; Conner v. State, 34 Tex. 659, 666; Griswold v. State, 24 Wis. 144, 148; Crawford v. State, 4 Coldw. (Tenn.) 190, 192; State v. Worthington, 64 N. Car. 594, 596; State v. Hollenscheit, 61 Mo. 302; Dodson v. State, 86 Ala. 60, 63, 5 So. 485; Commonwealth v. Keyes, 11 Gray (Mass.) 323; State v. Green, 48 S. Car. 136, 26 S. E. 234; State v. Busse (Iowa), 100 N. W. 536; Frazier v. Commonwealth (Ky.), 114 S. W. 268; Maddox v. State (Ala.), 48 So. 689. "There is no doubt that if a prosecutor uses the declaration of a prisoner he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration taken in evidence must be admitted as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a position to contradict any part of it, he is at liberty

to do so, and then the statement of the prisoner and the whole of the other evidence must be left to the jury for their consideration, precisely as in any other case where one part of the evidence is contradictory of another." The court, in Rex v. Jones, 2 C. & P. 629.

⁷¹ Rex v. Clewes, 4 C. & P. 221, 225; Furst v. State, 31 Neb. 403, 409, 47 N. W. 1116; People v. Taylor, 93 Mich. 638, 641, 53 N. W. 777; Griswold v. State, 24 Wis. 144, 148; Hanrahan v. People, 91 Ill. 142, 147; Long v. State, 86 Ala. 36, 37, 5 So. 443; Johnson v. State (Ga., 1890), 12 S. E. 471; People v. Cassidy, 133 N. Y. 612, 30 N. E. 1003, 44 N. Y. St. 869; Blackburn v. State, 23 Ohio St. 146; Commonwealth v. Brown, 149 Mass. 35, 38, 20 N. E. 458; Hauk v. State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; State v. Brinte, 4 Pen. (Del.) 551, 58 Atl. 258; State v. Blodgett, 50 Ore. 329, 92 Pac. 820; State v. LuSing, 34 Mont. 31, 85 Pac. 521; State v. Tilghman (Del.), 63 Atl. 772; Brewer v. State, 72 Ark. 145, 78 S. W. 773; Nicks v. State, 40 Tex. Cr. App. 1, 48 S. W. 186.

and reject the rest; but, of course, they should not, in accepting or rejecting the confession, act arbitrarily or without reason.⁷²

All that the accused said constituting the confession, whether favorable to him or not, ought to be received in its entirety. To allow the introduction of fragments of a conversation, admitting those indicative of the prisoner's criminality and suppressing others which, by limiting or modifying the former, may establish his innocence, is utterly inconsistent with all principles of justice and humanity.⁷³

⁷² *Gantling v. State*, 40 Fla. 237, 23 So. 857; *Zuckerman v. People*, 213 Ill. 114, 72 N. E. 741.

⁷³ A witness called to identify a written confession, on being asked if the accused said anything further, may state that the writing contains the substance of what was said. Such

an answer is not inadmissible as an opinion. *State v. Williamson*, 106 Mo. 162, 171, 17 S. W. 172. See, as sustaining text, *People v. Gelabert*, 39 Cal. 663; *McCann v. State*, 13 Sm. & M. (Miss.) 471; *Brown v. Commonwealth*, 9 Leigh. (Va.) 633, 33 Am. Dec. 263.

CHAPTER XIII.

ALIBI.

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| § 148. Definition and character of alibi—Burden of proof. | § 151. Impeaching the alibi—Defendant's declarations. |
| 149. Distance and period of absence. | 152. Reasonable doubt. |
| 150. Relevancy of evidence. | 153. Cautioning the jury as to evidence of alibi. |

§ 148. Definition and character of alibi—Burden of proof.—The plea of an alibi is a plea of not guilty, because at the instant of the crime the accused was "elsewhere" than where it was committed. In theory this plea may be viewed from two standpoints. First, it may be regarded as a traverse of the crime alleged raising a clear and direct issue of the defendant's guilt on the whole case in the same manner as any defense involving the assertion of an independent and distinct fact, as, for example, the plea of insanity, or that the supposed victim of a homicide is alive. Or, it may be regarded solely as traversing a single element in the criminal charge against the accused, *i. e.*, his presence at the place and time of the offense.¹

The majority of the cases, adopting the former view, maintain that the burden of proving the alibi is upon the defendant, in accordance with the rule that the burden of proof is always upon the party asserting an affirmative fact, or one peculiarly within his own knowledge. Until the state offers rebutting evidence to overcome the alibi, the only evidence before the jury to counterbalance defendant's evidence is the incidental proof of time and place contained in the *prima facie* case of the state. But suppose all the evidence offered by the state showing the presence of the accused, while insufficient to convince the jury of *that fact* beyond a reasonable doubt, preponderates over the evidence of the de-

¹ Under some circumstances the on the question of his identity. For proof that the accused was elsewhere evidence of identification, see *supra*, than the place of the crime must turn §§ 53-56.

defendant *on that point*? Must he lose the benefit of this evidence in disproving his guilt because *on one particular point* it is outweighed? The jury have no right to disregard any evidence unless after due consideration they totally disbelieve it. They may and should consider defendant's evidence of an alibi in connection with all the evidence in the case; and the general rule still holds good that the state is required to convince them of his guilty participation in the crime, time and place being essential ingredients in this participation, beyond a reasonable doubt upon all the evidence.*

If the alibi be regarded solely as a denial of a single necessary element in the charge, it seems as illogical in such case to place the burden of proof on the accused as it would be to require him to prove the absence of a criminal intent. Time and place are essential elements of a crime.* The state must prove them *prima*

*State v. Conway, 56 Kan. 682, 44 Pac. 627; State v. Harvey, 131 Mo. 339, 32 S. W. 1110; State v. Lowry, 42 W. Va. 205, 24 S. E. 561; People v. Pichette, 111 Mich. 461, 69 N. W. 739; Borrego v. Territory, 8 N. Mex. 446, 46 Pac. 349; Carlton v. People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; Ackerson v. People, 124 Ill. 563, 571, 16 N. E. 847, 849; Watson v. Commonwealth, 95 Pa. St. 418, 422; Ware v. State, 59 Ark. 379, 392, 27 S. W. 485; Harrison v. State, 83 Ga. 129, 134, 9 S. E. 542; Walters v. State, 39 Ohio St. 215, 217; Chappel v. State, 7 Coldw. (Tenn.) 92; State v. Ward, 61 Vt. 153, 192, 17 Atl. 483; Beayers v. State, 103 Ala. 36, 15 So. 616; Parham v. State, 147 Ala. 57, 42 So. 1; Bennett v. State, 30 Tex. App. 341, 17 S. W. 545; State v. Chee Gong, 16 Ore. 534, 538, 19 Pac. 607. In Watson v. Commonwealth, 95 Pa. St. 418, 422, the court says: "An alibi is as much a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, with other facts of

the case, raise a reasonable doubt of the guilt of the accused. When the evidence is so imperfect as not to satisfy the jury they will not find the fact. Where the commonwealth rests upon positive and undoubted proof of the prisoner's guilt, it should not be overcome by less than full, clear and satisfactory evidence of the alleged alibi. But the evidence tending to establish an alibi, though not of itself sufficient to work an acquittal, shall not be excluded from the case, for the burden of proof never shifts, but rests upon the commonwealth throughout, upon all the evidence given in the cause, taken together, to convince the jury, beyond a reasonable doubt, of the prisoner's guilt." Notes on proof and burden of proof of alibi, 41 L. R. A. 530-541, 68 L. R. A. 222.

*The prosecution may always with propriety prove that the accused was near the scene of the crime about the time it was committed though he does not allege an alibi. State v. Maher, 74 Iowa 77, 37 N. W. 2; Linsday v.

facie, at least and may do so inferentially, that is by circumstantial evidence, as it may prove the intent. If no alibi is alleged, the burden of proof, under a plea of not guilty, to show the place of the crime is on the state, but is sufficiently sustained by its *prima facie* case. The issue of the defendant's guilt then turns upon other essentials, and the necessity for evidence directly applicable to the issue of place does not arise.

§ 149. **Distance and period of absence.**—The accused is not confined in his evidence to proving that he was elsewhere at the instant of the offense or during the whole of it, if it is a lengthy transaction. The important and necessary facts to be considered in alibi evidence and which the accused may prove are the distance between the scene of the crime and the prisoner's whereabouts; the time of the crime, as compared with that of the alibi, allowing for differences in time-pieces, and in opinions respecting time; and the available means and celerity of travel.⁴ The farther away the accused was the more doubtful is his guilt, until mere distance becomes conclusive if it be so great as to render his participation impossible. If he could have participated, though he were remote, distance, though relatively great, is not conclusive, but time and means of travel must also be considered.⁵ The evidence of the alibi may fairly be required to cover the whole time of the criminal transaction in question, and it has been held also but by a minority of the cases that the accused may be required to show his whereabouts during such a period as will, by its length, convince the jury that it was absolutely impossible for him to have been on the scene of the crime when it was committed.⁶ This seems almost

People, 63 N. Y. 143; Anglely v. State, 35 Tex. Cr. App. 427, 34 S. W. 116.

⁴ Klein v. People, 113 Ill. 596, 599-602. Note on time covered by proof, see 41 L. R. A. 541.

⁵ State v. Fenlason, 78 Me. 495, 502, 7 Atl. 385.

⁶ Beavers v. State, 103 Ala. 36, 15 So. 616; Wisdom v. People, 11 Colo. 170, 175, 17 Pac. 519; Briceland v. Commonwealth, 74 Pa. St. 463, 469; Ware v. State, 67 Ga. 349; Miller v. People, 39 Ill. 457, 464; Albritton v.

State, 94 Ala. 76, 10 So. 426; Williams v. State, 53 Tex. Cr. App. 375, 111 S. W. 729; Kinnemer v. State, 66 Ark. 206, 49 S. W. 815; Fortson v. State, 125 Ga. 16, 53 S. E. 767; Howard v. State, 50 Ind. 190. Where defendant was charged with burning hay stacks which were some distance apart, the evidence should cover the whole time, so as to render it very improbable that the defendant could have burned them. Creed v. People, 81 Ill. 565.

equivalent to requiring him to prove his innocence beyond a reasonable doubt. Hence it is generally sufficient if the evidence, though not absolutely covering the whole time of the transaction,⁷ shall tend fairly to show that he was elsewhere at the moment of the crime, and that he remained there such a period of time as will reasonably exclude the probability that he was in the place of the crime when it was committed.⁸ The length of the period is for the jury to determine upon the facts, including the distance and the time and the customary mode of travel.⁹ If the time necessary to go from the place of the alibi to the place of the crime is in issue, a witness, who has traveled from the one place to the other, may state the time occupied and at what gait he walked.¹⁰ Dissimilarity of conditions and modes of travel may affect the weight, but they cannot the competency of such evidence.¹¹ If the precise time a train left a certain place on a certain date is material on the question of alibi the evidence of the railroad officials that the

⁷ An instruction "that to render an alibi satisfactory the evidence must cover the whole of the time of the transaction in question" was held proper in *Barr v. People*, 30 Colo. 522, 71 Pac. 392. What the "transaction" is, of course, depends on the facts of each case. Hence the period to be covered by the alibi will be more or less elastic, as the court expands or contracts the time limits of the transaction.

⁸ Where an alibi depends upon the agreement of time-pieces, a disagreement of a few minutes being vital, a disagreement may be presumed, rather than to assume that the witnesses on either side testified falsely. *Painter v. People*, 147 Ill. 444, 35 N. E. 64. The accused, it has been held, must show that he was present at some other place before the time of the alleged crime for such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the

time he was at such other place. *Mays v. State*, 72 Neb. 723, 101 N. W. 979.

⁹ *People v. Worden*, 113 Cal. 569, 45 Pac. 844; *State v. Fenlason*, 78 Me. 495, 502, 7 Atl. 385; *Johnson v. State*, 59 Ga. 142, 144; *Pollard v. State*, 53 Miss. 410, 24 Am. 703; *Stuart v. People*, 42 Mich. 255, 261, 3 N. W. 863; *State v. Maher*, 74 Iowa 77, 37 N. W. 2; *West v. State*, 48 Ind. 483, 485; *Albritton v. State*, 94 Ala. 76, 79, 10 So. 426; *State v. Powers*, 130 Mo. 475, 32 S. W. 984. It is not absolutely essential that the evidence of the alibi should cover the whole time of the transaction, though it may be properly regarded with suspicion, if it does not. *State v. Jaynes*, 78 N. Car. 504, 506; *Henry v. State*, 51 Neb. 149, 70 N. W. 924, 66 Am. St. 450.

¹⁰ *People v. Kelly*, 35 Hun (N. Y.) 295, 305; *State v. Flint*, 60 Vt. 304, 14 Atl. 178.

¹¹ *State v. Flint*, 60 Vt. 304, 317, 14 Atl. 178.

company's rules do not permit trains to arrive before their schedule time is inadmissible as hearsay.¹²

§ 150. **Relevancy of evidence.**—The accused may prove he conversed with persons who were at the place where he claims to have been, and he may give a general outline of what was said. But he cannot give all the details of what was said on a pretext that he can thereby show how much time was occupied in the conversation as measuring the period of the alibi.¹³ Evidence that residents of the town, where the defendant is alleged to have been, asserted from the time of his arrest that he was there at the date of the crime is inadmissible as hearsay,¹⁴ nor can he show that he was in the habit of frequenting the locality of the alibi.¹⁵ A witness called to prove an alibi may be asked when his attention was called to the charge against the accused, and what was the date of the crime. He cannot, however, be asked, to impeach him, what he did to inform the prosecuting attorney of the whereabouts of the accused.¹⁶ Evidence that the accused could not have left the house where he was sleeping on the night of the crime without arousing the inmates with evidence that no one was aroused is competent under a plea of alibi.¹⁷

§ 151. **Impeaching the alibi—Defendant's declarations.**—The accused may be asked whom or what he saw while in the place he swears he was, and the state may then show, to impeach him, by witnesses who were present, what persons or things were actually to be seen there.¹⁸ The state may also show where the accused

¹² *People v. Mitchell*, 94 Cal. 550, 554, 29 Pac. 1106.

¹³ *State v. Bedard*, 65 Vt. 278, 284, 26 Atl. 719, 721; *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *Elliott Ev.*, § 2726; note on measure of proof, 41 L. R. A. 537.

¹⁴ *Schuster v. State*, 80 Wis. 107, 118, 49 N. W. 30.

¹⁵ *State v. Wilkins*, 66 Vt. 1, 28 Atl. 323.

¹⁶ *Schuster v. State*, 80 Wis. 107, 108, 49 N. W. 30.

¹⁷ *State v. Delaney*, 92 Iowa 467, 61 N. W. 189.

¹⁸ *People v. Gibson*, 58 Mich. 368, 371, 25 N. W. 316. If the description of other witnesses agreed with defendant's, it would certainly do him no harm; if it disagreed radically, it would be proper for the jury to consider it as a circumstance bearing upon the question whether he saw it as he had testified. See, also, *People v. La Munion*, 64 Mich. 709, 31 N. W. 593. See, also, *People v. Zimmerman*, 3 Cal. App. 84, 84 Pac. 446.

has testified that he was not in the city where the crime was committed during a long period that certain witnesses had seen him there at dates near the date of the crime.¹⁹ It may always be shown that the accused was at or near the scene of the crime. This evidence must come from some one who saw him there. Hearsay evidence that on the day of the crime the accused had been seen in the locality where it was committed is not admissible.²⁰ Any witness who testifies that he saw the accused in the neighborhood of the crime within such a period thereafter as would indicate that he participated in it should be permitted to testify to his conduct, language or appearance as indicating that he did or did not participate in the crime. A witness who immediately after a man was shot saw the accused running toward the place of the crime should be permitted to state that he seemed excited, was running or walking fast and that he panted for breath.²¹ Nor are self-serving declarations of the accused not a part of the *res gesta*, received to prove an alibi. The danger of permitting the accused thus to fabricate evidence for himself is clear. Hence, his statements as to his whereabouts made on returning to his home after an absence covering the date of the crime are inadmissible.²² Nor can the accused prove that about six hours before the crime he invited another person to spend the night with him at his home about three miles from the *locus in quo*.²³

§ 152. **Reasonable doubt.**—The cases generally hold that the accused need not, in order that his evidence of an alibi may be by the jury considered sufficient to acquit him, establish it by a preponderance of the evidence.²⁴ But the alibi must be sustained by

¹⁹ *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668.

²⁰ *Commonwealth v. Ricker*, 131 Mass. 581, 583. In this case a police sergeant was permitted to testify that a police officer reported to him that he had seen defendant in a certain place on a given date. Held error.

²¹ *State v. Matthews*, 119 La. 665, 44 So. 336.

²² *State v. McCracken*, 66 Iowa 569, 573, 24 N. W. 43. The declaration is a mere narration of a past event. It

is offered to prove something antecedent to the return in no manner pertaining to the character, motive or object of it.

²³ *Sasser v. State*, 129 Ga. 541, 59 S. E. 255.

²⁴ *State v. Rivers*, 68 Iowa 611, 616, 27 N. W. 781; *State v. Rowland*, 72 Iowa 327, 328, 33 N. W. 137; *State v. Howell*, 100 Mo. 628, 664, 14 S. W. 4; *People v. Lee Sare Bo*, 72 Cal. 623, 629, 14 Pac. 310; *Walters v. State*, 39 Ohio St. 215, 217; *Miles v. State*, 93

credible evidence which will reasonably satisfy the jury of the truth of this defense.²⁵ What evidence will be reasonably satisfactory depends wholly upon the circumstances of each case as disclosed by all the evidence, the jury being the sole judges of its weight and sufficiency. If it clearly and cogently appears from the evidence offered by the prosecution that the accused was present at the crime, proof of an alibi ought to be equally clear, cogent and convincing.²⁶ But the evidence of the alibi, even though not clear, may, with other facts, raise enough doubt of guilt to acquit. A reasonable doubt that the accused was present at the time and place of the crime is a reasonable doubt of his guilt.²⁷ Hence, to require the fact of his absence to be fully established and found as a fact by the jury is to disregard all evidence falling short of full proof and to require him to prove the alibi beyond a reasonable doubt. This is certainly not the law.²⁸ If the accused succeeds by his evidence of an alibi in connection with all the evidence in raising a reasonable doubt that he was present he should be acquitted.²⁹

Ga. 117, 19 S. E. 805, 44 Am. St. 140; State v. Child, 40 Kan. 482, 485, 20 Pac. 275. *Contra*, State v. Ward, 61 Vt. 153, 192, 17 Atl. 483; State v. Fenlason, 78 Me. 495, 502, 7 Atl. 385; State v. Hamilton, 57 Iowa 596, 598, 11 N. W. 5; Glover v. United States, 147 Fed. 426, 77 C. C. A. 450. Exhaustive note on proof of reasonable doubt, see 41 L. R. A. 530.

²⁵ Ackerson v. People, 124 Ill. 563, 16 N. E. 847; Watson v. Commonwealth, 95 Pa. St. 418, 420, 422; Albritton v. State, 94 Ala. 76, 10 So. 426; Garrity v. People, 107 Ill. 162, 166; Ransom v. State, 2 Ga. App. 826, 59 S. E. 101; State v. Davis, 6 Idaho 159, 53 Pac. 678; Smith v. State (Tex. Cr. App.), 78 S. W. 516. *Contra*, Hoge v. People, 117 Ill. 35, 44, 6 N. E. 796; State v. Hardin, 46 Iowa 623, 528, 26 Am. 174.

²⁶ Klein v. People, 113 Ill. 596.

²⁷ See Harrison v. State, 83 Ga. 129,

135, 9 S. E. 542; People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233, 5 Cr. L. Mag. 64.

²⁸ People v. La Munion, 64 Mich. 709, 31 N. W. 593; Briceland v. Commonwealth, 74 Pa. St. 463; State v. Jaynes, 78 N. Car. 504; Landis v. State, 70 Ga. 651, 659, 660, 48 Am. 588; People v. Fong Ah Sing, 64 Cal. 253, 255, 28 Pac. 233, 5 Cr. L. Mag. 64; State v. Sanders, 106 Mo. 188, 195, 17 S. W. 223; State v. Woolard, 111 Mo. 248, 256, 20 S. W. 27; State v. Fenlason, 78 Me. 495, 502, 7 Atl. 385; State v. Howell, 100 Mo. 628, 14 S. W. 4; People v. Pearsall, 50 Mich. 233, 236, 15 N. W. 98; Miles v. State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. 140; State v. Hardin, 46 Iowa 623, 628, 26 Am. 174; Hauser v. People, 210 Ill. 253, 71 N. E. 416; Jais v. Territory (N. Mex., 1908) 94 Pac. 917.

²⁹ Kaufman v. State, 49 Ind. 248; Towns v. State, 111 Ala. 1, 20 So.

§ 153. Cautioning the jury as to evidence of an alibi.—The defense of an alibi, it cannot be denied is regarded with some sus-

598; *People v. Resh*, 107 Mich. 251, 65 N. W. 99; *People v. Pichette*, 111 Mich. 461, 69 N. W. 739; *Ware v. State*, 59 Ark. 379, 392, 27 S. W. 485; *State v. Reed*, 62 Iowa 40, 17 N. W. 150; *State v. Fry*, 67 Iowa 475, 478, 25 N. W. 738; *Binns v. State*, 46 Ind. 311, 312; *Watson v. Commonwealth*, 95 Pa. St. 418, 422; *Klein v. People*, 113 Ill. 596, 599, 602; *Sheehan v. People*, 131 Ill. 22, 22 N. E. 818; *French v. State*, 12 Ind. 670, 674, 675, 74 Am. Dec. 229; *State v. Ward*, 61 Vt. 153, 192, 17 Atl. 483; *Commonwealth v. Choate*, 105 Mass. 451; *State v. McCracken*, 66 Iowa 569, 24 N. W. 43; *State v. Jennings*, 81 Mo. 185, 51 Am. 236; *Johnson v. State*, 21 Tex. App. 368, 381, 17 S. W. 252; *State v. Reitz*, 83 N. Car. 634, 635; *People v. Pearsall*, 50 Mich. 233, 15 N. W. 98; *People v. Fong Ah Sing*, 64 Cal. 253, 255, 28 Pac. 233; *Ware v. State*, 67 Ga. 349; *Garrity v. People*, 107 Ill. 162, 167; *Beavers v. State*, 103 Ala. 36, 15 So. 616; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n; *McLain v. State*, 18 Neb. 154, 160, 24 N. W. 720; *Ackerson v. People*, 124 Ill. 563, 574, 16 N. E. 847. In *State v. Hamilton*, 57 Iowa 596, 599, 11 N. W. 5, the court said, by Adams, Ch. J., dissenting: "This court has never undertaken to abrogate the rule that a reasonable doubt of guilt justifies an acquittal. It has, indeed, recognized this rule in the very cases relied upon by the majority as holding that when the defendant relies upon proving an alibi he must prove it by a preponderance of evidence. Both rules cannot be correct, because they are inconsistent with each other. No jury can follow both. Let us suppose

a case where the evidence of an alibi does not preponderate, but does raise a reasonable doubt of guilt. What shall a jury do? If they follow the instruction that the evidence of an alibi must preponderate, they must convict and disobey the instruction as to reasonable doubt. On the other hand, if they follow the instruction as to reasonable doubt they must acquit and disobey the instruction as to the evidence of an alibi. I cannot regard the rule adopted by the majority as to evidence of an alibi as being the established doctrine of this court, so long as it is inconsistent with another rule to which the court still adheres. If the court adopts the rule in question as to an alibi, then to be consistent it should modify the rule as to reasonable doubt. The rule as modified would be as follows: A reasonable doubt of guilt is sufficient to justify an acquittal, unless it is raised by evidence of an alibi, and if it is then it is not sufficient." In *State v. Taylor*, 134 Mo. 109, 35 S. W. 92, the jury was correctly instructed that, although the evidence of an alibi falls short of the weight of moral certainty, yet if it leaves in the minds of the jury such a doubt or uncertainty that, if taken by itself, they could not find for or against an alibi, then the jury must carry such doubt into the case of the prosecution and array it there as an element of reasonable doubt, beyond which the prosecution must establish guilt, that the defendant is entitled as much to the benefit of such doubt as to any other doubt raised by the evidence, and if its weight alone, or with any other doubt, be sufficient to raise a doubt of de-

picion by the courts. This suspicion is doubtless warranted by the ease with which evidence to support an alibi can be manufactured. In the case of a confirmed criminal who has had experience in prior attempts to avoid the consequences of his criminal conduct; and who possesses no appreciation of the sanctity of an oath, an alibi offers a ready defense, particularly where the evidence against him is wholly circumstantial so that he will be confronted on his trial with no eye-witness of his crime. If he has a reasonable expectation that no one will testify that he was actually seen to commit the crime, the temptation is almost irresistible to procure from persons of easy conscience testimony that at the time the crime was committed, the accused was at some place at such a distance from the place of the crime that he could not have committed it.

If the place chosen for the alibi is sufficiently removed from the place of the crime; and if the prosecution has not been informed as to the witnesses the accused will produce to prove his alibi, he may reasonably expect that his testimony of an alibi will not be directly controverted by the prosecution. It then remains for the prosecution only to cross-examine the witnesses called to prove the alibi and by this means to shake their testimony in the minds of the jury. Nevertheless, these considerations are not sufficient as matter of law to disparage the testimony of the defendant to his alibi in the eyes of the jury. A charge which in substance disparages the testimony tending to support the alibi, or which casts any suspicion upon an alibi, as a legitimate defense, is erroneous.³⁰

And it is an invasion of the province of the jury for the court in its charge to instruct them that, as a rule of the criminal law, the defense of alibi is open to great and manifest abuse, because

defendant's guilt, the jury must acquit. See, also, sustaining the text: *Leger v. State*, 111 Tenn. 368, 77 S. W. 1059, 102 Am. St. 781; *State v. Thomas*, 135 Iowa 717, 109 N. W. 900; *Schultz v. Territory*, 5 Ariz. 239, 52 Pac. 352; *State v. MacQueen*, 69 N. J. L. 522, 55 Atl. 1006; *State v. Gadsden*, 70 S. Car. 430, 50 S. E. 16.

³⁰ *Prince v. State*, 100 Ala. 144, 14 So. 409, 410, 46 Am. St. 28; *People*

v. Pearsall, 50 Mich. 233, 15 N. W. 98; *State v. Crowell*, 149 Mo. 391, 50 S. W. 893, 73 Am. St. 402; *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *People v. Kelly*, 35 Hun (N. Y.) 295; *People v. Lattimer*, 86 Cal. 403, 405, 24 Pac. 1091; *Albin v. State*, 63 Ind. 598, 600; *Sater v. State*, 56 Ind. 378; *Albritton v. State*, 94 Ala. 76, 79, 10 So. 426; *State v. Chee Gong*, 16 Ore. 534, 538, 19 Pac. 607.

of the comparative ease with which testimony in support of this defense may be fabricated; or that this defense is often resorted to by those who are guilty; or that perjury, mistake, contrivance and deception are frequently employed and involved in supporting it.⁸¹

It is proper, however, to warn the jury in the charge or to instruct them that they should consider the evidence in support of an alibi with great caution and care,⁸² and that the evidence to prove an alibi should be subjected to a rigid scrutiny. This is true of all evidence.⁸³ But this caution or warning should always be accompanied by an instruction to the effect that if the accused should raise a reasonable doubt of his guilt by reason of the evidence of his alibi, the jury must acquit. So, too, it is not error for the court to tell the jury that they must consider, in determining the credibility of the alibi, that witnesses may be honestly mistaken in or forgetful of times and places,⁸⁴ or that an alibi, like any other defense, may be easily fabricated.⁸⁵

The failure on the part of the accused to prove an alibi should not have any more weight in the minds of the jury than his failure to prove any other defense. The rule is that if it appears to the jury that a witness has wilfully testified falsely to any material fact, they may reject all his testimony. But this rule is not a rule of law and simply permits a presumption of fact to arise in the minds of the jurors. This presumption may arise against the accused where the jurors detect him in deliberately giving false testimony to an alibi.⁸⁶ However, aside from deliberate perjury on the part of the accused or one of his witnesses, in endeavoring to prove an alibi, an unsuccessful attempt to substantiate his de-

⁸¹ *State v. Chee Gong*, 16 Ore. 534, 538, 19 Pac. 607; *Murphy v. State*, 31 Fla. 166, 12 So. 453; *Dawson v. State*, 62 Miss. 241. And see cases cited in last note.

⁸² *People v. Tice*, 115 Mich. 219, 73 N. W. 108, 69 Am. St. 560; *People v. Lee Gam*, 69 Cal. 552, 11 Pac. 183.

⁸³ *Albritton v. State*, 94 Ala. 76, 10 So. 426; *State v. Rowland*, 72 Iowa 327, 329, 33 N. W. 137; *Common-*

wealth v. Webster, 5 Cush. (Mass.) 295, 319, 52 Am. Dec. 711n; *People v. Tice*, 115 Mich. 219, 73 N. W. 108, 69 Am. St. 560.

⁸⁴ *State v. Blunt*, 59 Iowa 468, 13 N. W. 427.

⁸⁵ *People v. Wong Ah Foo*, 69 Cal. 180, 183, 184, 10 Pac. 375, 377.

⁸⁶ *State v. Johnson*, 91 Mo. 439, 444, 445, 3 S. W. 868.

fense of an alibi is not, as a matter of law, a circumstance of much weight against the accused.³⁷

The deliberate fabrication of evidence is always a circumstance pointing, though never conclusively, to the guilt of the prisoner.³⁸ But the mere fact that the prisoner or one of his witnesses has sworn falsely by no means warrants the presumption that the evidence of the state is in all respects true.³⁹ And generally a failure by the accused to prove an alibi does not differ in its effect from a failure on his part to prove any other material fact alleged by him.⁴⁰ Where there is any evidence tending to prove the alibi, it is sometimes, though not universally, held to be reversible error for the court to refuse to charge specially thereon,⁴¹ or to refuse to charge expressly that a reasonable doubt may arise therefrom.⁴²

In view of the apparent irreconcilable conflict of opinion as to the character of this plea and of the right of the court to comment upon the evidence which is offered to sustain it, it is advisable for the court, when cautioning the jury, to accompany its cautionary admonitions with a statement that the alibi is sufficiently proved by the accused if upon all the issues he has succeeded in raising a reasonable doubt in the minds of the jurors that he was present at the time and place of the crime. That fact is exclusively for the jurors to determine.⁴³

³⁷ *Parker v. State*, 136 Ind. 284, 293, 35 N. E. 1105; *Miller v. People*, 39 Ill. 457; *People v. Malaspina*, 57 Cal. 628, 629; *Albritton v. State*, 94 Ala. 76, 10 So. 426; *Commonwealth v. McMahon*, 145 Pa. St. 413, 416, 22 Atl. 971; *Ransom v. State*, 2 Ga. App. 826, 59 S. E. 101; *Landis v. State*, 70 Ga. 651, 48 Am. 588; *Prince v. State*, 100 Ala. 144, 14 So. 409, 46 Am. St. 28; *Adams v. State*, 28 Fla. 511, 10 So. 106.

³⁸ *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

³⁹ *Sawyers v. State*, 15 Lea (Tenn.) 694.

⁴⁰ *Miller v. People*, 39 Ill. 457, 465; *Prince v. State*, 100 Ala. 144, 14 So. 409, 46 Am. St. 28; *Parker v. State*,

136 Ind. 284, 35 N. E. 1105; *Adams v. State*, 28 Fla. 511, 10 So. 106; *Landis v. State*, 70 Ga. 651, 48 Am. 588; *Turner v. Commonwealth*, 86 Pa. St. 54, 27 Am. 683; *People v. Malaspina*, 57 Cal. 628.

⁴¹ *Bennett v. State*, 30 Tex. App. 341, 17 S. W. 545; *Fletcher v. State*, 85 Ga. 666, 667, 11 S. E. 872. *Contra*, *State v. Ward*, 61 Vt. 153, 194, 17 Atl. 483; *Conrad v. State*, 132 Ind. 254, 258, 31 N. E. 805. If the alibi turns on a question of disputed identity, a separate instruction on the former is unnecessary. *Dale v. State*, 88 Ga. 552, 15 S. E. 287.

⁴² *Fleming v. State*, 136 Ind. 149, 36 N. E. 154, 41 L. R. A. 539n.

⁴³ In *State v. Blunt*, 59 Iowa 468, 13

N. W. 427, the court said: "It is recognized in the law that the defense of alibi is one easily manufactured, and jurors are generally and properly advised by the courts to scan the proofs of an alibi with care and caution. * * * That this proposition is correct there can be no doubt. It accords with the observation of every one of experience in criminal trials. Besides, there can be no prejudice in cautioning the jury to closely and carefully scan the proof in every case." There was no prejudice to the defendant in such instructions. So, in the case of *Miller v. People*, 39 Ill. 457: "Failing to prove an alibi

should have no greater weight to convince a jury of the guilt of the prisoner attempting it than the failure to prove any other important item of defense. A prisoner is entitled to rely on the facts in his favor, he may suppose he is able to prove, and if he is so unfortunate as to fail in his proof, it should not, generally speaking, operate to his prejudice. Proof of an alibi is a defense as legitimate as any other, and the court should not say, lest it prejudice the minds of the jury, that failing to establish it, should have great weight against the prisoner."

CHAPTER XIV.

EVIDENCE OF INSANITY AND INTOXICATION.

- § 154. Mental capacity to know right and wrong as a test of insanity.
- 155. Uncontrollable impulse and insane delusions.
- 156. Presumption of continuance of insanity.
- 157. Burden of proof to show sanity and insanity.
- 158. Proof of insanity beyond a reasonable doubt not required.
- 159. The character and range of evidence to show insanity.
- 160. Evidence showing the appearance, conduct and language of the accused after the crime—Evidence of insanity in family of accused.
- 161. Non-expert evidence.
- § 162. Non-expert must relate in evidence facts on which his impression is based—Degree of knowledge required.
- 163. Expert evidence—What constitutes an expert—Physical examination of accused to ascertain sanity.
- 164. Evidence of voluntary intoxication—When irrelevant.
- 165. Insensibility or insanity from indulgence in intoxicants may be shown.
- 166. Evidence of intoxication as bearing on a specific intent, or on premeditation.
- 167. Mode of proving or disproving intoxication.
- 168. Morphine habit.

§ 154. **Mental capacity to know right and wrong as a test of insanity.**—Every man is presumed by the law to be sane and responsible for his actions until the contrary appears. The authorities are by no means harmonious as regards the amount, quality or degree of proof which will be required to overcome this presumption. But the tendency of the most recent cases is to give the prisoner, who pleads insanity as a defense, every reasonable opportunity to secure an acquittal by the employment of the means which modern scientific investigation, into the domain of mental disease, has placed within his reach. The accused must, however, according to a large majority of the cases, prove that "he was laboring under such a defect of reason from disease of the mind as not to know" (*i. e.*, as not to have sufficient mental capacity to know) "the nature and quality of the act he was do-

ing; or, if he did know it, that he did not know he was doing wrong."¹ This rule, which has been followed by a majority of the cases in America, may be considered as a settled rule regulating the degree of mental derangement which must be shown in a criminal trial to overcome the presumption of sanity.²

¹ This is the rule laid down in *McNaghten's Case* in 1843, 10 Cl. & F. 200; 1 C. & K. 130; 8 Scott N. R. 595. In that case the court said: "The jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." Again, in *Moett v. People*, 85 N. Y. 373, 380, the court, by Earl, J., said: "The laws of God and the land are the measure of every man's act and make it right or wrong, and it is right or wrong, as it corresponds with such laws. When it is said that a prisoner must, at the time of the alleged criminal act, have sufficient capacity to distinguish between right and wrong with respect to such act, it is implied that he must have sufficient capacity to know whether such act is in violation of the law of God or of the land, or of both. It is not the duty of the trial judge to present the matter to the jury in every possible phase and in every form of language which the ingenuity of counsel can devise."

² *Mangrum v. Commonwealth*

(Ky.), 39 S. W. 703, 19 Ky. L. 94; *Mackin v. State*, 59 N. J. L. 495, 36 Atl. 1040; *People v. Riordan*, 117 N. Y. 71, 75, 22 N. E. 455; *People v. Downs*, 123 N. Y. 558, 565, 25 N. E. 988; *Tiffany v. Commonwealth*, 121 Pa. St. 165, 180, 15 Atl. 462, 6 Am. St. 775; *Rudy v. Commonwealth*, 128 Pa. St. 500, 18 Atl. 344; *Howard v. State*, 50 Ind. 190; *State v. Wingo*, 66 Mo. 181, 183, 186, 27 Am. 329; *Ogle-tree v. State*, 28 Ala. 693; *Tweedy v. State*, 5 Iowa 433; *State v. Flye*, 26 Me. 312; *People v. Potter*, 5 Mich. 1, 7, 71 Am. Dec. 763; *Dale v. State*, 10 Yerg. (Tenn.) 550; *Goodwin v. State*, 96 Ind. 550, 560; *Conway v. State*, 118 Ind. 482, 490, 21 N. E. 285; *Plake v. State*, 121 Ind. 433, 435, 23 N. E. 273, 16 Am. St. 408; *Willis v. People*, 32 N. Y. 715, 719; *People v. Taylor*, 138 N. Y. 398, 406, 34 N. E. 275; *State v. Harrison*, 36 W. Va. 729, 744, 755, 15 S. E. 982; *Flanagan v. People*, 52 N. Y. 467, 469, 470, 11 Am. 731; *People v. Carpenter*, 102 N. Y. 238, 250, 6 N. E. 584; *State v. Alexander*, 30 S. Car. 74, 84, 8 S. E. 440, 14 Am. St. 879; *United States v. Holmes*, 1 Clif. (U. S.) 98, 26 Fed. Cas. 15382; *State v. Pagels*, 92 Mo. 300, 314, 4 S. W. 931; *State v. Hockett*, 70 Iowa 442, 30 N. W. 742; *Leache v. State*, 22 Tex. App. 279, 308, 3 S. W. 539, 58 Am. 638; *State v. Nixon*, 32 Kan. 205, 211, 212, 4 Pac. 159; *State v. Brandon*, 8 Jones (N. Car.) 463, 467, 468; *People v. Hoin*, 62 Cal. 120, 45 Am. 651; *State v. Lawrence*, 57 Me. 574, 577, 581; *Commonwealth v. Gerade*, 145 Pa. St.

§ 155. **Uncontrollable impulse and insane delusions.**—Some recent cases have departed from this rule. This repudiation of the right and wrong test is, doubtless, due to the desire of the judges to harmonize the legal rules which determine what facts must be proved as a necessary basis for an inference of insanity with the views of the medical profession. In almost every trial where sanity is an issue, medical witnesses are produced, who, viewing the question of sanity from a medical standpoint, give evidence tending to set up some other test than that of a capacity to distinguish and to choose between right and wrong. It is well recognized that the moral sense is highly developed in many whose mental powers are greatly impaired, and that some faint gleam of moral judgment may be discovered, even in the most idiotic. The medical treatment of the insane in asylum proceeds largely upon the theory that the majority of such persons possess the capacity to distinguish between right and wrong, and the testimony of medical witnesses is very apt to be colored thereby and to lead the jury to believe that other elements, than a capacity to judge of the moral character of the act, are to be considered in determining if the accused was insane. Thus, it is said, that though the accused may have been capable of appreciating the moral character of his act, and may have been able to choose the right and to avoid the wrong, yet he should be absolved from punishment for his act if, knowing it was wrong, he was prompted to do it by some uncontrollable or irresistible influence, or was under some insane delusion that made him choose the wrong in preference to the right.

289, 296, 22 Atl. 464, 27 Am. St. 689; 64; State v. O'Neil, 51 Kan. 651, 33 Armstrong v. State, 30 Fla. 170, 205, Pac. 287, 24 L. R. A. 555; State v. 11 So. 618, 17 L. R. A. 484n; Jamison v. People, 145 Ill. 357, 34 N. E. 486; State v. Murray, 6 Cr. L. Mag. 255; State v. Spencer, 21 N. J. L. 196, 206; 87 N. E. 457; Maas v. Territory, 10 Genz v. State, 59 N. J. 488, 37 Atl. 69, Okla. 714, 63 Pac. 960, 53 L. R. A. 59 Am. St. 619; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. 193; Green v. State, 64 Ark. 523, 43 S. W. 973; State v. Swift, 57 Conn. 496, 18 Atl. 664; Lee v. State, 116 Ga. 563, 42 S. E. 759; Hornish v. People, 142 Ill. 620, 32 N. E. 677, 18 L. R. A. 237; State v. Arnold, (Kan. 1909) 100 Pac. 64; State v. O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; State v. Lewis, 20 Nev. 333, 23 Pac. 241; People v. Taylor, 138 N. Y. 398, 34 N. E. 275; People v. Farmer, 194 N. Y. 251, 87 N. E. 457; Maas v. Territory, 10 Okla. 714, 63 Pac. 960, 53 L. R. A. 814; Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. 26; United States v. Chisholm, 153 Fed. 808; State v. Craig (Wash.), 100 Pac. 167; State v. Barker, 216 Mo. 532, 115 S. W. 1102; Thomas v. State (Tex. Cr. App. 1909), 116 S. W. 600.

After the jury have heard such a statement from a medical witness, they are extremely apt to be puzzled by a seemingly contradictory instruction setting up the right and wrong test. Accordingly many of the cases have held that though the evidence shows the defendant had capacity to know the right from the wrong in that particular case, yet, if from the facts it appears that he was acting under an irresistible impulse preventing the choosing of the right or compelling wrong-doing, he should be acquitted.³

§ 156. **Presumption of continuance of insanity.**—No presumption of law is recognized that insanity proved to exist is always continuous down to the date of the crime. The presumption is one of fact, and clearly the continuance of the insanity depends entirely upon the nature of the mental malady. Insanity is undoubtedly often chronic and permanent. This is the case in congenital mental infirmity, as idiocy, or in senile dementia, and it may require very clear proof to overcome the presumption that such insanity is continuous.⁴ If there is proof that the accused had been insane since childhood, he is entitled to an instruction that if he were insane at any time before the commission of the crime, his insanity was presumed to continue, and that the burden is on the state to show that he became sane and was so when he committed the crime.⁵ But the reverse is true where insanity is the result of delirium, ensuing from physical disease or indulgence in intoxicants. The circumstances of each case should be considered, and the matter is wholly for the jury to determine whether a mental condition shown to exist continued down to any specific later period.⁶ Where an insane person has lucid intervals, and no proof

³ *Parsons v. State*, 81 Ala. 577, 2 So. 18 N. E. 833; *State v. Snell*, 46 Wash. 854, 60 Am. 193n (leading case); 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191, 35 L. R. A. 117 note.
⁴ *State v. Jones*, 50 N. H. 369, 9 Am. 242; *Leache v. State*, 22 Tex. App. 779, 3 S. W. 539, 58 Am. 638; *Dacey v. People*, 116 Ill. 555, 556, 6 N. E. 165; *State v. Felter*, 32 Iowa 49; *Plake v. State*, 121 Ind. 433, 435, 23 N. E. 273; but cf. *Grubb v. State*, 117 Ind. 277, 280, 20 N. E. 257, 725.

⁵ *State v. Reddick*, 7 Kan. 143, 151; *Goodwin v. State*, 96 Ind. 550, 560; *Wagner v. State*, 116 Ind. 181, 187, 18 N. E. 833; *State v. Snell*, 46 Wash. 854, 60 Am. 193n (leading case); 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191, 35 L. R. A. 117 note.
⁶ *Allams v. State*, 123 Ga. 500, 51 S. E. 506; *Wooten v. State*, 51 Tex. Cr. App. 428, 102 S. W. 416.
⁷ *Armstrong v. State*, 30 Fla. 170, 204, 11 So. 618, 17 L. R. A. 484n; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *State v. Wilner*, 40 Wis. 304; *State v. Reddick*, 7 Kan. 143, 151; *State v. Lowe*, 93 Mo. 547, 5 S. W. 889; *Whart. Cr. L.*, § 56. It is only

of insanity existing at the instant of the offense is offered, it will be presumed to have been committed during a lucid interval.⁷

§ 157. **Burden of proof to show sanity and insanity.**—The cases are inharmonious upon the question on whom does the burden of proof rest when insanity is in issue in a criminal trial? The prisoner's sanity is an essential and requisite ingredient in any crime with which he may be charged, for, if his mental soundness is not shown, there certainly cannot be a criminal intent present to render the act with which he is connected a crime. It is the general rule that the state has the burden of proving all the necessary ingredients of a crime, including the criminal intention, and this rule logically casts the burden of proving the sanity of an accused person upon the prosecution in the first instance.⁸ We must distinguish clearly between the burden of proof, that is, the obliga-

where the insanity of the accused is of an apparently permanent or continuing type, having the characteristics of a confirmed disorder of the mind as distinguished from spasmodic mania or delirium, the product of disease that any presumption of the continuance of insanity is recognized. *People v. Francis*, 38 Cal. 183; *Armstrong v. State*, 30 Fla. 170, 204, 11 So. 618, 17 L. R. A. 484n; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874.

⁷ *Leache v. State*, 22 Tex. App. 279, 313, 3 S. W. 539, 58 Am. 638; 1 *Russell on Crimes*, p. 11.

⁸ *Ford v. State*, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117n; *O'Connell v. People*, 87 N. Y. 377, 41 Am. 379; *People v. Holmes*, 111 Mich. 364, 69 N. W. 501; *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; *Chase v. People*, 40 Ill. 352, 358; *Langdon v. People*, 133 Ill. 382, 403, 24 N. E. 874; *People v. McCann*, 16 N. Y. 58, 64, 67, 69 Am. Dec. 642n; *Walter v. People*, 32 N. Y. 147; *Walker v. People*, 88 N. Y. 81, 88; *State v. Davis*, 109 N. Car. 780, 14 S. E. 55; *State v. West*,

1 *Houst. Cr. (Del.)* 371; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *Ogletree v. State*, 28 Ala. 693, 702; *Polk v. State*, 19 Ind. 170, 172, 81 Am. Dec. 382; *Armstrong v. State*, 30 Fla. 170, 204, 11 So. 618, 17 L. R. A. 484n; *State v. Schaefer*, 116 Mo. 96, 22 S. W. 447; *State v. Coleman*, 20 S. Car. 441, 454; *Wright v. People*, 4 Neb. 407, 410; *Commonwealth v. Pomeroy*, 117 Mass. 143, 148, 149, followed in *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. 353; *State v. Johnson*, 40 Conn. 136; *Guetig v. State*, 66 Ind. 94, 105-109; *State v. Speyer*, 207 Mo. 540, 106 S. W. 505; *Fults v. State*, 50 Tex. Cr. App. 502, 98 S. W. 1057; *State v. Pressler*, 16 Wyo. 214, 92 Pac. 806; *State v. Quigley*, 26 R. I. 263, 58 Atl. 905, 67 L. R. A. 322; *People v. Casey*, 231 Ill. 261, 83 N. E. 278; *Knights v. State*, 58 Neb. 225, 78 N. W. 508, 76 Am. St. 78n; *Allams v. State*, 123 Ga. 500, 51 S. E. 506; *Wooten v. State*, 51 Tex. Cr. App. 428, 102 S. W. 416, 76 Am. St. 92, 97, note; *Underhill on Ev.*, § 249. *Ante*, §§ 23, 24.

tion imposed upon a party who alleges a fact to establish it by proof, and the mode and order of proof.⁹

The state need not prove the prisoner's sanity by positive and direct evidence. Presumptions often stand for proof until rebutted. The presumption of law that every one is sane, which holds good and is the full equivalent of express proof until it is rebutted,¹⁰ will be sufficient to sustain the burden of proving the prisoner's sanity where the evidence of the state suggests nothing to the contrary. If the state shall prove, even *prima facie*, that the accused committed an act which is criminal by law, and no other evidence is given, his sanity will be presumed, and if the prisoner, in the defense made by him, offers no evidence or offers unconvincing or unsatisfactory evidence on this point, his sanity may be regarded as proved.¹¹ When the accused offers evidence tending to show insanity, the state must produce evidence in re-

⁹ *People v. McCann*, 16 N. Y. 58, 66, 69 Am. Dec. 642n.

¹⁰ *Commonwealth v. Gerade*, 145 Pa. St. 289, 297, 22 Atl. 464, 27 Am. St. 689; *Ford v. State*, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117n; *State v. Cloninger*, 149 N. Car. 567; 63 S. E. 154; *Montag v. People*, 141 Ill. 75; 30 N. E. 337; *United States v. Chisholm*, 153 Fed. 808; *Commonwealth v. Eddy*, 7 Gray (Mass.) 583. See cases cited in next note. Under this rule, it has been held proper to refuse to charge that the burden is on the accused to prove by a preponderance of the evidence that he was not of sound mind at the time of the commission of the crime. *State v. Pressler*, 16 Wyo. 214, 92 Pac. 806.

¹¹ *Bolling v. State*, 54 Ark. 588, 602, 16 S. W. 658; *O'Brien v. People*, 48 Barb. (N. Y.) 274, 280; *Armstrong v. State*, 30 Fla. 170, 197, 11 So. 618, 17 L. R. A. 484n; *O'Connell v. People*, 87 N. Y. 377, 384, 41 Am. 379; *Commonwealth v. Gerade*, 145 Pa. St. 289, 296, 297, 22 Atl. 464, 27 Am. St. 689; *Dove v. State*, 3 Heisk. (Tenn.) 348,

371; *Walker v. People*, 88 N. Y. 81; *Casat v. State*, 40 Ark. 511, 513, 523; *Brown v. State*, 40 Fla. 459, 25 So. 63; *Commonwealth v. Wireback*, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. 625; *State v. Clark*, 34 Wash. 485, 76 Pac. 98, 101 Am. St. 1006; *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093. "Insanity, when it is relied on as a defense to a charge of crime, must be proved to the satisfaction of the jury to entitle the accused to be acquitted on that ground, though such proof may be furnished by evidence introduced by the commonwealth to sustain the charge, as well as by evidence introduced by the accused to sustain the defense. * * * The commonwealth having proved the *corpus delicti*, and that the act was done by the accused, has made out her case. If he relies on the defense of insanity, he must prove it to the satisfaction of the jury. If, upon the whole evidence, they believe he was insane, when he committed the act, they will acquit him on that ground." *Boswell's Case*, 20 Gratt. (Va.) 860, 876.

buttal, to revive and strengthen the presumption of sanity. Then the duty of proving the sanity of the accused, his possession of mental capacity and sense of moral responsibility, is deemed to be upon the state. The presumption of sanity, having been overthrown by the evidence for the defense, is no longer to be considered, but the prosecution must prove the sanity of the accused upon the whole evidence and beyond a reasonable doubt.¹² But the prevailing rule seems to be that an allegation that the defendant is insane is a statement of an independent fact, and is, in its nature, a plea of confession and avoidance. Hence, if insanity is pleaded as a defense, the burden of proof is on the defendant, in conformity with the general rule that he who asserts any affirmative fact has the burden of proof.¹³

¹² Where habitual insanity was proved by the defendant, it was held that the state must prove the existence of a lucid interval at the instant of the crime by direct evidence. *Ford v. State*, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117n; *Thomas v. State* (Tex. Cr. App. 1909), 116 S. W. 600; *State v. Craig* (Wash.), 100 Pac. 167.

¹³ *Boswell's Case*, 20 Gratt. (Va.) 860, 875; *State v. Starling*, 6 Jones (N. Car.) 366; *People v. Myers*, 20 Cal. 518; *State v. Smith*, 53 Mo. 267; *Montag v. People*, 141 Ill. 75, 30 N. E. 337; *Walker v. People*, 88 N. Y. 81; *McKenzie v. State*, 26 Ark. 334, 340; *State v. Stickley*, 41 Iowa 232, 237; *Dove v. State*, 3 Heisk. (Tenn.) 348, 371; *Commonwealth v. Eddy*, 7 Gray (Mass.) 583; *Bergin v. State*, 31 Ohio St. 111; *People v. Travers*, 88 Cal. 233, 238, 26 Pac. 88; *State v. Coleman*, 27 La. Ann. 691, 692; *Meyers v. Commonwealth*, 83 Pa. St. 131; *Graham v. Commonwealth*, 16 B. Mon. (Ky.) 587; *People v. Taylor*, 138 N. Y. 398, 406, 34 N. E. 275; *McLeod v. State*, 31 Tex. Cr. App. 331, 20 S. W. 749; *State v. Pagels*, 92 Mo. 300, 315, 4 S. M. 931; *Sanders v. State*, 94 Ind. 147, 148; *McDougal v.*

State, 88 Ind. 24, 26; *Plake v. State*, 121 Ind. 433, 435, 23 N. E. 273; *Keener v. State*, 97 Ga. 388, 24 S. E. 28; *State v. Wright*, 134 Mo. 404, 35 S. W. 1145; *Brotherton v. People*, 75 N. Y. 159, 163; *People v. McCann*, 10 N. Y. 58, 59, 69 Am. Dec. 642n; *State v. Scott*, 49 La. Ann. 253, 21 So. 271, 36 L. R. A. 721n; *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; *Loeffner v. State*, 10 Ohio St. 598; *United States v. McGlue*, 1 Curt. (U. S.) 1, 26 Fed. Cas. 15679; *State v. Brandon*, 8 Jones (N. Car.) 463; *Commonwealth v. Heidler*, 191 Pa. St. 375, 43 Atl. 211; *People v. Willard*, 150 Cal. 543, 89 Pac. 124; *Porter v. State*, 140 Ala. 87, 37 So. 81; *State v. Johnston*, 118 La. 276, 42 So. 935; *Talbert v. State*, 140 Ala. 96, 37 So. 78; *Kroell v. State*, 139 Ala. 1, 36 So. 1025; *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *State v. Cloninger*, 149 N. Car. 567, 63 S. E. 154. *Ante*, §§ 23, 24.

The question on whom is the burden of proof when insanity is alleged is one of some difficulty. It lies in a narrow compass. The difficulty is the starting point. By some it is maintained that sanity is an essential of the crime and a necessary part of its

§ 158. Proof of insanity beyond a reasonable doubt not required.—

If it be granted that the defendant has the burden of proving his insanity, it remains to be considered what amount or degree of proof is sufficient. The safest rule, and one that is sustained by a large majority of the cases, is that a reasonable preponderance of evidence upon this particular point should acquit the defendant.¹⁴ Though this is a general rule, the verbal forms in which it has been expressed have resulted in throwing the matter into some

definition, and that it must be proved to the jury in the same way as any other part. But it must be remembered that we start with the presumption that all men are sane and responsible for their acts, in the same way that we start with the proposition that no man can legally do that which is a crime. All the elements which enter into the definition of any crime assume a responsible agent to exist, and sanity is assumed and treated as an essential attribute of crime. The indictment says nothing of his capacity, and as it is only as regards the facts therein alleged, that he is presumed innocent, they must be proved and nothing more. By a plea of not guilty alone he has the negative of the issue. If he shall plead insanity, he assumes the affirmative, for, though such a plea is usually coupled with a plea of not guilty, it is, strictly speaking, a confession and avoidance. It admits the allegations of the indictment, but claims that the accused is mentally irresponsible. It raises an affirmative issue outside of the indictment. Even so far as malice is concerned, using that word in its legal sense, it cannot be said that the plea of insanity denies its existence. It admits its presence, but claims the accused was mentally unsound. *State v. Lawrence*, 57 Me. 574, 584.

¹⁴ *Genz v. State*, 58 N. J. L. 482, 34

Atl. 816; *People v. Nino*, 149 N. Y. 317, 43 N. E. 853; *State v. Larkins*, 5 Idaho 200, 47 Pac. 945; *State v. Scott*, 49 La. Ann. 253, 21 So. 271, 36 L. R. A. 721n; *King v. State*, 74 Miss. 576, 21 So. 235; *State v. Redemeier*, 71 Mo. 173, 176, 36 Am. 462; *Graves v. State*, 45 N. J. L. 347, 360, 46 Am. 778; *Fisher v. State*, 30 Tex. App. 502, 18 S. W. 90; *Ford v. State*, 71 Ala. 385; *State v. Felter*, 32 Iowa 49, 54; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642n; *People v. McElvaine*, 125 N. Y. 596, 26 N. E. 929; *State v. Coleman*, 20 S. Car. 441, 454; *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382; *Loeffner v. State*, 10 Ohio St. 598, 616; *Green v. State*, 88 Tenn. 614, 14 S. W. 430; *Smith v. State*, 19 Tex. App. 95, 111; *Graham v. Commonwealth*, 16 B. Mon. (Ky.) 587; *People v. Myers*, 20 Cal. 518; *People v. Bawden*, 90 Cal. 195, 199, 27 Pac. 204; *Commonwealth v. Gerade*, 145 Pa. St. 289, 296, 22 Atl. 464; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458; *Dove v. State*, 3 Heisk. (Tenn.) 348, 373; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *Langdon v. People*, 133 Ill. 382, 403, 24 N. E. 874; *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112; *Schultz v. Territor*, 5 Ariz. 239, 52 Pac. 352; *Braham v. State*, 143 Ala. 28, 38 So. 919.

confusion. Thus it has been said that insanity must be established to the entire or reasonable satisfaction of the jury, or by evidence satisfactory to them, or which satisfies their minds or clearly preponderating. Such expressions are misleading and may be construed to mean that insanity must be established by proof beyond a reasonable doubt. This, however, is not required. Reasonably, not extraordinarily, clear and substantial proof is required. Evidence fairly preponderating is necessary, but never proof beyond a reasonable doubt.¹⁵ To state this doctrine in another way by which, perhaps, the lack of harmony and the confusion in the authorities may be avoided, while the burden of proof to show insanity is on the defendant, yet if he introduces evidence on that point sufficiently preponderating to raise a reasonable doubt in the minds of the jury it is their duty to acquit.¹⁶

¹⁵ *Walker v. People*, 88 N. Y. 81; *Smith v. State*, 31 Tex. Cr. App. 14, 19 S. W. 252; *Commonwealth v. Gerade*, 145 Pa. St. 289, 298, 22 Atl. 464, 27 Am. St. 689; *Coyle v. Commonwealth*, 100 Pa. St. 573, 45 Am. 397; *People v. Bawden*, 90 Cal. 195, 199, 27 Pac. 204; *People v. Willard*, 150 Cal. 543, 89 Pac. 124; *Commonwealth v. Heidler*, 191 Pa. St. 375, 43 Atl. 211; *Al-lams v. State*, 123 Ga. 500, 51 S. E. 506; *State v. Barker*, 216 Mo. 532, 115 S. W. 1102; *People v. Egnor*, 175 N. Y. 419, 67 N. E. 906; *Reed v. State*, 75 Neb. 509; 106 N. W. 649.

¹⁶ *Brotherton v. People*, 75 N. Y. 159, 163; *Casey v. People*, 31 Hun (N. Y.) 158; *Armstrong v. State*, 30 Fla. 170, 196, 11 So. 618, 17 L. R. A. 484n. See also, 17 Am. Law Rev. 922, 10 Crim. Law Mag. 182. *State v. Shuff*, 9 Idaho 115, 72 Pac. 664; *Caffey v. State* (Miss. 1898), 24 So. 315; *State v. Barker*, 216 Mo. 532, 115 S. W. 1102. In *Brotherton v. People*, 75 N. Y. 159, the court, by Church, C. J., remarks as follows: "Crimes can only be committed by human beings who are in a condition to be responsible for their acts, and upon this general proposition the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. * * * Whoever denies this or interposes a defense based upon its untruth, must prove it; the burden, not of the general issue of crime by a competent person, but the burden of overthrowing the presumption of sanity and of showing insanity, is upon the person who alleges it, and if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts, and upon this question the presumption of sanity, and the evidence, are all to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the pris-

§ 159. The character and range of evidence to show insanity.—

Evidence to show insanity is not confined to evidence of the mental condition of the accused at the instant of the act, though whatever facts are adduced must tend to show his mental state at that moment. Mind can only be known by outward acts. By these we read the thoughts, the motives and the emotions, and as one's acts conform to the practice of people of sound mind or contrast therewith we form our judgment of sanity. Evidence is competent to prove conduct and language at various times and places indicating an unhealthy mental condition, and the more extensive the view, the safer is the determination reached. It is proper to allow considerable latitude in the examination of the witness.¹⁷ Every fact which shows or tends to show that the mental or physical condition of the accused was abnormal at the date of the crime, is competent.¹⁸ Thus, a witness may testify that on a certain occasion when the accused was in his presence, his actions were unusual, peculiar or unnatural,¹⁹ and that he talked disconnectedly and appeared absent minded.²⁰ The evidence in point of time may cover an extensive period; the family history of the accused, his relations with the deceased in the case of a homicide and his actions towards the deceased are relevant. In the case of a homicide, where the relations of the deceased with the wife of the accused were of such a character that they might reasonably affect the nervous or mental condition of the accused, those relations may be thoroughly inquired into.²¹ Under the above rule, it has been repeatedly held that evidence of the mental condition of the accused prior and subsequent to the crime,²² and of his conduct at the time of the crime, and within a reasonable period before and after it,²³ is competent. All the previous mental and physical history of the accused is relevant where insanity is the defense as an inference of insanity must rest upon many facts.²⁴

oner is sane, or not, he is entitled to the benefit of the doubt, and to an acquittal."

¹⁷ *Dejarnette v. Commonwealth*, 75 Va. 867.

¹⁸ *State v. Porter*, 213 Mo. 43, 111 S. W. 529, 127 Am. St. 589; *People v. Brent* (Cal. App., 1909), 106 Pac. 110.

¹⁹ *Braham v. State*, 143 Ala. 28, 38 So. 919.

²⁰ *Braham v. State*, 143 Ala. 28, 38 So. 919.

²¹ *State v. McGowan*, 36 Mont. 422, 93 Pac. 552.

²² *People v. Koerner*, 191 N. Y. 528, 84 N. E. 1117.

²³ *People v. Willard*, 150 Cal. 543, 89 Pac. 124.

²⁴ *Guiteau's Case*, 10 Fed. 161, 167.

It may always be shown that he was insane prior to the crime,²⁵ and, though this fact is never conclusive of his insanity at the date of the crime, it may be received as tending to render the truth of independent evidence of that fact more probable.²⁶ The evidence of the insanity or mental weakness of the accused prior to the crime ought to be rejected if too remote in point of time. So where accused who has reached adult years pleads insanity evidence tending to show that when he was a child he was mentally weak ought to be rejected.²⁷

§ 160. Evidence showing the appearance, conduct and language of the accused after the crime—Evidence of insanity in family of accused.—The appearance and conduct of the accused while testifying may be considered by the jury,²⁸ aided by the opinions of experts thereon. The hideous, unnatural and barbarous character of the crime, or the absence of adequate motive, though either may be shown and be considered by the jury,²⁹ does not alone justify an inference of insanity.³⁰ The demeanor of a prisoner after a homicide perpetrated by him, his coolness and lack of regret for his act, his physical appearance and condition, his language showing a motive or the lack of one, his attempt to conceal his crime or to escape, or his open boast that he committed the homicide and the reason for it, may be proved to show his mental condition. None of these facts is conclusive however, and the

²⁵ *People v. Wood*, 126 N. Y. 249, 257, 27 N. E. 362, 365; *United States v. Guiteau*, 10 Fed. 160, 172; *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177; *Pratt v. State*, 50 Tex. Cr. App. 227, 96 S. W. 8; *Braham v. State*, 143 Ala. 28, 38 So. 919; *People v. Willard*, 150 Cal. 543, 89 Rep. 124; *State v. Porter*, 213 Mo. 43, 111 S. W. 529; 127 Am. St. 589; *People v. Koerner*, 191 N. Y. 528, 84 N. E. 1117. Evidence that the accused was or is weak minded or easily influenced should not be received when insanity is not the defense. *State v. Flowers*, 58 Kan. 702; 50 Pac. 938. See, also, as to evidence of the fantastic and ridiculous conduct of the accused while a girl at-

tending school. *Rogers v. State*, 77 Vt. 454, 61 Atl. 489.

²⁶ *State v. Spencer*, 21 N. J. L. 196, 203; *State v. Newman*, 57 Kan. 705, 47 Pac. 881.

²⁷ *People v. Carlin*, 194 N. Y. 448, 87 N. E. 805.

²⁸ *Commonwealth v. Buccieri*, 153 Pa. St. 535, 26 Atl. 228; *Elliott Ev.*, § 2728.

²⁹ *Commonwealth v. Buccieri*, 153 Pa. St. 535, 536, 544, 26 Atl. 228.

³⁰ *United States v. Lee*, 4 Mackey (D. C.) 489; *State v. Stark*, 1 Strobh. (S. Car.) 479; *Guiteau's Cas.* 10 Fed. 161, 168.

jury may discredit them and find the accused guilty.³¹ Indeed isolated facts are of little weight to prove insanity if a person has been generally considered sane, for it may be that the peculiar or eccentric conduct was caused otherwise than by mental weakness. Thus, if the insanity is claimed to have been the result of epilepsy, and the accused states that he frequently fell to the ground in a fit and lay for some time unconscious, the state may be permitted to produce witnesses who knew him well and who had often seen him in a drunken stupor.³² The conversations and the declarations of the accused uttered within a reasonable period before or after the crime are admissible to show his mental condition at the date of the crime.³³ The length of the period within which evidence to show the sanity or insanity of the accused may be permitted depends on the circumstances of each particular case. If it is alleged by the accused that his insanity existed for a long period before the crime and it is apparently of a permanent character, his sanity may be shown by any relevant conduct or conversations within the same period. In one case, the state was permitted to prove conduct and conversations which impressed witnesses as being entirely rational which occurred a year before the crime.³⁴

The jury may consider the cunning and sagacity displayed by the accused in planning the crime, the promptitude and courage shown in using a deadly weapon and the skill exhibited in effecting an escape. Evidence that the accused was generally reputed, prior to the commission of the alleged crime, to be of unsound mind is not admissible, being hearsay merely.³⁵ It may be shown

³¹ *Commonwealth v. Gerade*, 145 Pa. St. 289, 297, 22 Atl. 464, 27 Am. St. 689; *State v. Jones*, 64 Iowa 349, 354, 17 N. W. 911, 20 N. W. 470; *Sanchez v. People*, 22 N. Y. 147; *People v. Thurston*, 2 Park. Cr. (N. Y.) 49; *Jacobs v. Commonwealth*, 121 Pa. St. 586, 15 Atl. 465, 6 Am. St. 802; *People v. Koerner*, 191 N. Y. 528, 84 N. E. 1117, aff'g 117 App. Div. (N. Y.) 40, 102 N. Y. Sup. 93. See §§ 116-120.

³² *Commonwealth v. Buccieri*, 153 Pa. St. 535, 26 Atl. 228.

³³ *Taylor v. United States*, 7 App. Cas. D. C. 27. Under this rule, the

testimony of the accused on former trials was received to show his sanity. *State v. Speyer*, 207 Mo. 540, 106 S. W. 505, 14 L. R. A. (N. S.) 836.

³⁴ *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730.

³⁵ *Brinkley v. State*, 58 Ga. 296; *People v. Pico*, 62 Cal. 50; *Walker v. State*, 102 Ind. 502, 507, 1 N. E. 856; *State v. Hoyt*, 47 Conn. 518, 36 Am. 89n; *Choice v. State*, 31 Ga. 424. Cf. *State v. Leuth*, 5 Ohio C. C. 94, 2 Greenl. § 371; *State v. Church*, 199 Mo. 605, 98 S. W. 16; *Womble v. State*, 39 Tex. Cr. App. 24, 44 S. W.

that an ancestor or the progeny of the accused was insane if there is independent evidence directly tending to show he is insane,³⁶ but evidence of the insanity of collateral relations is irrelevant,³⁷ and evidence of insanity in an ancestor may be excluded, if it is not also shown that the insanity was hereditary.³⁸ The cause of such insanity is always relevant to prove it was not hereditary.³⁹

In proving hereditary insanity, the practice is to permit witnesses who were acquainted with the ancestor of the accused to testify orally to his peculiar and irrational actions, and then to testify that, in the opinion of the witness, based upon such peculiar conduct, the ancestor in question was insane. In other words, a non-expert witness may testify to the insanity of an ancestor of the accused from his opinion based on the same class of facts and in the same manner that he may testify to the insanity of the accused himself. It is not permissible, however, for a witness, though she be the wife or other relation or a friend of the accused, to testify orally that an ancestor of the accused had been adjudged insane; this is not the best evidence. The record must be produced.⁴⁰ Nor can the fact of the insanity of the accused be proven as a matter of family pedigree by the testimony of a witness or the declarations of the relatives of the accused to his insanity. The kindred of the accused who are in a position to prove his insanity must be produced as witnesses.⁴¹

§ 161. Non-expert evidence.—By the weight of authority, a non-expert witness who has had adequate means of becoming ac-

827; *Demaree v. Commonwealth* (Ky.) 91 S. W. 1131; 28 Ky. L. R. 1374; *Porter v. State*, 140 Ala. 87, 37 So. 81; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112; *State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044; *State v. Penna*, 35 Mont. 535, 90 Pac. 787; *State v. Speyer*, 194 Mo. 459, 91 S. W. 1075.

³⁶ *Shaeffer v. State*, 61 Ark. 241, 32 S. W. 679; *Hagan v. State*, 5 Baxt. (Tenn.) 615, 618; *Guiteau's Case*, 10 Fed. 161; *People v. Garbutt*, 17 Mich.

9, 17, 97 Am. Dec. 162n; *Commonwealth v. Johnson*, 188 Mass. 382, 74 N. E. 939; *Watts v. State*, 99 Md. 30, 57 Atl. 542.

³⁷ *State v. Soper*, 148 Mo. 217, 49 S. W. 1007.

³⁸ *Walsh v. People*, 88 N. Y. 458; *State v. Quigley*, 26 R. I. 263, 58 Atl. 905, 67 L. R. A. 322.

³⁹ *State v. Hoyt*, 47 Conn. 518, 36 Am. 89n.

⁴⁰ *State v. Steidley*, 135 Iowa 512, 113 N. W. 333.

⁴¹ *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730.

quainted with the mental state of a person whose sanity is in issue may give his opinion upon the question whether such person was insane at the time of a specific occurrence which is also in evidence.⁴² Thus, for illustration, an attorney who has acted in a professional capacity for the accused may testify as to his conduct, whether rational or irrational at a particular time.⁴³ So, an official stenographer who was present and took down the testimony of the accused at a trial in which the accused was a defendant may state whether or not the answers of the accused impressed him as rational or otherwise. And it is immaterial, under such circumstances, that the stenographer prior to the trial was not personally acquainted with the accused, and that his opinion as to the rational character of the answers of the accused was based solely upon the

⁴² *State v. Williamson*, 106 Mo. 162, 171, 17 S. W. 172; *Phelps v. Commonwealth (Ky.)*, 32 S. W. 470, 17 Ky. L. 706; *Pflueger v. State*, 46 Neb. 493, 64 N. W. 1094; *Genz v. State*, 59 N. J. L. 488, 34 Atl. 816, 59 Am. St. 619; *People v. Strait*, 148 N. Y. 566, 42 N. E. 1045; *Dove v. State*, 3 Heisk. (Tenn.) 348, 367; *State v. Maier*, 36 W. Va. 757; *Schlencker v. State*, 9 Neb. 241, 251, 1 N. W. 857; *Sage v. State*, 91 Ind. 141, 143; *Armstrong v. State*, 30 Fla. 170, 201, 11 So. 618, 17 L. R. A. 484n; *Bolling v. State*, 54 Ark. 588, 16 S. W. 658; *McClackey v. State*, 5 Tex. App. 320; *Wood v. State*, 58 Miss. 741, 743; *People v. Levy*, 71 Cal. 618, 623; *State v. Hayden*, 51 Vt. 296; *Clark v. State*, 12 Ohio 483, 487, 40 Am. Dec. 481; *People v. Conroy*, 97 N. Y. 62; *Holcombe v. State (Ga. App.)*, 62 S. E. 647; *State v. Banner*, 149 N. Car. 519, 63 S. E. 84; *Atkins v. State (Tenn.)*, 105 S. W. 353; *Taylor v. United States*, 7 App. Cas. D. C. 27; *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177; *Leaptrot v. State*, 51 Fla. 57, 40 So. 616; *Watts v. State*, 99 Md. 30, 57 Atl. 542; *Lowe v. State*, 118 Wis. 641, 96 N. W. 417; *People v. Koern-*

er, 191 N. Y. 528, 84 N. E. 1117, aff'g 117 App. Div. (N. Y.) 40, 102 N. Y. S. 93; *State v. Beuerman*, 59 Kan. 586, 53 Pac. 874; *State v. Montgomery*, 121 La. 1005, 46 So. 997; *Rice v. State (Tex. Cr. App.)*, 112 S. W. 299; *State v. Bell*, 212 Mo. 111, 111 S. W. 24; *State v. Bronstine*, 147 Mo. 520, 49 S. W. 512; *Byrd v. State*, 76 Ark. 286, 88 S. W. 974; *Burton v. State*, 51 Tex. Cr. App. 196, 101 S. W. 226; *People v. Clark*, 151 Cal. 200, 90 Pac. 549; *State v. Penna*, 35 Mont. 535, 90 Pac. 787; *Commonwealth v. Wireback*, 190 Pa. St. 319, 42 Atl. 542, 70 Am. St. 625; *State v. Shuff*, 9 Idaho 115, 72 Pac. 664; *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *Glover v. State*, 129 Ga. 717, 59 S. E. 816; *Porter v. State*, 140 Ala. 87, 37 So. 81; *Kroell v. State*, 139 Ala. 1, 36 So. 1025; *Braham v. State*, 143 Ala. 28, 38 So. 919; *State v. Berberick (Mont.)*, 100 Pac. 209. See, also, *Hardy v. Merrill*, 56 N. H. 227, 22 Am. 441, and *Commonwealth v. Pomeroy*, 117 Mass. 143, overruling earlier cases, *contra*. *Patterson v. State*, 86 Ga. 70.

⁴³ *Bishoff v. Commonwealth*, 123 Ky. 340, 96 S. W. 538, 29 Ky. L. 770.

minutes of the testimony as made by him and without any recollection of the manner of the accused in testifying.⁴⁴ The expert may not state his present opinion as distinguished from the opinion he had or the impression made upon his mind at the time of the occurrence observed.⁴⁵ He must state the facts first, and then on this evidence he may express his opinion or impression formed at the time as to the sanity of the accused.⁴⁶ Though, the opinion of the non-expert witness is in its effect the opinion as to the sanity of the accused at a particular time, he is not usually permitted to state his opinion in that shape. All that he is permitted to do, after he has described the facts upon which the opinion is based, is to state whether in his opinion on the facts which he testified to the conduct of the accused was rational or irrational.⁴⁷

§ 162. Non-expert must relate in evidence facts on which his impression is based—Degree of knowledge required.—The opinion of a non-expert, on facts related to him, is never received. But where he has seen the actions of the person, and conversed with him, the law considers it easily within the mental ability of any ordinary person to distinguish the mental condition of an insane person. The influence and value of his opinion will depend largely on the intelligence he shows on his examination, and upon his opportunities for acquiring the knowledge on which his opinion is based.

⁴⁴ *People v. Koerner*, 191 N. Y. 528, 84 N. E. 1117, aff'g 117 App. Div. (N. Y.) 40, 102 N. Y. S. 93.

⁴⁵ *O'Brien v. People*, 36 N. Y. 276, 282; *Hickman v. State*, 38 Tex. 190.

⁴⁶ *Armstrong v. State*, 30 Fla. 170, 201, 11 So. 618, 17 L. R. A. 484n; *State v. Williamson*, 106 Mo. 162, 171, 17 S. W. 172; *State v. Pennymann*, 68 Iowa 216, 26 N. W. 82; *Hoover v. State*, 48 Neb. 184, 66 N. W. 1117; *Com. v. Buccieri*, 153 Pa. St. 535, 26 Atl. 228; *Ellis v. State*, 33 Tex. Cr. App. 86, 24 S. W. 894; *State v. Beuerman*, 59 Kan. 586, 53 Pac. 874; *Henderson v. State*, 49 Tex. Cr. App. 511, 93 S. W. 550; *State v. Bell*, 212 Mo. 111, 111 S. W. 24; *Atkins v. State* (Tenn.), 105 S. W. 353; *Common-*

wealth v. Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. 625; *State v. Constantine*, 48 Wash. 218, 93 Pac. 317; *Fults v. State*, 50 Tex. Cr. App. 502, 98 S. W. 1057; *Bothwell v. State*, 71 Neb. 747, 99 N. W. 669; *People v. Koerner*, 191 N. Y. 528, 84 N. E. 1117; *Parrish v. State*, 139 Ala. 16, 36 So. 1012. Where a lay witness, after describing the symptoms he observed, characterized a man's conduct as irrational, expert testimony showing that people may exaggerate such symptoms is inadmissible. *People v. Webster*, 59 Hun (N. Y.) 398, 400, 13 N. Y. S. 414.

⁴⁷ *People v. Spencer*, 179 N. Y. 408, 72 N. E. 461.

And his previous personal acquaintance with the accused, its character and the length of time it existed, his freedom from bias or interest, the absence of finely spun theories from his conception of the whole matter, the fullness of the facts within his knowledge, and the accuracy of his memory, are also to be regarded in estimating the value of his evidence.⁴⁸ The mental unsoundness or derangement of the accused may have been very marked. It may have been so apparent, from his actions, that any person, though possessing but weak and inadequate powers of observation, may be as competent to express an opinion as the most skillful and learned physician. Here it may be said that the insanity is matter of fact rather than of opinion, and the testimony of the witness is only an opinion in form. If, when stating it in a criminal trial, he narrates with particularity the minor details from which it is deduced or inferred, and, it being made to appear that he was personally acquainted with the accused for a long time, he details the furious acts and gestures, the foolish and incoherent talk, or the absurd and unnatural conduct of the accused, there can be no objection to his adding an inference that any man would draw from them, *i. e.*, that the accused was insane. No rule can be laid down as regards the amount of knowledge which the non-expert witness must possess. The weight the opinion shall have is for the jury alone. If he has full knowledge of the previous life, antecedents and surroundings of the prisoner his opinion ought certainly to have more value than that of a witness who has only meager knowledge of these subjects.⁴⁹

"It is true that a non-expert witness must always state the facts upon which he bases his opinion as to the mental capacity of a defendant in a criminal prosecution, and it is also true that it must appear that he has some knowledge of the acts and conduct of the person upon whose mental condition he declares his opinion. The extent of this knowledge has never been defined, and we cannot frame any general rule which will determine just how much or how little knowledge will entitle the witness' opinion to admission. * * * The court

cannot decide whether the opinion is of much or little weight; its duty is merely to decide whether such knowledge is shown and such facts stated as entitle the witness to express any opinion at all." *Colee v. State*, 75 Ind. 511, 514; *State v. Von Kutzleben*, 136 Iowa 89, 113 N. W. 484; *Underhill on Ev.*, § 197, p. 285.

* *McLeod v. State*, 31 Tex. Crim. App. 331, 20 S. W. 749; *Armstrong v. State*, 30 Fla. 170, 205, 11 So. 618, 17 L. R. A. 484n; *Clark v. State*, 12 Ohio 483, 489, 40 Am. Dec. 481; *Colee v. State*, 75 Ind. 511, 514; *Sage v. State*,

The question whether a witness who is a non-expert is competent to testify is for the court to determine. He must have had some acquaintance with the accused prior to the crime and he must have had some opportunity to observe his conduct upon which is based his opinion whether it was rational or irrational. If it shall appear *prima facie* that the witness did not have sufficient time for observation, his evidence should be excluded.⁵⁰ Thus the witness cannot give his opinion as to the rational conduct of the accused where his only knowledge of the accused was such as was derived from business relations subsequent to the crime.⁵¹ On the other hand, it has been held that a police officer who talked with the accused after his arrest might testify that he then talked rationally where the defense was insanity.⁵² And under the rule that the non-expert witness must have had sufficient opportunity for observations, the prosecution may properly be refused permission to put witnesses on the stand from among bystanders to express their opinion as to the rational conduct of the accused, where the only basis for such an opinion is observations made during the trial.⁵³

§ 163. Expert evidence—What constitutes an expert—Physical examination of accused to ascertain sanity.—The rule governing the admission of expert testimony is the same in criminal as in civil cases.⁵⁴ When the insanity of the accused is in issue, the opinions of competent physicians or of expert alienists are generally admissible. The opinion given may be brought out by a hypothetical question containing the facts proved, or assumed to be proved, on one side or the other.⁵⁵ The putting of a hypothetical question

91 Ind. 141; *Choice v. State*, 31 Ga. 424; *McClackey v. State*, 5 Tex. App. 320; *Pflueger v. State*, 46 Neb. 493, 64 N. W. 1094; *Braham v. State*, 143 Ala. 28, 38 So. 919; *Watts v. State*, 99 Md. 30, 57 Atl. 542; *United States v. Chisholm*, 153 Fed. 808; *Lawson v. State* (Ind.), 84 N. E. 974.

⁵⁰ *Hite v. Commonwealth* (Ky.), 20 S. W. 217, 14 Ky. L. 308; *Blake v. Rourke*, 74 Iowa 519, 38 N. W. 392; *Wells v. State*, 50 Tex. Cr. App. 499,

98 S. W. 851; *Young v. State* (Tex. Cr. App. 1907), 102 S. W. 1144.

⁵¹ *Queenan v. Territory*, 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. 762, aff'g 11 Okla. 261, 71 Pac. 218.

⁵² *Parrish v. State*, 139 Ala. 16, 36 So. 1012.

⁵³ *State v. Von Kutzleben*, 136 Iowa 89, 113 N. W. 484.

⁵⁴ *State v. Webb*, 56 Pac. 159, 18 Utah 441.

⁵⁵ *Cowley v. People*, 83 N. Y. 464.

and the giving of an opinion on it is the better and customary practice, but where the expert has heard all the testimony bearing on the mental condition of the accused, and there is no conflict in the evidence, it is not error to permit him to give his opinion based solely upon the evidence as heard by him.⁶⁶ So, also, an expert may give his opinion based on the evidence as stated in a hypothetical question and also upon an examination of the accused made by the expert as a physician.⁶⁷ An expert may give his opinion upon knowledge obtained and facts observed by the witness in treating or examining the accused professionally.⁶⁸ Generally an expert witness will not be allowed to give an opinion on the evidence, unless it is embodied in a hypothetical question. To allow this would be to usurp the exclusive province of the jury and enable him to decide upon the credibility of the testimony. But an expert witness may, where the evidence is not conflicting, and if he has heard all of it bearing on insanity, be permitted to give his opinion as regards the mental condition of the accused, based upon the facts in evidence, if true.⁶⁹ And where a hypothetical

470, 38 Am. 464; *Dejarnette v. Commonwealth*, 75 Va. 867; *State v. Pagels*, 92 Mo. 300, 315, 4 S. W. 931; *Underhill on Ev.*, p. 287, n. 4. *People v. James*, 5 Cal. App. 427, 90 Pac. 561; *State v. Bell*, 212 Mo. 111, 111 S. W. 24; *People v. Koerner*, 117 App. Div. (N. Y.) 40, 102 N. Y. 93; *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *State v. Dunn*, 179 Mo. 95, 77 S. W. 848; *Schissler v. State*, 122 Wis. 365, 99 N. W. 593.

⁶⁶ *State v. Privitt*, 175 Mo. 207, 75 S. W. 457.

⁶⁷ *People v. Koerner*, 191 N. Y. 528, 84 N. E. 1117, aff'g 117 App. Div. (N. Y.) 40, 102 N. Y. S. 93, 20 N. Y. Cr. 515.

⁶⁸ *Commonwealth v. Johnson*, 188 Mass. 382, 74 N. E. 939.

⁶⁹ *Sanchez v. People*, 22 N. Y. 147, 154; *People v. Lake*, 12 N. Y. 358, 362; *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; *State v. Wright*, 134 Mo. 404, 35 S.

W. 1145; *State v. Reidel*, 9 Houst. (Del.) 470, 14 Atl. 550; *State v. Hayden*, 51 Vt. 296; *People v. Wood*, 126 N. Y. 249, 27 N. E. 362, 366; *State v. Baber*, 74 Mo. 292, 41 Am. 314; *State v. Hockett*, 70 Iowa 442, 30 N. W. 742; *Commonwealth v. Buccieri*, 153 Pa. St. 535, 26 Atl. 228; *People v. Schuyler*, 106 N. Y. 298, 305, 306, 12 N. E. 783; *People v. Smiler*, 125 N. Y. 717, 719, 26 N. E. 312; *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *State v. Soper*, 148 Mo. 217, 49 S. W. 1007; *State v. Ayles*, 120 La. 661, 45 So. 540. The expert may give an opinion on an admitted state of facts, or may state facts within his knowledge as a witness and express an opinion on them; or a state of facts supported in some degree by the evidence might be assumed on which he may give an opinion; if the assumed facts are proved the statement of the opinion is evidence, otherwise it is not to be

question is put it is within the discretion of the court to permit the expert to make an explanation.⁶⁰ But the expert who testifies as to the insanity of the accused should not be permitted to testify that in his opinion, the accused was or was not capable of determining between right and wrong.⁶¹ A witness to be regarded as an expert must have made insanity a subject of special study. He should also have had such practical experience in the care and treatment of the insane⁶² as will render him conversant with the subject and able to recognize its peculiar subtle manifestations.⁶³ A medical student whose knowledge of mental diseases is wholly derived from lectures he has heard cannot be accepted as an expert.⁶⁴ But a physician attached to a hospital or asylum may testify to the mode of treating insane persons and as to the methods of his hospital though he is not an expert on insanity.⁶⁵ But it has been held that if he has had experience in treating cases of insanity, and if he has practiced as a physician and surgeon, he is not incompetent because he has not made insanity a special study.⁶⁶ In the absence of a mandatory statute the appointment by the court of a physician to examine an accused person, alleged to be insane at the time of his arraignment, is wholly discretionary, and usually the necessity for the examination must be made to appear.⁶⁷ The jury are never concluded by the report of exam-

considered. It is not necessary in stating a hypothetical case to assume all the facts which the evidence tends to prove, but all facts assumed must be supported by some evidence. *Gueting v. State*, 66 Ind. 94, 104-105, 32 Am. 99n; and *cf.* *Burt v. State*, 38 Tex. Cr. App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305n; *Schissler v. State*, 122 Wis. 365, 99 N. W. 593.

⁶⁰ *Commonwealth v. Parsons*, 195 Mass. 560, 81 N. E. 291.

⁶¹ *State v. Brown*, 181 Mo. 192, 79 S. W. 1111.

⁶² A physician in active practice who has made a study of insanity and has averaged 15 cases a year is an expert. *Hamilton v. United States*, 26 App. Cas. D. C. 382.

⁶³ *Reese Med. Juris.*, p. 19; *State v. Bell*, 212 Mo. 111, 111 S. W. 24; *Lowe v. State*, 118 Wis. 641, 96 N. W. 417. The physician had treated four insane persons during a practice of 18 months.

⁶⁴ *Hamilton v. United States*, 26 App. Cas. D. C. 382.

⁶⁵ *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730.

⁶⁶ *State v. Reddick*, 7 Kan. 143, 151; *Lowe v. State*, 118 Wis. 641, 96 N. W. 417.

⁶⁷ *People v. McElvaine*, 125 N. Y. 596, 604, 608, 26 N. E. 929. See, also, *Webber v. Commonwealth*, 119 Pa. St. 223, 13 Atl. 427, 4 Am. St. 634; *State v. Arnold*, 12 Iowa 479, 483; *People v. Ah Ying*, 42 Cal. 18.

iners to the effect that the accused is insane. The evidence of such examiners is merely that of experts and its credibility is for the jury. So, also, a judgment which declared the accused insane based upon an examination following his commitment to the state asylum for the insane is not conclusive on the question of his insanity. And while the commitment of the accused to a state asylum may be admissible as tending to prove his insanity, the written reports of the examining physicians, and their certificates upon which the commitment was based, are not competent evidence of his insanity.⁶⁸ Where the expert has made a physical examination he may be required to describe the facts and symptoms observed,⁶⁹ as well as the conversation which he had with the defendant,⁷⁰ but he cannot be allowed to narrate what the attendants said.⁷¹ The expert for the state who is appointed, or who is requested by the prosecuting attorney to examine the accused for the purpose of ascertaining his sanity, should conduct himself in a fair and impartial manner during the examination. He need not tell the accused the purpose of the examination but the fact that he does so, asking the accused to be open and free with him, but that he need not tell him anything that would incriminate him, does not exclude the evidence secured by the expert. Such a statement is not a promise on the part of the physician that he will not testify against the accused, and he may testify to any fact ascertained by him or admitted to him, even though he has not warned the accused that his statements made on the examination may be used against him.⁷² A physician who has examined the accused may, after giving an opinion based on the knowledge thus

⁶⁸ *People v. Willard*, 150 Cal. 543, 89 Pac. 124.

⁶⁹ *Commonwealth v. Gerade*, 145 Pa. St. 289, 291, 296, 22 Atl. 464, 27 Am. St. 689; *White v. Bailey*, 10 Mich. 155; *Puryear v. Reese*, 6 Coldw. (Tenn.) 21; *Commonwealth v. Johnson*, 188 Mass. 382, 74 N. E. 939; *Cordes v. State* (Tex. Cr. App. 1908), 112 S. W. 943.

⁷⁰ *People v. Nino*, 149 N. Y. 317, 43 N. E. 853; *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315. Cf. *Davis v.*

United States, 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. 360. See *post*, § 181; *Braham v. State*, 143 Ala. 28, 38 So. 919; *Commonwealth v. Johnson*, 188 Mass. 382, 74 N. E. 939. But not that the accused had told the examining physician that he believed himself going crazy. *State v. Dunn*, 179 Mo. 95, 77 S. W. 848.

⁷¹ *Heald v. Thing*, 45 Me. 392, 396.

⁷² *People v. Hill* (N. Y. 1909), 87 N. E. 813.

acquired, be asked a hypothetical question upon facts occurring prior to the examination,⁷³ and the fact that the witness fears his opinion in answer to such question may be influenced by the facts observed by him will not exclude it.⁷⁴ The opinion which is expressed by the expert must be positive in form and character. If he cannot or will not give such an opinion his doubts that the accused was sane, or his conjectures that he was insane, must be rejected.⁷⁵

§ 164. Evidence of voluntary intoxication.—When irrelevant.—A: common law voluntary intoxication, as distinct from *mania a potu*, furnishes no excuse, justification or extenuation for a crime committed under its influence.⁷⁶ Intoxication as a mental and

⁷³ *People v. Lake*, 12 N. Y. 358, 362; *State v. Church*, 199 Mo. 605, 98 S. W. 16; *Commonwealth v. Woelfel*, 121 Ky. 48, 88 S. W. 1061, 28 Ky. L. 16; *Ince v. State*, 77 Ark. 426, 93 S. W. 65.

⁷⁴ *People v. Schuyler*, 43 Hun (N. Y.) 88.

⁷⁵ *Sanchez v. People*, 22 N. Y. 147, 154. As a general rule, neither books of established reputation, whether written by physicians or lawyers, nor statistics on the increase of insanity, can be read to the jury. *Commonwealth v. Wilson*, 1 Gray (Mass.) 337, 339.

⁷⁶ 4 Bl. Com. 25, 26, 1 Hale P. C. 32; Bacon's Maxims, rule 5; *Colee v. State*, 75 Ind. 511, 515; *Hopt v. People*, 104 U. S. 631, 633, 26 L. ed. 873; *Goodwin v. State*, 96 Ind. 550, 556; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95; *McCook v. State*, 91 Ga. 740, 17 S. E. 1019; *People v. Rogers*, 18 N. Y. 9, 16-23, 72 Am. Dec. 484; *People v. Garbutt*, 17 Mich. 9, 19, 97 Am. Dec. 162n; *Sanders v. State*, 94 Ind. 147, 148; *Wagner v. State*, 116 Ind. 181, 186, 18 N. E. 833; *Conly v. Commonwealth*, 98 Ky. 125, 32 S. W. 285, 17

Ky. L. 678; *People v. Miller*, 114 Cal. 10, 45 Pac. 986; *Commonwealth v. Gentry*, 5 Pa. Dist. 703; *Cribb v. State*, 118 Ga. 316, 45 S. E. 396; *State v. Brown*, 181 Mo. 192, 79 S. W. 1111; *State v. Hogan*, 117 La. 863, 42 So. 352; *Morris v. Territory* (Okla. Cr. App. 1909), 99 Pac. 760, *Elliott Ev.* § 2729. See, also, as sustaining the text, *Cleveland v. State*, 86 Ala. 1, 5 So. 426; *People v. Blake*, 65 Cal. 275, 4 Pac. 1; *State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *State v. O'Neil*, 51 Kan. 651, 33 Pac. 287; 24 L. R. A. 555; *State v. Lowe*, 93 Mo. 547, 5 S. W. 889; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95; *Cline v. State*, 43 Ohio St. 332, 1 N. E. 22; *State v. Bundy*, 24 S. Car. 439, 58 Am. 262; *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. 322; *Springfield v. State*, 96 Ala. 81, 11 So. 250, 38 Am. St. 85; *McCook v. State*, 91 Ga. 740, 17 S. E. 1019; *Aszman v. State*, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33n; *Shannahan v. Commonwealth*, 8 Bush. (Ky.) 463, 8 Am. 465; *Flanigan v. People*, 86 N. Y. 554, 40 Am. 556n; *People v. Leonardin*, 143 N. Y. 360, 38 N. E. 372; *State v. McDaniel*, 115

physical condition may be easily simulated. While if the accused was really intoxicated when he committed the crime, if he has cast aside the restraints of sobriety and voluntarily contracted madness, his drunken condition is not relevant to excuse him. This is true though he may have been in a frenzy from indulgence in drink, for, if he has capacity remaining to appreciate and recognize the moral character of his acts, he is responsible. Hence evidence of mere intoxication voluntarily acquired, and not claimed to involve mental derangement, existing when the crime was committed, is inadmissible where its sole purpose and object are to furnish an excuse for or extenuation of the crime.

§ 165. Insensibility or insanity from indulgence in intoxicants may be shown.—Evidence of intoxication is sometimes relevant, not strictly as a defense, but to show the condition, either mental or physical, of the prisoner. Thus if the bodily powers of the accused were so far subjugated by his indulgence in intoxicating drink, or in stupefying drugs, that, at the time of the crime alleged, he was physically unable to make the motions involved in its commission, his drunkenness may be proved to show he was not and could not have been implicated in the crime.⁷⁷ Evidence of intoxication at the time of the offense, or prior thereto, is admissible under a plea of insanity caused by over-indulgence in intoxicating liquors. But the fact of the prisoner's intoxication is mainly relevant to show his mental condition. It is never conclusive. The question of his insanity is for the jury to determine upon all the circumstances. His prior dissipation and actual drunkenness at the date of the crime are merely facts for them to consider in determining whether he was, at the instant of the crime, suffering from such a degree of mental unsoundness as to destroy his capac-

N. Car. 807, 20 S. E. 622; Commonwealth v. Cleary, 135 Pa. St. 64, 19 Atl. 1017; 26 W. N. C. 137, 8 L. R. A. 301n; Terrill v. State, 74 Wis. 278, 42 N. W. 243.

⁷⁷ "If a man by voluntary drunkenness renders himself incapable of walking for a limited time, it is just as competent evidence tending to show that he did not walk during the

time he was so incapable, as though he had been so rendered incapable by paralysis of his limbs from some cause over which he had no control. The cause of the incapacity in such case is immaterial; the material question is, was he in fact incapable of doing the acts charged?" Ingalls v. State, 48 Wis. 647, 651, 4 N. W. 785.

ity to distinguish between right and wrong in that particular case.⁷⁸ A witness cannot express an opinion as to whether the accused can or cannot control his appetite for intoxicating drink.⁷⁹

§ 166. Evidence of intoxication as bearing on a specific intent or on premeditation.—Where the existence of a particular specific intent is necessary to constitute a given act a crime, evidence that the accused was intoxicated when he committed the alleged criminal act is relevant to show the accused could not have entertained the intent.⁸⁰ This does not mean that drunkenness is an excuse for the commission of crime. If the mental condition of the accused at the time of the alleged criminal act is such that he was incapable of having any intent his act is not a crime at all. And it is always competent to show his excessive intoxication by which the accused was wholly though temporarily deprived of his reason if it was not indulged in to commit the crime and such evidence is for the jury to consider in determining whether there was an intent to commit a crime.⁸¹ So, where one is indicted for assault with intent to rob,⁸² to commit rape, or to do great bodily harm,⁸³ evidence that he was very much intoxicated at the date of the assault is relevant to show that he did not entertain the intent

⁷⁸ *People v. Blake*, 65 Cal. 275, 4 v. State, 130 Ga. 361, 60 S. E. 1005; *Pac. 1*; *Erwin v. State*, 10 Tex. App. 8 L. R. A. 33, note.

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⁷⁹ *Goodwin v. State*, 96 Ind. 550, 566.

⁸⁰ *State v. Zorn*, 22 Ore. 591, 30 Pac. 371; *Commonwealth v. Hagenlock*, 140 Mass. 125, 3 N. E. 36; *Cline v. State*, 43 Ohio St. 332, 1 N. E. 22; *Reg. v. Moore*, 3 C. & K. 319, 16 Jur. 750; *People v. Rogers*, 18 N. Y. 9, 17, 72 Am. Dec. 484; *Wood v. State*, 34 Ark. 341, 36 Am. 13; *Garner v. State*, 28 Fla. 113, 155, 9 So. 835, 29 Am. St. 232; *Aszman v. State*, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33n; *People v. Walker*, 38 Mich. 156; *People v. Odell*, 1 Dak. 197, 46 N. W. 601; *Mooney v. State*, 33 Ala. 419; *Chrisman v. State*, 54 Ark. 283, 288, 15 S. W. 889, 26 Am. St. 44; *Robinson*

Williams v. State, 81 Ala. 1, 1 So. 179, 60 Am. 133; *Cleveland v. State*, 86 Ala. 1, 5 So. 426; *People v. Williams*, 43 Cal. 344; *People v. Vincent*, 95 Cal. 425; 30 Pac. 581; *Chrisman v. State*, 54 Ark. 283, 15 S. W. 889, 26 Am. St. 44; *People v. Lane*, 100 Cal. 379, 34 Pac. 856; *People v. Young*, 102 Cal. 411, 36 Pac. 770; *Schlencker v. State*, 9 Neb. 241, 1 N. W. 857; *O'Grady v. State*, 36 Neb. 320, 54 N. W. 556; *Wilcox v. State*, 94 Tenn. 106, 28 S. W. 312; *Clore v. State*, 26 Tex. App. 624, 10 S. W. 242.

⁸¹ *Scott v. State*, 12 Tex. App. 31, 39; *Keeton v. Commonwealth*, 92 Ky. 522, 18 S. W. 359, 13 Ky. L. 748.

⁸² *State v. Garvey*, 11 Minn. 154; *Contra, Jeffries v. State*, 9 Tex. App. 598, 605.

charged.⁸⁴ If, from such evidence the jury are convinced the accused was so intoxicated as to be unable to form the specific intent, a conviction of any crime other than simple assault must be reversed. The specific intent to deprive the owner of his property, as well as the taking away, are essential ingredients of larceny. If it can be shown that the accused while carrying away the goods was too drunk to entertain the intent of depriving the owner of his property, he must be acquitted.⁸⁵ So, the defendant's intoxication is relevant to disprove the felonious intention which must be present in the act of breaking in and entering to constitute burglary.⁸⁷ In all these cases the question of intent is for the jury alone and the intoxication of the accused, however great, is never conclusive but is merely a circumstance for the jury to consider in determining the intent. Evidence of intoxication may be relevant to show the absence of guilty knowledge. Thus, the existence of knowledge of the falsity of the testimony given, when perjury has been committed, or of the spurious character of the notes or money forged in the crime of counterfeiting may both be rebutted by evidence that the mind of the accused was so overcome by drink that he did not possess the guilty knowledge necessary to these crimes.⁸⁸ But where some act, innocent in itself, as for example, voting more than once at an election, is made criminal by statutes if voluntarily done,⁸⁹ or where no specific intent is required by law, evidence of intoxication is irrelevant.⁹⁰ Sometimes by statute the existence of a premeditated design to cause death on the part of the accused is essential to constitute a homicide murder in the first degree. In such case drunkenness is relevant and may be considered by the jury to determine the mental condition of the

⁸⁴ State v. Donovan, 61 Iowa 369, 16 N. W. 206; State v. Fiske, 63 Conn. 388, 392, 28 Atl. 572; State v. Gut, 13 Minn. 341, 361; People v. Harris, 29 Cal. 678, 683.

⁸⁵ Ingalls v. State, 48 Wis. 647, 651, 4 N. W. 785; Wood v. State, 34 Ark. 341, 36 Am. 13; People v. Walker, 38 Mich. 156. *Contra*, Dawson v. State, 16 Ind. 428, 439, 79 Am. Dec. 439, 36 Am. 13.

⁸⁷ See § 397. Breaking in and entering.

⁸⁸ Pigman v. State, 14 Ohio 555, 557, 45 Am. Dec. 558 (counterfeiting); Lytle v. State, 31 Ohio St. 196, 200 (perjury).

⁸⁹ State v. Welch, 21 Minn. 22, 26-28.

⁹⁰ People v. Marseiler, 70 Cal. 98, 100.

accused, that is, to ascertain whether he had mental capacity to form a premeditated design, and from the fact of his drunkenness, if excessive, they may infer that his intellect was so befogged that the formation or execution of a deliberate intention or a premeditated design to kill was impossible.⁹¹ In other words an allegation that the accused acted with premeditation or deliberation lets in evidence that he was intoxicated at the time. But proof of his intoxication does not, as matter of law, rebut a presumption of premeditation arising in the circumstances, nor is an instruction to that effect warranted. It is only a circumstance for the jury. and its effect in negating premeditation is for them, as they measure the degree of intoxication upon all the facts.⁹² Evidence of voluntary intoxication, not producing complete insensibility, is sometimes relevant and may be considered by the jury in determining the meaning of, and motive for, words uttered, as, for example, to determine whether threatening language used by the accused, or the victim of a homicide was the outcome of deliberate hatred, or the idle vapors of a drunken man.⁹³

§ 167. **Mode of proving or disproving intoxication.**—A non-expert witness may testify that the accused or some other person was intoxicated on a given date,⁹⁴ and that he was habitually intem-

⁹¹ *Garner v. State*, 28 Fla. 113, 155, 9 So. 835, 29 Am. St. 232; *Shannahan v. Commonwealth*, 8 Bush (Ky.) 463, 8 Am. 465; *Boswell's Case*, 20 Gratt. (Va.) 860; *Hopt v. People*, 104 U. S. 631, 26 L. ed. 873; *State v. Donovan*, 61 Iowa 369, 16 N. W. 206; *Scott v. State*, 12 Tex. App. 31; *People v. Cummins*, 47 Mich. 334; *Tidwell v. State*, 70 Ala. 33; *Kelly v. State*, 3 Sm. & M. (Miss.) 518; *Commonwealth v. Dorsey*, 103 Mass. 412; *Haile v. State*, 11 Humph. (Tenn.) 153; *People v. Belencia*, 21 Cal. 544; *State v. Johnson*, 40 Conn. 136; *Roberts v. People*, 19 Mich. 401, 417; *State v. Mcwry*, 37 Kan. 369, 377; *Bernhardt v. State*, 82 Wis. 23, 51 N. W. 1009; *Malone v. State*, 49 Ga. 210; *Cluck v. State*, 40 Ind. 263; *Peo-*

ple v. Rogers, 18 N. Y. 9, 26, 72 Am. Dec. 484; *Keenan v. Commonwealth*, 44 Pa. St. 55, 84 Am. Dec. 414; *State v. McCants*, 1 Speers (S. Car.) 384; *State v. Robinson*, 20 W. Va. 713, 43 Am. 799; *State v. Hertzog*, 55 W. Va. 74, 46 S. E. 792.

⁹² *People v. Mills*, 98 N. Y. 176, 182.

⁹³ *People v. Rogers*, 18 N. Y. 9, 19, 72 Am. Dec. 484; *Friery v. People*, 54 Barb. (N. Y.) 319, 326; *Hopt v. People*, 104 U. S. 631, 26 L. ed. 873; *State v. Welch*, 21 Minn. 22; *Davis v. State*, 25 Ohio St. 369; *State v. Johnson*, 40 Conn. 136.

⁹⁴ *People v. Sanford*, 43 Cal. 29, 32, 33; *People v. Monteith*, 73 Cal. 7, 14 Pac. 373; *People v. Eastwood*, 14 N. Y. 562; *State v. Pierce*, 65 Iowa 85, 21 N. W. 195; *Commonwealth v.*

perate.⁹⁵ Evidence of the conduct of the accused on previous occasions when he was intoxicated is competent as bearing on his intoxication when he committed the crime charged, and as illustrating his usual manner of acting when drunk.⁹⁶ The witness will not be permitted to testify that the defendant's intoxication was or was not sufficient to prevent the formation of intent or premeditation, as that is a question for the jury alone.⁹⁷ It is not relevant for the defense to show that the prisoner had liquor in his house which he might have drunk,⁹⁸ or that he was easily affected by liquor and had drunk more than usual,⁹⁹ or to prove experiments made with liquor which is not positively identified by independent evidence as the liquor drunk by the accused prior to the crime.¹⁰⁰

§ 168. Morphine habit.—Though habitual indulgence in morphine is by no means as common as indulgence in intoxicating liquors, the use of morphine, cocaine and similar drugs is sufficiently common to justify an inquiry into what circumstances evidence of their use is competent. The habitual use of morphine may be shown, and, if proved, is a circumstance for the jury to consider in determining the mental condition of the accused. If on all the circumstances they shall determine that the faculty of understanding the moral quality of the act has been destroyed by the use of the deleterious drugs they should acquit. Many petty crimes spring from the morphine habit. Those who use it habitually will resort to any method, however criminal, to attain it, such as forging a prescription for it, or stealing it from the office of a physician. In all such cases, evidence of experts is competent to show the peculiar symptoms which are inseparable from the continued use of the drug.¹⁰¹

Sturtivant, 117 Mass. 122, 19 Am. 401n; Underhill on Ev., p. 269, n 8.

⁹⁵ Gallagher v. People, 120 Ill. 179, 182, 11 N. E. 335; Smith v. State, 55 Ala. 1, 10; Tatum v. State, 63 Ala. 147, 150; Henningburg v. State, 153 Ala. 13, 45 So. 246; State v. Cather, 121 Iowa 106, 96 N. W. 722.

⁹⁶ Upstone v. People, 109 Ill. 169,

175. *Contra*, Commonwealth v. Cloonen, 151 Pa. St. 605, 25 Atl. 145.

⁹⁷ Armor v. State, 63 Ala. 173, 176.

⁹⁸ Commonwealth v. Cloonen, 151 Pa. St. 605, 25 Atl. 145.

⁹⁹ State v. Smith, 49 Conn. 376.

¹⁰⁰ People v. Slack, 90 Mich. 448, 51 N. W. 533.

¹⁰¹ System of Legal Medicine, vol. 2, p. 207.

CHAPTER XV.

PRIVILEGED COMMUNICATIONS.

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| <p>§ 169. Foundation of the doctrine and classification of communications.</p> <p>170. Executive communications and transactions.</p> <p>171. Communications to police officials.</p> <p>172. Communications to attorneys-at-law.</p> <p>173. Communications made by or to the agent of the attorney.</p> <p>174. Character and date of the communications.</p> <p>175. Communications made in contemplation of crime.</p> <p>176. Permanency of the privilege—Waiver.</p> <p>177. Writings, when privileged.</p> <p>178. Communications to spiritual adviser.</p> <p>179. Communications passing between medical practitioners and their patients.</p> <p>180. Death of the patient—Purpose of the communication—Contemplated crime.</p> | <p>§ 181. Communications made during an examination to detect or ascertain sanity.</p> <p>182. Secrecy of telegrams.</p> <p>183. Indecency of the facts to be proved.</p> <p>184. Privileged communications between husband and wife.</p> <p>185. Husband and wife as witnesses in criminal proceedings.</p> <p>186. Statutory competency of husband and wife.</p> <p>187. Confidential communications between husband and wife.</p> <p>188. Husband or wife of co-defendant as a witness for or against his associate in crime—Testimony of husband or wife on trial of a third person tending to criminate.</p> <p>189. Valid marriage is necessary.</p> <p>190. Privilege as relating to the evidence to judicial officers.</p> <p>191. Privilege as relating to grand jurors.</p> <p>192. Statutory regulations of the competency of grand jurors.</p> <p>193. Evidence of traverse jurors.</p> |
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§ 169. Foundation of the doctrine and classification of communications.—The welfare of society and the proper and orderly administration of justice require that certain evidence, or, more correctly speaking, the evidence of certain classes of witnesses, shall be absolutely inadmissible, in criminal trials. The advantage which would be gained in punishing any particular crime would be more

than counterbalanced by the injury to society as a whole. Thus it is recognized that, because of the complexity of modern jurisprudence, both criminal and civil, any person who has to defend himself against a criminal accusation, or to protect or enforce a right, must secure and receive the assistance of counsel who, because of their skill and experience, are fitted to aid and advise him. To enable members of the legal profession to render efficient aid, and to bring the matters entrusted to them to a successful conclusion, it is usually an absolute necessity that the client should make a full and complete disclosure of every fact bearing on the criminal transaction. It is a maxim of the criminal law that no man can be compelled to testify against himself. Hence, no fact or admission can with justice be used against the accused which he was under the necessity of imparting confidentially to his counsel. The law regards it as extremely wise to encourage and sustain the high and unlimited confidence which should exist between persons who bear the peculiar and intimate relations towards one another of attorney and client. Upon similar considerations the knowledge acquired by a physician while attending a patient, by a clergyman during the performance of his spiritual duties, or the communications passing between husband and wife, are also privileged. Writers upon the law of evidence have divided privileged communications into four classes, viz., professional, judicial, political and social. In the first class are included disclosures to attorneys, physicians and priests. Communications privileged because of their judicial character comprise the oral deliberations of grand and trial juries, the evidence given before the grand jury, communications passing between judges, and all information in the hands of prosecuting officials or others which leads to the detection or punishment of crime. The third class, or political communications, is composed of the transactions of the executive departments of the government and all communications passing between the departmental officials. By social communications are meant the communications passing between husband and wife in the intimacy and confidence of the marriage relation.

These restrictions upon the capacity of certain classes of persons as regards the evidence which they will be allowed to give, are not founded on any peculiar respect which the law entertains

for their calling or character. They have their origin in the desire to procure a pure and unembarrassed administration of the law, to subserve justice, and to protect the innocent, while securing the punishment of the guilty.

§ 170. **Executive communications and transactions.**—The common law has always regarded as privileged all information in the possession of executive officials as such; and has uniformly declined to compel them to divulge facts of which they have obtained knowledge in any official capacity. This rule has been most frequently invoked in civil cases.¹ In this country the various executive departments of the government, both federal and state, acting under the power conferred by the legislative branch to formulate rules for the proper conduct of departmental affairs, have forbidden their subordinate officials to disclose official information, unless permitted or required to do so by their official superiors. The true rule, therefore, now is that the chief executive officer is the sole judge of the propriety of refusing to testify or producing papers and of permitting his subordinates to do so.²

The privilege as regards executive communications is not absolute in the sense that professional communications are absolutely privileged and cannot be divulged. Thus the governor of a state may or he may not with perfect propriety refuse to state his reasons for signing a bill passed by the legislature or any facts which were communicated to him in connection with his

¹ *Thompson v. German Valley R. Co.*, 22 N. J. Eq. 111, 113; *Totten v. United States*, 92 U. S. 105, 107, 23 L. ed. 605. (Action to recover for services as spy during rebellion dismissed.) *Huttman, In re*, 70 Fed. 699, 705. In this case the refusal to permit an official of the United States internal revenue to testify in a state court for the trial of criminals to the contents of the records of his office, was based upon the regulations of the commissioner of internal revenue forbidding the disclosure of these records. And the court held that internal revenue officials were not subject to the state

court where obedience to the orders of these courts would require such officials to disobey the rules of the general government.

² *Burr's Trial*, 182; *Gray v. Pentland*, 2 S. & R. (Pa.) 23, 31. In which it was held that parol evidence could not be given of a libellous deposition which had been sent to the governor of Pennsylvania containing charges against an officer he had appointed in an action for libel, though the court had refused a subpoena *duces tecum*. and the governor could exercise his own discretion in producing the deposition.

action in the premises. And no valid reason exists why he may not testify when or by whom it was delivered to him, for that is a bare fact implying no action on his part. The propriety and advisability of testifying to any fact which the executive official may have acquired while acting in an official capacity are, however, always exclusively for his determination.³

§ 171. Communications to police officials.—The proper administration of justice and the protection of society against criminals imperatively require that persons should be encouraged in performing the duty, incumbent upon all, of communicating to the proper officials any information which they may possess regarding the commission of a crime, or the identity or whereabouts of the criminal. To this end the disclosure in court of the names of persons who gave such information, either by a police official who made the arrest,⁴ by the informer himself, or by any other person, will not be permitted.⁵

Under the original rule not only was the name of the informer and the name of the magistrate or other person to whom information was given excluded, but every communication made, or act done, leading up to the detection of a crime, or to the apprehension of the criminal, was excluded from evidence in a criminal trial.⁶ This is doubtless a just rule in civil cases where the question of guilt is involved collaterally, as in an action for slander or libel contained in a communication to the police. But when

³Appeal of Hartranft, 85 Pa. St. 433, 447, 27 Am. 667n.

⁴United States v. Moses, 4 Wash. C. C. (N. S.) 726, 27 Fed. Cases 15825.

⁵Attorney-General v. Briant, 15 M. & W. 169, 15 L. J. Exch. 265; Rex v. Akers, 6 Esp. 125n; Rex v. Hardy, 24 How. St. Tr. 199; Rex v. Watson, 32 How. St. Tr. 1, 105, 2 Stark. 104, 116, 136; State v. Brown, 2 Marv. (Del.) 380, 36 Atl. 458. The owner of stolen property is not bound to disclose, on the witness stand, the names of persons who wrote to him in regard to his missing property. State v. Soper,

16 Me. 293, 295, 33 Am. Dec. 665.

"The general rule is that persons engaged in the detection of crime are not bound to disclose the sources of the information which led to the apprehension of the prisoner. The reason for the rule is that such disclosure can be of no importance to the defense, and may be highly prejudicial to the public in the administration of justice by deterring persons from making similar disclosures." People v. Laird, 102 Mich. 135, 60 N. W. 457.

⁶Rex v. Watson, 32 How. St. Tr. 1, 105, 2 Stark. 104, 116.

the question arises in a criminal trial, and the information is material to determine the defendant's innocence, it would seem both reasonable and just that the necessity and desirability of the disclosure and the question whether the public interests would be benefited or would suffer, should be solely for the judicial discretion upon the circumstances of the case.⁷

§ 172. Communications to attorneys-at-law.—At common law an attorney could not be compelled, nor would he be allowed, to disclose any communication made to him by a client, or the advice given by him in the course of his professional employment.⁸ In very many, if not in a majority of the states, this rule has been confirmed by statute. It is also often expressly provided that the privileged character of the communication may be waived by the client.⁹ The modern tendency of the courts is to give the rule its fullest possible application, and to apply it in both civil and criminal proceedings, not only to oral or written communications passing between attorney and client, but to all information which is acquired by the former because of the existence of the professional relation. It matters not whether the information has been derived from the client's words, actions or personal appearance. Thus, where the accused was on trial for stealing a quantity of current silver coin, it was held error to compel his

⁷ *People v. Davis*, 52 Mich. 569, 573, 18 N. W. 362; *Reg. v. Richardson*, 3 F. & F. 693; *People v. Laird*, 102 Mich. 135, 139, 60 N. W. 457; *United States v. Moses*, 4 Wash. C. C. (U. S.) 726, 27 Fed. Cases 15825. The matter is now sometimes regulated by statute, Cal. Code Civ. Proc. § 1881; Colo., Acts 1883, p. 289; Minn. Stat., § 5094. The disclosure of the name of the informer may be necessary in a case where the accused claims he is the victim of false accusations by an enemy, or where he claims he is the victim of a groundless arrest or persecution by the police. And the rule of silence is in modern times of very little importance where a complainant must under local rules of statutory

practice sign the complaint and testify as a witness.

⁸ Best on Ev., §§ 53, 581; *Reg. v. Hankins*, 2 C. & K. 823, 825 (a writing in the hands of the attorney); *Rex v. Dixon*, 3 Burr. 1687; 1 Phill. on Ev., 171; *Casey v. State*, 37 Ark. 67, 83, 84. See civil cases *Underhill* on Ev., § 169 *et seq.*

⁹ See Tennessee Code, 1884, § 4748, p. 897; Georgia Code, 1882, p. 987, § 3797; Pennsylvania, 2 Pur. Dig. pp. 1493, 1495; California Code Civ. Proc. § 1881; Indiana Rev. St. 1881, §§ 497, 1796; Missouri Rev. St., 1879, p. 690, § 4017; Wisconsin An. St. 1898, § 4076; Texas Code Cr. Proc. 1906, § 773.

attorney to testify to the fact that he had received silver coin as a part of his retainer.¹⁰ And in some states the statute expressly provides that all information coming to the attorney and relating to the matter upon which he has been consulted by the client is privileged.¹¹ The rules and statutes regulating privileged communications are generally regarded, both by legislators and by the courts, as applicable to the examination of witnesses in criminal trials, even where this is not expressly provided for in the statute.¹² Any communication which passes between the client and the attorney or between the attorney and the witnesses for the client before the trial is usually privileged. It is not only the right of the accused to have his witnesses interviewed by his attorney before the trial, but it is the duty of the attorney to confer with the witnesses for his client and ascertain what they will testify. Anything passing between them, aside from the privilege, is not material, but it is always material and proper to show that the attorney attempted to corrupt or influence a witness to color his testimony in favor of the accused or to testify falsely; and it is extremely doubtful whether the privilege could be pleaded by the accused to protect him against evidence that his attorney had with his consent attempted to bribe a witness to testify falsely or to absent himself from the reach of process.¹³ The fact that the client, being an accomplice, turns state's evidence does not waive the privilege. Even such a course on his part does not open his attorney's lips as regards professional communications.¹⁴

¹⁰ State v. Dawson, 90 Mo. 149, 154, 483. Cf. People v. West, 106 Cal. 89, 1 S. W. 827; State v. Douglass, 20 W. 39 Pac. 207.
Va. 770, 781.

¹¹ Texas Code Cr. Proc., 1906, § 483. Cf. People v. West, 106 Cal. 89, 39 Pac. 207.
¹² Eads v. State (Wyo. 1909), 101 Pac. 946.

¹³ Sutton v. State, 16 Tex. App. 490.

¹⁴ Wharton Cr. Ev. § 496, *et seq.*; Milan v. State, 24 Ark. 346, 355; Benedict v. State, 44 Ohio St. 679, 688, 11 N. E. 125; State v. Hazleton, 15 La. Ann. 72; Hernandez v. State, 18 Tex. App. 134, 152, 51 Am. 295; Polson v. State, 137 Ind. 519, 35 N. E. 907; Graham v. People, 63 Barb. (N. Y.) 468, 50 Tex. Cr. App. 381, 97 S. W. 474.

§ 173. Communications made by or to the agent of the attorney.—

The communication need not have been made directly to a member of the legal profession. But it must have been made to a person who, whatever his character, was actually occupying the position of legal adviser. If a communication was made to an attorney whom the accused has requested to act for him, and who has not at once expressly refused to do it will be privileged, though he subsequently refuse to act.¹⁵ The rule does not require that a retainer should have been paid,¹⁶ or any particular form of application made to the attorney, if he was consulted with the intention of obtaining his professional services and he by implication or expressly has consented to act. A communication to or advice from the representative of an attorney is no less privileged than a communication by or to the attorney. Thus, a clerk, interpreter, or agent of the attorney, will not be allowed to testify to any communication made to him in a professional capacity by a client of his employer.¹⁷ One present during a conversation between attorney and client, but who was not the medium of conversation or who did not stand in a position of peculiar confidence to the client may testify to what he saw and heard.¹⁸ Thus a friend of the accused who took him to the office of a lawyer may testify to what passed between the lawyer and the accused at the interview.¹⁹ So, also, a mere bystander who took absolutely no part in the conversation between the attorney and the client may testify to what he heard though all his knowledge of what was said was acquired by reason of the carelessness

¹⁵ *Peek v. Boone*, 90 Ga. 767, 17 S. E. 66, 67; *Young v. State*, 65 Ga. 525.

¹⁶ *Bacon v. Frisbie*, 80 N. Y. 394, 399, 36 Am. 627n; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110n.

¹⁷ *Underhill on Evidence*, § 169; *Hawes v. State*, 88 Ala. 37, 68, 7 So. 302; 1 *Green. on Evid.*, § 239; *Studdy v. Sanders*, 2 Dowl. & R. 347.

¹⁸ *People v. Buchanan*, 145 N. Y. 1, 26, 39 N. E. 846, 64 N. Y. St. 427; *State v. Perry*, 4 Idaho 224, 38 Pac. 655; *Tyler v. Hall*, 106 Mo. 313, 17 S. W. 319, 27 Am. St. 327n; *Walker v. State*, 19 Tex. App. 176, 181, 182;

Hoy v. Morris, 13 Gray (Mass.) 519, 74 Am. Dec. 650; *Holman v. Kimball*,

22 Vt. 555. The presence of the mother of a prosecutrix in a trial for the crime of seduction at an interview between her daughter and the daughter's attorney does not destroy the privilege as the daughter's youth, innocence and modesty would imperatively require the mother to be present at the interview. *Bowers v. State*, 29 Ohio St. 542, 546.

¹⁹ *People v. Buchanan*, 145 N. Y. 1, 26, 39 N. E. 846.

and inadvertence of the parties to the conversation in overlooking the fact that the witness was within hearing distance.²⁰ And, generally, every person of whom legal advice is asked may be compelled to testify regarding information divulged, if, at that time and in reference to that matter, he did not occupy the position of an attorney.²¹

The authorities are not harmonious upon the question whether communications are privileged which are made to a person who is not in fact an attorney where they were made because the party making them supposed the person to whom they were made was an attorney.

It has been held in Massachusetts and in England that communications though of a confidential character made to a person whom the communicant supposed was an attorney are not privileged where in fact that person was not an attorney.²² But the contrary has been held in other jurisdictions. Thus it has been held that confidential communications of facts constituting a confession of crime made in reliance on the supposed relation of attorney and client should be excluded upon the plainest principles of justice whether the person assuming to act as such is an attorney or not.²³

So where a man though never actually admitted to the bar has practiced for many years before justices of the peace, communications made to him by the accused not merely as a friend but for the purpose of securing his professional advice and assistance are privileged.²⁴ It is very well settled that communications between an employer and a confidential clerk or steward are

²⁰ *State v. Perry*, 4 Idaho 224, 38 Pac. 655.

²¹ "It is equally well established law that an interpreter, intermediary, agent or clerk of an attorney, through whom communications between attorney and client are made, stands upon the same footing as his principal, and will not be allowed to divulge any fact coming to his knowledge as the conduit of information between them. But the rule extends no further than this." In *Hawes v. State*, 88 Ala. 37, 68, 7 So. 302;

Walker v. State, 19 Tex. App. 176, 181; *In re Monroe*, 20 N. Y. 82, 84; *Schubkagel v. Dierstein*, 131 Pa. St. 46, 54, 18 Atl. 1059, 6 L. R. A. 481n (law student); *Brungger v. Smith*, 49 Fed. 124.

²² *Barnes v. Harris*, 7 Cush. (Mass.) 576, 578, 54 Am. Dec. 734; *Fountain v. Young*, 6 Esp. 113.

²³ *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. 50rn.

²⁴ *Benedict v. State*, 44 Ohio St 679, 688, 11 N. E. 125.

never privileged.²⁵ And information disclosed in friendly confidence to a non-professional person, even though under a pledge of secrecy, is not privilege.²⁶

If there is any doubt whether the communication is intended to be privileged or not, the accused in a criminal trial should have the benefit of the doubt.²⁷

§ 174. Character and date of the communications.—The presence of certain elements is indispensable to all classes of privileged communications. In the first place the communication must have been made, the advice given or the information divulged while the confidential relation existed. Anything said afterwards is not within the rule.²⁸ The accused must show that the relation of attorney and client existed in any case where he claims that evidence is admissible because the witness who is called on to disclose it was his attorney. He must show that the witness had agreed to be his attorney and that he had agreed to have him as such. So that where a lawyer and friend of the accused, without express employment or promise or hope of compensation, was asked by the accused while in the jail visiting another client to

²⁵ *State v. Charity*, 2 Dev. (N. Car.) 543, 545, 549; *Sample v. Frost*, 10 Iowa 266, *Gartside v. Outram*, 26 L. J. Ch. 113.

²⁶ *McManus v. Freeman*, 2 Pa. Dist. 144; *Cady v. Walker*, 62 Mich. 157, 158, 28 N. W. 805, 4 Am. 834; *Wilson v. Rastall*, 4 T. R. 753.

²⁷ *People v. Atkinson*, 40 Cal. 284, 286.

²⁸ *People v. Hess*, 8 App. Div. (N. Y.) 143, 40 N. Y. S. 486, aff'g 6 Misc. (N. Y.) 246, 56 N. Y. St. 267, 26 N. Y. S. 630 (construing New York statute which requires the communication to have been made in the course of professional employment); *Long v. State*, 86 Ala. 36, 5 So. 443; *Reg. v. Hayward*, 2 C. & K. 234, 236; *Reg. v. Farley*, 2 C. & K. 313, 315; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *State v. Hedgepeth*, 125 Mo. 14,

20, 21, 28 S. W. 160, 162; *Hernandez v. State*, 18 Tex. App. 134, 51 Am. 295; *State v. Cummings*, 189 Mo. 626, 88 S. W. 706. Under a statute exempting "confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office," it has been held that the relation of attorney and client need not exist, but that communications made to the prosecuting attorney by a witness for the state are within the statute. *State v. Houseworth*, 91 Iowa 740, 60 N. W. 221, the court saying that under the statute it makes no difference from whom the communication comes. *State v. Hedgepeth*, 125 Mo. 14, 21, 28 S. W. 160. See, also, *State v. Smith*, 138 N. Car. 700, 703, 50 S. E. 859; *State v. Stafford* (Iowa, 1909), 123 N. W. 167.

convey a message to the chief of police to the effect that the accused would plead guilty if he were let off with light punishment, the communication is not privileged and may be proved by the attorney.²⁹ So the communications must have been made by or to the attorney, physician or priest while he was acting professionally. Information, such as belongs to ordinary intercourse, is not privileged. The communication must relate to the attorney's professional duty, though it is never necessary that it should be expressly stated to him by the client that it is confidential,³⁰ for this fact is always inferred and presumed until the contrary is shown whenever the relation of attorney and client is proved to exist.

The attorney has been permitted in civil cases to identify his client,³¹ to disclose the name of a person who retained him,³² to prove his client's handwriting,³³ or address,³⁴ the date when he received a certain instrument,³⁵ the fact that he drew a deed for his client,³⁶ or paid money to him,³⁷ or to a third person on his client's account. So an attorney may be compelled to answer a question designed solely to ascertain whether he had ever been consulted in his professional capacity by the accused,³⁸ or whether he had acted for him without authority.³⁹

And generally when an attorney, though acting as such, obtains knowledge of any fact, not by means of his professional character but by his powers of observation as a man, *i. e.*, by the

²⁹ *State v. Hedgepeth*, 125 Mo. 14, 21, 28 S. W. 160.

³⁰ *Wheeler v. Hill*, 16 Me. 329. A letter written by an attorney to his client informing him of the terms of an injunction is not a privileged communication because it is in no sense confidential. *Aaron v. United States*, 155 Fed. 833, 84 C. C. A. 67.

³¹ *Studdy v. Sanders*, 2 Dowl & Ry. 347.

³² *Brown v. Payson*, 6 N. H. 443, 448.

³³ *Hurd v. Moring*, 1 C. & P. 372; *Brown v. Jewett*, 120 Mass. 215, 218.

³⁴ *Commonwealth v. Bacon*, 135

Mass. 521, 524; *State v. Houston*, 3 Harr. (Del.), 15; *Martin v. Anderson*, 21 Ga. 301, 309.

³⁵ *Wheatley v. Williams*, 1 M. & W. 533, 2 Gale 140, 5 L. J. Ex. 237.

³⁶ *Barry v. Coville*, 53 Hun (N. Y.) 620, 7 N. Y. Supp. 36, affirmed in 129 N. Y. 302, 29 N. E. 307, 41 N. Y. St. 628.

³⁷ *Chapman v. Peebles*, 84 Ala. 283, 284, 4 So. 273.

³⁸ *White v. State*, 86 Ala. 69, 75, 5 So. 674; *Leindecker v. Waldron*, 52 Ill. 283, 285.

³⁹ *Cox v. Hill*, 3 Ohio 411, 424.

same means any one in a like situation would employ, the information is not privileged.⁴⁰

It is never essential to create the privilege that any proceedings, criminal or civil, should be pending or even in contemplation. That the relation of attorney and client exists is enough; for, whatever the transaction (unless some future infraction of the criminal law is contemplated), and whether or not it is likely to be subsequently litigated, the communication or advice is privileged.⁴¹ In conclusion, it may be noted as not within the rule, that an attorney may testify that a person alleged to be his client had made no communication to him or received no advice;⁴² and he may repeat a statement made to him (though made while he was acting professionally) by a third person, to whom he was referred by his client,⁴³ or communications by the client which he meant should be imparted to others by the attorney,⁴⁴ or a conversation between two persons which took place in his presence, though both were his clients.⁴⁵

§ 175. Communications made in contemplation of crime.—Communications made by a client who contemplates the future commission of a felony, or advice given by an attorney to enable his client to escape the consequences of a future infraction of the

⁴⁰ *State v. Fitzgerald*, 68 Vt. 125, 34 Atl. 429; *Milan v. State*, 24 Ark. 346, 355; *Swaim v. Humphreys*, 42 Ill. App. 370; *State v. Merchant* (N. H.), 18 Atl. 654; *Theisen v. Dayton*, 82 Iowa 74, 47 N. W. 891. So an attorney may testify from his knowledge of his client's handwriting that an instrument was written by him if his knowledge was gained by handling documents written by his client. *Johnson v. Daverne*, 19 Johns. (N. Y.) 134; *Coates v. Birch*, 2 Q. B. 252, 1 G. & D. 647, 11 L. J. Q. B. 1, 5 Jur. 1009; *Chant v. Browne*, 12 Eng. L. & E. 299. See civil cases, *Underhill on Ev.*, § 170.

⁴¹ *Arnold v. Chesebrough*, 41 Fed. 74; *Snow v. Gould*, 74 Me. 540, 542,

543, 43 Am. 604; *In re Whitlock*, 51 Hun (N. Y.) 351, 353-355, 3 N. Y. S. 855, rev'g 2 N. Y. S. 683; *Bingham v. Walk*, 128 Ind. 164, 172, 27 N. E. 483; *Mutual Life Ins. Co. v. Selby*, 72 Fed. 980, 19 C. C. A. 331.

⁴² *Daniel v. Daniel*, 39 Pa. St. 191.

⁴³ *Mellen, In re*, 63 Hun (N. Y.) 632, 18 N. Y. S. 515.

⁴⁴ *White v. State*, 86 Ala. 69, 5 So. 674; *Roper v. State*, 58 N. J. L. 420, 33 Atl. 969; *Ferguson v. McBean*, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65; *Hughes v. Boone*, 102 N. Car. 137, 159, 160, 9 S. E. 286; *Cady v. Walker*, 62 Mich. 157, 158, 28 N. W. 805, 4 Am. St. 834.

⁴⁵ *Weaver's Estate*, 9 Pa. Co. Ct. 516.

criminal law, are not privileged.⁴⁶ An accused person may claim privilege for any information communicated by him to an attorney or physician *after* the date of the crime with which he is charged.⁴⁷ He cannot claim to have the mouth of an attorney closed with whom he consults to ascertain how he may commit a crime and escape the detection and punishment.

It is no part of the duty of an attorney to counsel as to the best methods of violating the law.⁴⁸

The cases make a distinction between a confidential communication which states the intention to do a treasonable or felonious act, which both client and attorney know to be such, with a request for advice to enable the client to execute the act in such a way as to escape punishment; and the communication of an intention to commit an act which, under certain circumstances and with a particular intention, may become criminal accompanied by a request for advice as to how far the client may go without exceeding the limits beyond which the act would become criminal. In the first case, where the act is palpably and clearly criminal, a communication which seeks to be advised in order that criminal consequences may be avoided is not privileged. Thus, where a victim of a homicide had advised with an attorney how he might kill the accused and escape the consequences of his crime, it was held that the communication was not privileged and might be proved by the attorney.⁴⁹

So, also where two persons accused of crime had consulted an attorney upon the best method by which they might fraudulently conceal their property as against a judgment creditor and the attorney had advised them against doing so, the attorney was

⁴⁶ The lawfulness of the purpose of the communication will, in the absence of contrary proof, be presumed. If the client's purpose be to commit a felony or to do any act which is *malum in se*, the privilege is at once destroyed. *Bank of Utica v. Merse-
reau*, 3 Barb. Ch. (N. Y.) 528; *Peo-
ple v. Blakeley*, 4 Park Cr. (N. Y.)
176, 181. It is otherwise if the intent
is doubtful, and if the act contem-
plated might be lawful, *e. g.*, produc-
ing a miscarriage or abortion on a

pregnant woman, which, under some
circumstances, might be lawful as
necessary to save the mother's life.
Guptill v. Verback, 58 Iowa 98, 100,
12 N. W. 125. See, *State v. Smith*,
138 N. Car. 700, 50 S. E. 859.

⁴⁷ *Coveney v. Tannahill*, 1 Hill (N.
Y.) 33, 36, 37 Am. Dec. 287n.

⁴⁸ *Taylor v. Evans* (Tex. 1894), 29
S. W. 172, 174.

⁴⁹ *Everett v. State*, 30 Tex. App. 682,
685, 18 S. W. 674.

permitted to reveal on the witness stand what had been said to him.⁵⁰

In another case it was held that an attorney who had been consulted as to the possibility of forging a deed might testify on the trial of his client for the forgery to what had been said to him indicating an intention to forge.⁵¹

There are many other cases to the same effect, for the rule is that the prostitution of the honorable relation of attorney and client will not be permitted under the guise of privilege, and every communication made to an attorney by a client for a criminal purpose is a conspiracy or attempt at a conspiracy which is not only lawful to divulge, but which the attorney under certain circumstances may be bound to disclose at once in the interest of justice.⁵²

In accordance with this rule, where a forged will or other instrument has come into the possession of an attorney through the instrumentality of the accused, with the hope or expectation that the attorney would take some action in reference thereto, and the attorney does act, in ignorance of the true character of the instrument, there is no privilege, in as much as full confidence has been withheld. The attorney is then compellable to produce the forged writing against his client.⁵³

⁵⁰ Reg. v. Cox, L. R. 14 Q. B. Div. 153, 168, which is a very well considered case in which all the prior cases are cited and commented on. See also, Cromack v. Heathcote, 4 Moore 357, 2 Br. & B. 4 (1820), 22 R. R. 638; Gartside v. Outram, 26 L. J. Ch. 113; Annesley v. Anglesea, 17 How. St. Tr. 1139 (1743); Rex v. Dixon (1765), 3 Burr. 1687.

⁵¹ People v. Van Alstine, 57 Mich. 69, 79, 23 N. W. 594.

⁵² Orman v. State, 22 Tex. App. 604, 617, 3 S. W. 468, 58 Am. 662; Greenough v. Gaskell, 1 M. & K. 98, 104; People v. Blakeley, 4 Park. Cr. (N. Y.) 176, 181; Coveney v. Tannahill, 1 Hill. (N. Y.) 33, 36; People v. Mahon, 1 Utah 205; Russell v. Jackson, 9 Hare 387, 68 Eng. Ch. Rep. 558.

⁵³ Reg. v. Hayward, 2 C. & K. 234; Reg. v. Tynley, 1 Den. C. C. 319, 3 Cox C. C. 160, 18 L. J. M. C. 36, 37, 38. "If any man should confide to a professional person that he had a treasonable or felonious intention and wished to know how he might execute it so as to escape punishment, it would be too much to say that such communication which might make the man consulted guilty of misprision, was privileged, but if a man meditates an act which, exceeding certain limits, would become criminal, and confined within certain bounds would be perfectly justifiable, the person asking the advice must be considered as seeking how he may avoid and not how he may commit a crime, and it is impossible that an attorney should

The fact that the attorney is not cognizant of the criminal or wrongful purpose, or, knowing it, attempts to dissuade his client,⁵⁴ is immaterial. The attorney's ignorance of his client's intentions deprives the information of a professional character as full confidence has been withheld.⁵⁵

§ 176. **Permanency of the privilege—Waiver.**—The termination of the transaction pending when the communication was made, or the termination of the relation of attorney and client by the death of the client, or for any other cause, does not unseal the lips of the attorney.⁵⁶ The privilege is designed to protect the interests of the client. He may waive it if he deems it to his advantage to do so. His representative may, after his decease, waive the privilege, but only when the application of the rule would be disadvantageous to his estate.⁵⁷ The privilege may be waived by the client, either by implication arising from his silence or failure to make prompt objection and, *a fortiori*, by an express waiver.⁵⁸ The doctrine of an implied waiver arising from cir-

be obliged to disclose such communication. * * * It cannot be said to amount to the meditation of a crime, if a man adopts a course by which he seeks to avoid the commission of one." *Rex v. Haydn*, 2 F. & S. 379.

⁵⁴ *Orman v. State*, 22 Tex. App. 604, 617, 3 S. W. 468, 58 Am. 662; *Reg. v. Hayward*, 2 C. & K. 234.

⁵⁵ *Reg. v. Cox*, L. R. 14 Q. B. Div. 153, 163, 165, 5 Am. Cr. 140; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054. "In order that the rule may apply there must be both professional confidence and professional employment, but if a client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, for it cannot be the

solicitor's business to further a criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist." *Reg. v. Cox*, L. R. 14 Q. B. Div. 153, 168.

⁵⁶ *Underhill on Ev.*, § 172.

⁵⁷ *Layman's Will, In re*, 40 Minn. 371, 373, 42 N. W. 286; *Morris v. Morris*, 119 Ind. 341, 343, 21 N. E. 918; *Blackburn v. Crawford*, 3 Wall. (U. S.) 175, 18 L. ed. 186. *Contra*, *Loder v. Whelpley*, 111 N. Y. 239, 245, 19 N. Y. St. 631, 1 Dem. Surr. 368; *Underhill on Ev.*, § 172, note 5. The privilege is wholly personal to the client while he is living. It cannot be waived by any person merely because he stands in privity with him. *State v. James*, 34 S. Car. 579, 13 S. E. 325.

⁵⁸ *Blackburn v. Crawford*, 3 Wall. (U. S.) 175, 194, 18 L. ed. 186; *State*

cumstances is doubtless a safe rule in civil litigation, though very dangerous doctrine in a criminal trial. An express waiver is always allowed in a criminal prosecution, particularly where the accused is desirous of having his counsel testify in his behalf.⁵⁹ But it is doubtful if any waiver would be implied in a criminal trial.⁶⁰ The privilege of the accused is certainly not waived because he goes on the stand as a witness. In civil cases it has been held that a party is privileged from disclosing what his attorney would be prevented from divulging,⁶¹ and the same rule would doubtless apply to the cross-examination of the accused.⁶² But an accomplice who consents to be a witness for the prosecution cannot claim the privilege for his statements to his attorney. He must, under his arrangement with the state, tell all he knows, and if he knowingly keeps back any relevant fact he loses his right to the immunity promised. And the fact that he may be compelled to state what he divulged to his attorney regarding his own guilt may be the only means left to an innocent man accused of crime, of meeting the perjury of the real criminal, posing as a penitent accomplice on the witness stand.⁶³ The privilege belongs to the client and ought to be promptly claimed by him or for him by his attorney or representative. But it seems that, particularly in a criminal trial, the court may and perhaps should interpose of its own motion for the protection of an accused

v. Depoister, 21 Nev. 107, 25 Pac. 1000, 1002, holding that a client who requests his attorney to act as a subscribing witness to his will waives his privilege by implication, and the attorney is compellable to testify to all facts which may be proved by a subscribing witness, though confidential communications may be included.

⁵⁹Whart. Cr. Ev., §§ 498, 500; Walker v. State, 19 Tex. App. 176, 182; Hamilton v. People, 29 Mich. 173, 179.

⁶⁰Duttenhofer v. State, 34 Ohio St. 91, 95, 32 Am. 362. The calling of the attorney as a witness for the client is of course a waiver. Where accused

puts his attorney on the witness stand he may be compelled to relate relevant communications on his cross-examination.

⁶¹Hemenway v. Smith, 28 Vt. 701; Bigler v. Reyher, 43 Ind. 112, 114; Baker v. Kuhn, 38 Iowa 392, 395.

⁶²Alderman v. People, 4 Mich. 414, 422, 69 Am. Dec. 321.

⁶³Alderman v. People, 4 Mich. 414, 423, 69 Am. Dec. 321; Foster v. People, 18 Mich. 265; Hamilton v. People, 29 Mich. 173, 184; Wharton on Cr. Ev., § 502; People v. Gallagher, 75 Mich. 512, 516, 42 N. W. 1063; *Contra*, Sutton v. State, 16 Tex. App. 490, 495.

person who may be entirely ignorant of his right to remain silent when he is called upon to state what he said to his attorney.⁶⁴

§ 177. Writings when privileged.—A communication to or advice given by an attorney in writing is always privileged, nor can an attorney be compelled to produce a client's papers deposited with him for safe-keeping or for the purpose of obtaining his professional opinion. He may always be permitted to prove that a paper is in existence, that he has searched for it, and that it is or is not in his possession, to enable the other party to prove it by parol. He cannot be compelled to produce the papers, or to disclose their contents, if the papers are no longer in his custody.⁶⁵ Not only is the attorney prohibited from producing the writing, but he is also forbidden to disclose all information, whether names, dates, or other facts which he may have derived therefrom. So, if a forgery is under investigation by the grand jury,⁶⁶ or a person accused of that crime is on trial, an attorney, who may have the alleged forged writing in his possession cannot be compelled to produce it as evidence against the accused if the attorney received it professionally,⁶⁷ and not as a part of the preparation to commit the crime. The object of the privilege is to promote justice and to protect the innocent. But the law frowns upon all attempts to use it to defeat justice by shielding guilty persons. Hence, writings are not privileged which are

⁶⁴ "The communications between a party, or his legal adviser, and witnesses, are also privileged. There is, in those cases, the same necessity for protection; otherwise it would be impossible for a defendant to write a letter for the purpose of obtaining information on the subject of a suit, without incurring the liability of having the materials of his defense disclosed to the adverse party." Hare on Discovery of Evid., 151.

⁶⁵ *Brandt v. Klein*, 17 Johns. (N. Y.) 335; *Brard v. Ackerman*, 5 Esp. 119; *Wright v. Mayer*, 6 Ves. Jr. 280; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 35, 37 Am. Dec. 287n; *People*

v. Benjamin, 9 How. Pr. (N. Y.) 419, 423; *Selden v. State*, 74 Wis. 271, 274, 275, 42 N. W. 218, 17 Am. St. 144; *State v. Hazleton*, 15 La. Ann. 72; *Neal v. Patten*, 47 Ga. 73; *Jackson v. Denison*, 4 Wend. (N. Y.) 558, and cases cited in *Underhill on Ev.*, § 173.

⁶⁶ *Anon.*, 8 Mass. 370, 371.

⁶⁷ *Rex v. Smith*, 1 Phill. on Ev. (9th ed.) 171; *Reg. v. Tylney*, 1 Den. C. C. 319, 3 Cox Cr. Cas. 160, 18 L. J. (M. C.) 36, 324; *State v. Squires*, 1 Tyler (Vt.), 147, 152; *Reg. v. Hayward*, 2 C. & K. 234, 2 Cox. Cr. Cas. 23; *Reg. v. Cox*, L. R. 14 Q. B. 153, 174.

not given to the attorney in good faith and in his professional capacity. He may be compelled to produce forged writings which he received without knowing their true character in the execution of a proposed scheme to defraud,⁶⁸ or writings which were given to him for the purpose of suppressing evidence.⁶⁹

A communication to an attorney acting as a conveyancer is privileged,⁷⁰ though he act for both parties.⁷¹

§ 178. **Communications to spiritual adviser.**—By the early common law, following the rule of the modern Roman and the canon law, statements made to a priest in a confession were privileged, except, perhaps, in case of high treason.⁷² But the common law, since the Reformation, has only protected the information divulged by the penitent to his spiritual adviser to the extent that the latter was under no legal compulsion to reveal the evidence to a magistrate and to denounce the evil-doer.⁷³

The priest could be compelled, however, when placed upon the witness stand, to divulge any confession of crime made to him, though it was received in the course of religious discipline, and though the law of his church sealed his lips under penalty of suspension from or loss of office.⁷⁴ In this respect a communica-

⁶⁸ Reg. v. Farley, 2 C. & K. 313, 319; Reg. v. Hayward, 2 C. & K. 234, 2 Cox Cr. Cas. 23.

⁶⁹ People v. Sheriff, 29 Barb. (N. Y.) 622.

⁷⁰ Bingham v. Walk, 128 Ind. 164, 27 N. E. 483; Getzlaff v. Seliger, 43 Wis. 297. *Contra*, In re Smith, 61 Hun (N. Y.) 101; 15 N. Y. S. 425.

⁷¹ Clay v. Williams, 2 Munf. (Va.) 105, 122, 5 Am. Dec. 453. It is for the court to determine in what capacity and for what purpose documents were left with an attorney. Reg. v. Jones, 1 Den. C. C. 166, 2 Car. & K. 234. See cases cited Underhill on Ev., § 173.

⁷² 2 Best on Ev., §§ 583, 584. See note to Reg. v. Hay, 2 F. & F. 4.

⁷³ Wilson v. Rastall, 4 T. R. 753, 759; Anon., Skin. 404; MacNally's

Ev. 254; Rex v. Sparkes, cited in Peake N. P. 78. In Broad v. Pitt, 3 C. & P. 518, Best C. J., said: "I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner, but if he chooses to disclose them I shall receive them." See, also, Greenleaf on Evidence, § 247.

⁷⁴ Rex v. Gilham, 1 Moody C. C. 186; Smith's Case, 2 City Hall Rec. (N. Y.) 77, 80; Commonwealth v. Drake, 15 Mass. 161 (confession of a church member was admitted); Reg. v. Hay, 2 F. & F. 4 (where a priest refused to reveal from whom he received a stolen watch and was committed for contempt). *Contra*, Rex v. Griffin, 6 Cox Cr. Cas. 219. See, also, Greenlaw v. King, 1 Beav. 137, 145; Russell v. Jackson, 9 Hare 387, 391; Anderson v. Bank, L. R. 2 Ch. D. 644,

tion made to a priest is, in the absence of statute, on a par with one made to a layman.

Many of the states have sought to remedy the unfairness of this rule by statutory enactments by which priests and clergymen are absolutely prohibited from disclosing any fact becoming known to them while acting in a professional capacity, or in the course of discipline enjoined by the rules of the religious body to which they belong.⁷⁵ But a communication to a priest made otherwise than in his ecclesiastical capacity is not privileged.⁷⁶

So, where the accused met the priest on a railroad train and, with no intent of receiving his professional advice, assistance or consolation, told his story, incriminating himself, it was held that there was no privilege under the statute.^{76a} And inasmuch as the privilege is by the statute directly or indirectly limited to confessions of sins made for the purpose of receiving spiritual advice, or assistance, it was held in a prosecution for the crime of bigamy that the statements of the accused made to a clergyman who was to communicate them to the first wife in order to

651, 45 L. J. Ch. 449, 35 L. T. (N. S.) 76, 24 Wkly. Rep. 624; *Wheeler v. Le Marchant*, L. R. 17, Ch. D. 675, 681.

⁷⁵ California (Code Civ. Proc.) § 1881; Colorado, Acts 1883, p. 290; Michigan, 2 Howell's An. Stat., § 7515; Kansas Gen. Stat. 1901, § 4771; Iowa Rev. Code, 1888, § 4893; Missouri Rev. St. 1879, p. 690, § 4017; Nebraska An. St. 1901, § 5902; Wisconsin An. Stat., 1898, § 4074. Similar statutes exist in Arizona, Arkansas, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming. The question of the constitutionality of such statutes has been raised, but, up to the present, never judicially determined. The only possible objection that can be raised on constitutional grounds is that they tend to establish some form of religion. Such

an objection is plainly untenable, as the statutes are universally applicable to communications made by the adherents of any religion, and their purpose is plainly neither to protect the priest, nor to promote any particular form of religion. Such statutes are evidently intended to protect all persons in the exercise of their religious belief according to the dictates of their conscience.

⁷⁶ *People v. Gates*, 13 Wend. (N. Y.) 311, 323; *Gillooley v. State*, 58 Ind. 182, 184; *State v. Morgan*, 196 Mo. 177, 95 S. W. 402. Under the principles of the text it is very doubtful if communications to a priest relating to a marriage to be performed by him would be privileged.

^{76a} *State v. Brown*, 95 Iowa 381, 64 N. W. Rep. 277.

influence her to abandon the prosecution for bigamy are not privileged.⁷⁷

§ 179. Communications passing between medical practitioners and their patients.—At common law communications to medical men were not privileged. Although a physician who voluntarily discloses professional secrets would, from a medical and moral standpoint, be guilty of a gross indiscretion, the law does not treat them as privileged, and, in the absence of statute, he may be compelled to testify upon the witness stand.⁷⁸ Every consideration that furnishes a basis for affixing a privilege to communications or information passing between attorney and client applies, with equal force, to the relation of physician and patient. Aside from the benefit to the patient in encouraging him to make a full disclosure, by means of which he may receive better treatment, the danger that the truth will be perverted or concealed, perhaps unconsciously, by the physician who is compelled to disclose medical secrets on the witness stand, in the struggle between professional duty and legal duty, is removed.

It is now often provided by statute that no physician or surgeon shall be allowed or compelled to disclose any information which he has acquired while attending a patient, or which was necessary to enable him to act as such.⁷⁹

⁷⁷ *Gillooley v. State*, 58 Ind. 182, 184; *Hills v. State*, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155n.

⁷⁸ *Baker v. London & C. R. Co.*, L. R. 3 Q. B. 91; *Duchess of Kingston's Case*, 20 How. St. Tr. 573-580 (1776); 11 Harg. St. Trials 243; *People v. Stout*, 3 Park. Cr. (N. Y.) 670, 673; *Pierson v. People*, 79 N. Y. 424, 433, 35 Am. 524; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *Wilson v. Rastall*, 4 T. R. 753, 760, 2 R. R. 515; *Falmouth v. Moss*, 11 Price 455, 470, 25 R. R. 753; *Reg. v. Powell*, 1 C. & P. 97 (where a surgeon who attended the accused who was indicted for the murder of her child could not refuse to testify to her confession); *Greenlaw v. King*, 1 Beav. 137, 145; *Rus-*

sell v. Jackson, 9 Hare 387, 391; *Anderson v. Bank*, L. R. 2 Ch. D. 644, 650, 45 L. J. Ch. 449, 35 L. T. (N. S.) 76, 24 Wkly. Rep. 624.

⁷⁹ "A person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." N. Y. Code Civ. Proc., § 834; California Code, Civ. Proc. § 1881; Indiana Rev. St. 1881, § 497; Michigan, 2 Howell's An. St. § 7516; Missouri R. S. 1879, p. 690, § 4017; Ohio R. S. 1884, p. 1096, § 5241; Wisconsin An. S. 1898, § 4075. Similar statutes exist in many other states; 17 Am. St. 570, note.

These statutes are designed to protect the patient, not the physician, and, being remedial in their nature, ought to receive a liberal construction which will fully effectuate their wise and humane provisions. The principles of law applicable to privileged communications in the case of attorney and client may be invoked here. No regular contract of hiring or payment of a fee by the patient need be proved. It is unnecessary to show that the patient called him or procured his attendance. If the physician was summoned by a friend or a relative, or even by a stranger standing by, or by an attending physician, it is sufficient, provided he attended as a physician.⁸⁰ If a physician attend a person under circumstances calculated to produce the impression that he does so professionally, and his visit is so regarded and acted upon by the person, it is enough to establish the relation.⁸¹

These statutes expressly confer the privilege upon such information only as "it was necessary to communicate to enable the physician or surgeon to act or prescribe." He will be compelled to testify to all facts with which he became acquainted which were not necessary to the exercise of his professional skill.⁸² The mere existence of the professional relation of physician and patient is not enough. He must testify to all information acquired while attending the patient, if the information was not necessary to enable him to act or to prescribe.⁸³

⁸⁰ *Renihan v. Dennin*, 103 N. Y. 573, 579, 9 N. E. 320, 4 N. Y. St. 261; 18 Abb. N. Cas. 101, 25 Wkly. Dig. (N. Y.) 172, 57 Am. 770; *Ætna Life Ins. Co. v. Deming*, 123 Ind. 384, 395, 24 N. E. 86, 375; *Raymond v. Burlington &c. R. Co.*, 65 Iowa 152, 154, 21 N. W. 495.

⁸¹ *People v. Murphy*, 101 N. Y. 126, 129, 4 N. E. 326, 54 Am. 661, 4 N. Y. Cr. 95; *People v. Stout*, 3 Park. Cr. (N. Y.) 670, 675-680. In *People v. Stout*, a prisoner, while in jail and suffering bodily injuries, was examined by the jail physician, and afterwards, with his consent, by two physicians sent by the coroner. It appeared that all parties understood that the examinations were made with a

view to medical treatment, though not expressly so stated, and though no medicine was given or prescribed. The physicians were not permitted to testify to the physical condition of the accused. Compare *Babcock v. People*, 15 Hun (N. Y.) 347, 355.

⁸² *Meyer v. Standard &c. Ins. Co.*, 8 App. Div. (N. Y.) 74, 40 N. Y. S. 419; *Campau v. North*, 39 Mich. 606, 609, 33 Am. 433n; *Briggs v. Briggs*, 20 Mich. 34, 40; *People v. Sliney*, 137 N. Y. 570, 580, 33 N. E. 150, 50 N. Y. St. 391; *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544; *Collins v. Mack*, 31 Ark. 684, 693, 694.

⁸³ *Hewitt v. Prime*, 21 Wend. (N. Y.) 79, 81; *Babcock v. People*, 15

He may testify that he attended a patient, the number of visits he made,⁸⁴ the persons whom he found present and generally what the patient said to him not strictly in reference to his physical or mental condition.

But where the statute expressly excludes all information communicated to or acquired by a medical man in the course of his professional duties, or "while attending a patient professionally," all knowledge of whatever description gained from the physician's observation, or from the examination of the patient, or from the latter's statements, is excluded.⁸⁵

The privilege may, at least in civil cases, be waived by the patient or by his personal representative who is expressly authorized to do so.⁸⁶ So, in a prosecution for rape, the general rule is that the physician who attended the woman may testify to any facts within his knowledge. His calling as a witness for the prosecution is an implied waiver of the privilege. Where the statute requires that the patient shall consent that the physician

Hun (N. Y.) 347, 354; Hoyt v. Hoyt, 112 N. Y. 493, 515, 20 N. E. 402, 21 N. Y. St. 593; Westover v. Ætna Life Ins. Co., 99 N. Y. 56, 60, 1 N. E. 104, 52 Am. In. On the other hand it has been said that as soon as the relation of physician and patient is shown to exist, it will be conclusively presumed that all oral communications were made for the purpose of enabling the physician to prescribe. The necessity and purpose of the communication need not be proved. Feeney v. Long Island R. Co., 116 N. Y. 375, 380, 381, 22 N. E. 402, 5 L. R. A. 544; Edington v. Mutual Life Ins. Co., 67 N. Y. 185, 194; Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 297, 36 Am. 617.

⁸⁴Cooley v. Foltz, 85 Mich. 47, 49, 48 N. W. 176.

⁸⁵"If the knowledge is acquired in the chamber of the patient, and in the discharge of professional duty, the physician can make no disclosure. This is true, whether the knowledge

is communicated by the words of the patient, or is gained by observation, or is the result of a professional examination." It is immaterial by what method the physician acquires his knowledge. Heuston v. Simpson, 115 Ind. 62, 63, 17 N. E. 261, 7 Am. St. 409; Renihan v. Dennin, 103 N. Y. 573, 578, 9 N. E. 320, 57 Am. 770; Edington v. Ætna Life Ins. Co., 77 N. Y. 564; Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 36 Am. 617; People v. Stout, 3 Park. Cri. (N. Y.) 670, 675; Morris v. New York &c. R. Co., 148 N. Y. 88, 42 N. E. 410, 51 Am. St. 675.

⁸⁶Carrington v. St. Louis, 89 Mo. 208, 216, 1 S. W. 240, 58 Am. 108; Valensin v. Valensin, 73 Cal. 106, 107, 14 Pac. 397; State v. Depoister, 21 Nev. 107, 25 Pac. 1000, 1003. A death certificate made out by an attending physician is not privileged. Adreveno v. Mutual &c. Life Assn., 34 Fed. 870; State v. Pabst (Wis. 1909), 121 N. W. 351.

testify, consent may be inferred in the case of a minor on whom a rape had been committed, from the action of the minor's parents, in prosecuting the criminal.⁸⁷

§ 180. Death of the patient—Purpose of the communication—Contemplated crime.—The statutes of privilege are usually applicable both to civil and criminal trials. This is the rule even when the statute is couched in the most general terms.^{87a} But in some of the states the statutes are expressly limited to civil cases.⁸⁸ Where the statutory privilege is applicable to criminal trials in a homicide trial, it would seem that the testimony of the attendant physician, proving the dying declaration of the victim, ought to be excluded, for it is clear that his statement that he is dying and his description of the manner of his wounding are necessary to enable the physician to prescribe. The statute was never intended as a defense for criminals. Its plain purpose is not to protect murderers, but to shield the memory of the dead.⁸⁹ Hence a physician who has been consulted, in advance, by the accused, as to the best mode of procuring an abortion on a third person may state what was said,⁹⁰ as for example that he was asked by the accused to procure an abortion and that he refused to do so,⁹¹ upon the theory that the relation of physician did not exist between them and that no disgrace is cast upon the object of the contemplated crime.

But a communication made by the accused that a woman, for

⁸⁷ *State v. Depoister*, 21 Nev. 107, 25 Pac. 1000, 1003; *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

^{87a} *People v. Murphy*, 101 N. Y. 126, 129, 4 N. E. 326, 54 Am. 661.

⁸⁸ *People v. Lane*, 101 Cal. 513, 516, 36 Pac. 16; *People v. West*, 106 Cal. 89, 39 Pac. 207.

⁸⁹ *Pierson v. People*, 79 N. Y. 424, 35 Am. 524. It is usually easy to prove dying declarations and all the attendant circumstances by the evidence of laymen. Where the statements to the physician are made in the presence of a third party they are not usually privileged, for the layman

may testify. The question is without any judicial adjudication so far as the author can ascertain.

⁹⁰ *Babcock v. People*, 15 Hun (N. Y.) 347, 354; *Hewitt v. Prime*, 21 Wend. (N. Y.) 79; *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465. Cf. *People v. West*, 106 Cal. 89, 39 Pac. 207; *State v. Smith*, 99 Iowa 26, 68 N. W. 428, 61 Am. St. 219 (causing miscarriage).

⁹¹ *Seifert v. State*, 160 Ind. 464, 67 N. E. 100, 98 Am. St. 340, which expressly states that a "request to a physician to commit a crime is never privileged."

whom he engages the physician's professional services, was pregnant by him and that either she or he had attempted to produce a miscarriage, in which he had assisted her, is privileged when made to enable the physician to give the woman proper and legal medical treatment.⁹² So a physician who has attended professionally a person who died from poison, alleged to have been administered by the accused, may in testifying for the prosecution describe the patient's condition both from his own observation and from what the patient told him.⁹³

A construction, which would operate to convert a statutory provision, intended to protect a patient from a damaging or objectionable disclosure, into a protection for a person accused of the murder of the patient, cannot be admitted nor can we believe that such was the legislative intent.⁹⁴

§ 181. Communications made during examination to detect or ascertain sanity.—A physician who is sent by the court to examine into the mental or physical condition of a person, *e. g.*, of the accused, while in jail, merely to determine his sanity, may testify to his mental or physical condition,⁹⁵ and even to what the accused said to him about the crime,⁹⁶ but only if it is conclusively shown that the relation of physician and patient did not and was not supposed by the accused to exist.⁹⁷

§ 182. Secrecy of telegrams.—Telegraphic dispatches are not privileged communications. But in many of the states statutes

⁹² *People v. Brower*, 7 N. Y. Cr. 292, 294.

⁹³ *Pierson v. People*, 79 N. Y. 424, 432 (which, however, refuses to lay down any general rule), 35 Am. 524.

⁹⁴ *People v. Harris*, 136 N. Y. 423, 437, 448, 33 N. E. 65, 49 N. Y. St. 751. In this case a physician testified to the removal of a dead *fœtus* from a woman of whose homicide the prisoner was accused, and that the defendant at the time stated he had twice procured an abortion on her, she being his wife. See, also, *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

⁹⁵ *People v. Kemmler*, 119 N. Y. 580, 585, 24 N. E. 9; *People v. Schuyler*, 7 N. Y. Cr. 262, 267, 106 N. Y. 298, 12 N. E. 783, 8 N. Y. St. 860, 27 Wkly. Dig. (N. Y.) 1.

⁹⁶ *People v. Sliney*, 137 N. Y. 570, 580, 33 N. E. 150, 50 N. Y. St. 391.

⁹⁷ In *Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 47 Pac. 1019, it was held under a statute conferring the privilege on "information * * * which was necessary to enable him (the physician) to prescribe," that information obtained by a physician, when conducting an autopsy, is not privileged. See, also, *ante*, § 164.

exist which forbid any clerk, messenger or other employe from divulging to any person except the person addressed the contents of a telegraphic message. These statutes do not apply to the production of telegrams in court which may be secured by serving a subpoena *duces tecum* upon the officer or employe having them in custody.⁹⁸ The rules of the telegraph company forbidding disclosure of dispatches do not, of course, avail to prevent the production of telegrams when needed in court.⁹⁹

The subpoena must identify the particular papers required by naming the parties sending or receiving them, the subject-matter and the dates if known.¹⁰⁰ But the particularity of the demand and the sufficiency of the language are wholly discretionary with the court. No definite rule can be laid down. But it may be said that the subpoena cannot be used to obtain an indiscriminate production of telegrams not material to the inquiry, and which may, perhaps, be only effectual in disclosing private, social and business matters which every man has a right to conceal. So a grand jury has no power to compel the production of telegrams passing between parties during a period of fifteen months past.¹ A telegraph official may be compelled to testify orally to the contents of a dispatch where the writing is lost or its absence is otherwise accounted for.²

§ 183. Indecency of the facts to be proved.—Evidence relevant to the guilt or innocence of the prisoner, and which is necessary for

⁹⁸ *Croswell on Electricity*, § 437; *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831; *Storrer, In re*, 63 Fed. 564, distinguishing *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. 524; *Brown, Ex parte*, 72 Mo. 83, 88, 37 Am. 426, 7 Mo. App. 484; *State v. Litchfield*, 58 Me. 267; *United States v. Babcock*, 3 Dill. (U. S.) 566, 24 Fed. Cas. 14484, 3 Cent. Law J. 101; *National Bank v. National Bank*, 7 W. Va. 544, 547; *United States v. Hunter*, 15 Fed. 712, 715; *Woods v. Miller Co.*, 55 Iowa 168, 170, 7 N. W. 484, 39 Am. 170; *People v. Webb*, 5 N. Y. 855.

⁹⁹ *State v. Litchfield*, 58 Me. 267.

¹⁰⁰ *Jaynes, Ex parte*, 70 Cal. 638, 639, 12 Pac. 117; *Storrer, In re*, 63 Fed. 564; *United States v. Hunter*, 15 Fed. 712, 715.

¹ *Brown Ex parte*, 72 Mo. 83, 94, 37 Am. 426, 7 Mo. App. 484.

² *State v. Litchfield*, 58 Me. 267. If the federal government shall take control of the telegraph it is reasonable to assume that the rule by which information in the hands of executive officials is privileged would apply. So, doubtless, Congress now has power by virtue of its control of interstate commerce, of which the telegraph is a component part, to pass such a statute.

the purposes of criminal justice, will not be excluded or regarded as privileged, merely because of its indecency. In the trial of certain rare and abnormal crimes caused by a perversion of the sexual instinct, the most shocking revelations of human depravity are frequently met with; while in the frequent criminal prosecutions for abortion, rape, adultery, seduction and bastardy, the evidence is utterly unfit for repetition before a miscellaneous gathering. Though relevant evidence cannot be excluded because of its indecency, it is always in the discretion of the court to exclude from the court-room all persons not concerned in the proceedings, either as jurors, witnesses, counsel, or court officers.³

§ 184. **Privileged communications between husband and wife.**—At common law, neither a husband nor a wife was a competent witness for or against the other in any judicial proceedings, civil or criminal, to which the other was a party.⁴ This incompetency, so far as civil actions were concerned, was largely (though by no means wholly) based upon the common law identity of interest in property rights existing between the parties. The rule that excluded a party as a witness because of interest logically excluded another who was merely his or her *alter ego*.

And in criminal trials it was conceived that to permit husband or wife to testify for the other would be to admit a witness who would be sure to perjure himself or herself because of interest in and bias and friendship for the accused.⁵ If either were recognized as a competent witness against the other who was accused of crime, besides the temptation to shield the accused, a very

³ Greenleaf on Ev., § 253; 1 Elliott Ev., § 647; 2 Elliott Ev., § 818.

⁴ Cases cited in Underhill on Ev., § 166; State v. Smith, 5 Pen. (Del.) 1, 57 Atl. 368; Finklea v. State (Miss. 1909), 48 So. 1; State v. Wooley, 215 Mo. 620, 115 S. W. 417; Baker v. State, 120 Wis. 135; 97 N. W. 566. Where the wife is incompetent to testify against her husband, the testimony of the third person as to her declarations in the presence of her husband is not admissible against him.

State v. Richardson, 194 Mo. 326, 92 S. W. 649.

⁵ Greenl. on Ev., § 334; 2 Best on Ev., § 586. Under a statute permitting husband or wife to testify in a prosecution for a crime committed by one against the other the crime must have been committed while the relation of husband and wife existed. A wife cannot testify against her husband on a prosecution for rape committed by him on her prior to marriage. State v. McKay, 122 Iowa 658, 98 N. W. 510.

serious injury would be done to the harmony and happiness of husband and wife and the confidence which should exist between them. In other words, the common law incompetency of the husband and wife as witnesses in criminal trials arose mainly from considerations of public policy having respect to the confidential nature of the marital relation, and the interest which the public have in the preservation of domestic peace and confidence between married people.⁶ Under the rules of the common law a wife is not competent to testify for her husband in a prosecution for violating a municipal ordinance, since such a proceeding is subject to the rules of evidence governing criminal proceedings.⁷

§ 185. Husband and wife as witnesses in criminal proceedings.—

At the common law a wife is never a competent witness for her husband in a criminal trial, though she may, in one or two exceptional cases, be a competent witness against him.⁸ The incompetency of the husband or the wife to testify for the other, where either is tried for a crime committed upon some third person, is sometimes confirmed by statute.⁹

A husband or wife may, if willing to do, testify against each other without the consent of the other though there is a statute providing that neither shall be compelled to testify against the other.¹⁰

* *Turpin v. State*, 55 Md. 462, 477; *Stapleton v. Crofts*, 83 End. C. L. 367, 369; *Lucas v. Brooks*, 18 Wall. (U. S.) 436, 453, 21 L. ed. 779; *Steen v. State*, 20 Ohio St. 333; *United States v. Jones*, 32 Fed. 569, 570; *Williams v. State*, 44 Ala. 24; *Lucas v. State*, 23 Conn. 18, 20; *Taulman v. State*, 37 Ind. 353, 355.

⁷ *Barron v. Anniston* (Ala. 1908), 48 So. 58.

* *Turpin v. State*, 55 Md. 462, 475; *Randall's Case*, 5 City Hall Rec. (N. Y.) 141, 153; *State v. Wright*, 41 La. Ann. 600, 603, 6 So. 135; *State v. Pain*, 48 La. Ann. 311, 19 So. 138; *Hussey v. State*, 87 Ala. 121, 135, 6 So. 420; *Johnson v. State*, 27 Tex. App. 135, 11 S. W. 34; *State v. Work-*

man, 15 S. Car. 540, 546; *Merriwether v. State*, 81 Ala. 74, 1 So. 560; *People v. Reagle*, 60 Barb. (N. Y.) 527, 547; *Lucas v. State*, 23 Conn. 18, 20; *Elmore v. State*, 140 Ala. 184, 37 So. 156; *State v. Vaughan* (Mo. App. 1909), 118 S. W. 1186; *Wesoky v. United States*, 175 Fed. 333.

⁹ *United States v. Bassett*, 5 Utah 131, 13 Pac. 237; *State v. Parrott*, 79 N. Car. 615, 617; *Johnson v. State*, 27 Tex. App. 135, 11 S. W. 34; *People v. Gordon*, 100 Mich. 518, 519, 59 N. W. 322. The privilege of silence may be claimed by the accused as well as by the witness. *People v. Wood*, 126 N. Y. 249, 264, 27 N. E. 362, 36 N. Y. St. 952.

¹⁰ *Commonwealth v. Barker*, 185 Mass. 324, 70 N. E. 203.

A statute declaring in general terms that a husband or a wife is competent as a witness¹¹ in an action for or against the other, or a statute which removes the common law incompetency of interested persons as witnesses in civil proceedings (and even in criminal proceedings) will not be effective to make husband and wife a competent witness against the other in a criminal trial.¹² An exception is made on the trial of the husband for a personal injury inflicted by him on his wife, and she is permitted to testify against him. Such an exception is absolutely necessary to promote justice and to protect the wife from violence at the hands of her husband in circumstances where, from the relation and surroundings of the parties, no third person could be present.¹³

It is the policy of the law to extend the right of the wife to testify against the husband in such cases.¹⁴

¹¹ See *People v. Reagle*, 60 Barb. Tex. Cr. App. 516, 31 S. W. 394, 53 (N. Y.) 527, 547; *Wilke v. People*, 53 Am. St. 720; *Whipp v. State*, 34 Ohio N. Y. 525, 526. St. 87, 89, 32 Am. 359; *Navarro v. State*, 24 Tex. App. 378, 6 S. W. 542;

¹² *State v. Evans*, 138 Mo. 116, 39 S. W. 462, 60 Am. St. 549; *Steen v. State*, 20 Ohio St. 333, 334; *Turpin v. State*, 55 Md. 462, 477; *United States v. Crow Dog*, 3 Dak. 106, 14 N. W. 437. Cf. *Everett v. State*, 33 Fla. 661, 673, 15 So. 543; *State v. Orth*, 79 Ohio St. 130, 86 N. E. 476; *Bryan v. State* (Tex. Cr. App.), 114 S. W. 811. The incompetency is based on public policy, not on interest on the action. *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 15; *Knowles v. People*, 15 Mich. 408, 413; *Dixon v. People*, 18 Mich. 84, 92. Cf. *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040; *State v. Reynolds*, 48 S. Car. 384, 26 S. E. 679.

¹³ 1 Bl. Com. (Brown) p. 655; 1 East P. C. 455; *Lord Audley's Case*, 3 How. St. Tr. 401, 402; 1 Whart. Cr. L., § 767; *State v. Sloan*, 55 Iowa 217, 220, 7 N. W. 516; *State v. Bennett*, 31 Iowa 24; *United States v. Bassett*, 5 Utah 131, 13 Pac. 237; *Bramlette v. State*, 21 Tex. App. 611, 718, 2 S. W. 765, 57 Am. 622; *Baxter v. State*, 34 Tex. Cr. App. 516, 31 S. W. 394, 53 Am. St. 720; *Whipp v. State*, 34 Ohio St. 87, 89, 32 Am. 359; *Navarro v. State*, 24 Tex. App. 378, 6 S. W. 542; *State v. Pennington*, 124 Mo. 388, 391, 27 S. W. 1106; *People v. Chegaray*, 18 Wend. (N. Y.) 637, 642; *Turner v. State*, 60 Miss. 351, 354, 45 Am. 412; *United States v. Smallwood*, 5 Cranch C. C. (U. S.) 35, 27 Fed. Cas. 16316; 1 Russell on Crimes (9th Am. Ed.) 948; *People v. Carpenter*, 9 Barb. (N. Y.) 580-584; *State v. Dyer*, 59 Me. 303, 307 (abortion); *Commonwealth v. Kreuger*, 17 Pa. Co. Ct. 181; *State v. Boyd*, 2 Hill (S. Car.) 288, 27 Am. Dec. 376n; *People v. Houghton*, 24 Hun (N. Y.) 501; *People v. Hovey*, 29 Hun (N. Y.) 382, 389; *Rex v. Jagger*, 1 East P. C. 455 (attempt to poison wife). This exception is recognized, even if other witnesses testify to material facts. *Bentley v. Cooke*, 3 Doug. 422; *Taulman v. State*, 37 Ind. 353, 355; *State v. Vaughan* (Mo. App. 1909), 118 S. W. 1186.

¹⁴ *People v. Sebring*, 66 Mich. 705, 707, 33 N. W. 808. In all cases where

The dying declarations of a wife are always competent on a trial of her husband accused of her homicide, and may be used for or against him.¹⁵

Where a husband and wife are jointly indicted for the commission of the same crime, the confession of the wife may be received against the husband so far as it admits or suggests *his* guilt. The statute excluding privileged communications between husband and wife does not render this evidence inadmissible; the same rule would apply to the confession of a husband implicated with his wife in a crime against a third person.¹⁶ In all cases where the statute permits a husband or wife to testify against the other in a criminal trial, the credibility of the husband or wife thus testifying is to be considered and determined by the same rule which applies to other witnesses. The fact of the relationship of the witness to the accused may be considered as bearing upon his or her credibility, but this relationship should not cause the evidence of the witness to be regarded with suspicion or scrutinized with more than ordinary care.¹⁷

§ 186. Statutory competency of husband and wife.—The competency of a husband or wife as a witness for or against the other is now, to a large extent, if not altogether, regulated by statute in this country. The general effect of this legislation has been to render the husband or wife competent in civil cases by remov-

a wife may testify against her husband she may, with equal reason, testify for him. *State v. Patterson*, 2 Ired. (N. Car.) L. 346, 355, 38 Am. Dec. 699; *State v. Neill*, 6 Ala. 685, 686; *People v. Fitzpatrick*, 5 Park. Cr. 26, 28; *Com. v. Murphy*, 4 Allen (Mass.) 491, 492; *Rex v. Sergeant*, 1 Ry. & Mood. 352, 3 Russ. on Cr. (9th Am. Ed.) 633. The question usually arises where the wife is a witness. The exception is also recognized where the husband is a witness for or against the wife. *Whipp v. State*, 34 Ohio St. 87, 89, 32 Am. 359; *State v. Davidson*, 77 N. Car. 522, 523, as in the case of an assault by the wife on the husband. *State v. Harris*,

5 Penn. (Del.) 145, 58 Atl. 1042; where he is the owner of property for the arson of which the wife is on trial. *Jordan v. State*, 142 Ind. 422, 41 N. E. 817; *People v. Johnson* (Cal. App.), 98 Pac. 682.

¹⁵ 1 East P. C. 357; *State v. Belcher*, 13 S. Car. 459, 462; *People v. Green*, 1 Denio (N. Y.) 614, 615; *Whart. Cr. Ev.*, § 393; *Rosc. Cr. Ev.* (7th ed.) 126.

¹⁶ *State v. Mann*, 39 Wash. 144, 81 Pac. 561.

¹⁷ *State v. Collins*, 20 Iowa 85, 92; *State v. Bernard*, 45 Iowa 234; *State v. Lingle*, 128 Mo. 528, 31 S. W. 20, 22.

ing any disqualification either may have been under because of the merger of the legal personality of the wife into that of the husband. This principle applied in civil cases only, and in such cases a husband or wife is now competent as a witness to the same extent as any other person with this exception (which is recognized in all the states which have legislated upon the subject), that neither can be permitted to disclose confidential communications which passed between them during coverture.¹⁸

The rule of the statute is applicable to confidential communications which are contained in letters or other writings as well as to those which are of an oral nature. Hence, it follows that letters passing between husband and wife are inadmissible against either of them on trial for a crime where by accident or design they have been delivered by the person who received them to the prosecuting official.¹⁹ But it must appear, to bring the case under the statute, that the letters or writings contained something of a confidential nature. This fact is to be determined by the reading of the writing itself, and is a preliminary question for the court. If the communication in writing is not confidential *per se*, it cannot be made so by the accused claiming that he wrote it in confidence. The mere objection that the writing is confidential will not exclude it if the court shall decide otherwise.²⁰

It seems that a written communication from a husband to his wife may lose its privileged character by her letting it go out of her hands. The writing is no longer confidential if both husband and wife have relinquished control over it.²¹

§ 187. Confidential communications between husband and wife.—

The statutory rule forbidding a husband or wife to disclose confidential communications made during marriage is applicable to criminal trials. Where the statute declares in express language that "the husband or wife cannot be compelled to disclose confidential communications," either may do so voluntarily if the other consents thereto,^{21a} though the privilege is absolute and

¹⁸ See Underhill on Ev., § 167; Cole v. State, 48 Tex. Cr. App. 439, 88 S. W. 341. Comprehensive notes on questions of competency of husband or wife to testify for or against each other in criminal proceedings, 24 Am. St. 663, 106 Am. St. 763-770.

¹⁹ Commonwealth v. Fisher, 221 Pa.

St. 538, 70 Atl. 865; Hearne v. State, 50 Tex. Cr. App. 431; 97 S. W. 1050.

²⁰ Caldwell v. State, 146 Ala. 141, 41 So. 473.

²¹ State v. Buffington, 20 Kan. 590, 614, 27 Am. 193.

^{21a} Emmons v. Barton, 109 Cal. 602, 42 Pac. 303; Southwick v. Southwick,

cannot be waived if the statute declares the communication to be incompetent.²² Where a communication is not confidential (and this will be presumed where it was made to a third person by the husband or wife in the presence of the other²³), or where a third person is present, or is concealed and overhears an interview between husband and wife, it will not be privileged,²⁴ and the third party or the husband or wife may testify to what was said. But sometimes it has been held that a communication need not be expressly confidential to be privileged,²⁵ and this certainly is the rule when the statute refers to all communications made during marriage.²⁶

Under such a statute by which all communications made during the marriage relation are excluded; either party may testify as to the fact of marriage or as to any other fact which is not contained in a communication passed between the parties.²⁷

A conversation between husband and wife is no less confidential because children were present who took no part in it.²⁸ The cessation of the marital relation by annulment, divorce or death will not let in a confidential communication made while it existed.

²² *Sweeny* (N. Y. Super.) 234. Thus, a confession by a wife to her husband that she has committed incest, extorted by his threats to leave her, and its repetition, under similar threats, to a third person, in her husband's presence, are confidential communications and incompetent. *State v. Brittain*, 117 N. Car. 783, 23 S. E. 433. *Cf. ante*, §§ 173, 174.

²³ *Commonwealth v. Cleary*, 152 Mass. 491, 25 N. E. 834; *Head v. Thompson*, 77 Iowa 263, 42 N. W. 188. The prosecutor in a trial for an assault cannot be compelled to state whether or not he told his wife that the accused had acted in self-defense. The law regards such a communication as confidential and will not compel its disclosure. *Murphy v. Commonwealth*, 23 Gratt. (Va.) 960, 965.

²⁴ *Commonwealth v. Griffin*, 110 Mass. 181; *Mainard v. Reider*, 2 Ind. App. 115, 28 N. E. 196.

²⁵ *Commonwealth v. Griffin*, 110 Mass. 181; *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31; *State v. Center*, 35 Vt. 378; *People v. Lewis*, 62 Hun (N. Y.) 622, 16 N. Y. S. 881, *aff'd* in 136 N. Y. 633, 32 N. E. 1014, 49 N. Y. St. 913, and *Underhill on Ev.*, § 168.

²⁶ *Commonwealth v. Hayes*, 145 Mass. 289, 293, 14 N. E. 151; *Howard v. Commonwealth*, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704, 25 Ky. Law 2213, where a wife was not permitted to testify to the identity of a letter from her husband.

²⁷ *Campbell v. Chace*, 12 R. I. 333; *King v. King*, 42 Mo. App. 454; *Cole v. State*, 48 Tex. Cr. App. 439, 88 S. W. 341.

²⁸ *Chase v. United States*, 7 App. D. C. 149.

²⁹ *Jacobs v. Hesler*, 113 Mass. 157, 160. So business communications are privileged. *Commonwealth v. Hayes*, 145 Mass. 289, 14 N. E. 151. A boast-

A divorced husband or wife cannot testify to an adulterous act by either, or any other fact occurring during coverture.⁸⁰

The termination of the marriage relation permits either party thereto to testify thereafter against the other party as to any incriminating fact occurring after the termination of the marriage.⁸⁰ This would be the effect of a decree of divorce but not of a mere separation by decree or otherwise, for it is well settled that separation and non-cohabitation, either by agreement or by a decree of a court of competent jurisdiction, do not remove the restriction that a husband and wife shall not testify against each other on a criminal trial.⁸¹

An appeal from a decree of divorce does not prevent the decree from putting an end to the marriage relations as of the date of its entry. Though an appeal has been taken, either party may testify on a criminal trial against the other as to all facts arising after the decree.⁸²

It is not always necessary to produce the decree of divorce to show that the witness has become competent. The question being a collateral question, the rule of the best evidence does not apply and the witness may testify that she was divorced from the accused and may also testify to the date of the divorce.

The fact that she has been divorced may be implied as where, for example, in a homicide case a witness testifies orally that she is the widow of the victim of the homicide. Upon such a statement by a woman in a Kentucky case, it was held that she might, in the absence of evidence to the contrary, be presumed to

ful and defiant declaration by a husband to his wife of his misconduct, and of his intention to openly persist in it, accompanied by insolent and brutal threats, is not a confidential communication. *Seitz v. Seitz*, 170 Pa. St. 71, 32 Atl. 578.

⁸⁰ *State v. Jolly*, 3 Dev. & B. (N. Car.) 110, 113. How far this case, which expressly assumes all marital transactions to be confidential, would apply where the statute restricts the privilege to confidential communications, is by no means certain. A divorced husband is competent to prove

the marriage on the trial of his wife for adultery committed during the coverture. *State v. Dudley*, 7 Wis. 664. See, also, *State v. Marvin*, 35 N. H. 22, 26; *Stanley v. Montgomery*, 102 Ind. 102, 26 N. E. 213; *French v. Ware*, 65 Vt. 338, 26 Atl. 1096. *Cf. ante*, § 176; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

⁸¹ *Tompkins v. Commonwealth*, 117 Ky. 138, 77 S. W. 712, 25 Ky. L. 1254.

⁸² *Johnson v. State*, 27 Tex. App. 135, 11 S. W. 34.

⁸³ *State v. Leasia*, 45 Ore. 410, 78 Pac. 328.

have been divorced from her former husband before her marriage to the deceased.⁸³

And either party to the marriage relation after the death of the other may testify to facts which he or she learned from other sources and not by reason of such relations.

In all cases where the question of the competency of the wife of the accused to testify against him arises, the court should decide against the competency of the witness if it has a reasonable doubt on that point.⁸⁴

§ 188. Husband or wife of co-defendant as a witness for or against his associate in crime—Testimony of husband or wife on trial of a third person tending to criminate.—Whether a husband or wife is competent to testify as a witness upon the trial of a third person for a crime (where the spouse of the witness is not a party to the record), if his or her testimony may incriminate the other party to the marriage relation, is a question which was formerly much discussed. It was at one time almost universally held that such evidence, though it only tended to incriminate collaterally and in connection with other circumstances, was inadmissible. But the rule is now well settled that this evidence is to be received, not only as to those facts which, though innocent in themselves, constitute links in a chain of proof which will implicate the husband or wife of the witness, but also as to those facts which are directly incriminating,⁸⁵ always provided the spouse of the witness is not a party to the record.

Where several persons, jointly indicted for the same crime, are tried together, a different rule applies. Then the husband or wife of no one of them is a competent witness for,⁸⁶ or

⁸³ *Tompkins v. Commonwealth*, 117 Ky. 138, 77 S. W. 712, 25 Ky. Law 1254.

⁸⁴ *Porter v. United States*, 7 Ind. Terr. 616, 104 S. W. 855.

⁸⁵ *Commonwealth v. Sparks*, 7 Allen (Mass.) 534, 543; *Pruett v. State*, 141 Ala. 69, 37 So. 343; *State v. Dudley*, 7 Wis. 664, 668; *State v. Marvin*, 35 N. H. 22; *State v. Briggs*, 9 R. I. 361, 11 Am. 270; *Rex v. All Saints*, 6

Maule & Selw. 194; *State v. Welch*, 26 Me. 30, 45 Am. Dec. 94; *Commonwealth v. Gordon*, 2 Brewst. (Pa.) 569; *State v. Bridgmen*, 49 Vt. 202, 209, 24 Am. 124. But compare *State v. Gardner*, 1 Root (Conn.) 485; *State v. Wilson*, 31 N. J. L. 77.

⁸⁶ *Rex v. Frederick*, 2 Stran. 1095; *Rex v. Locker*, 5 Esp. 107; *Commonwealth v. Easland*, 1 Mass. 15; *Commonwealth v. Robinson*, 1 Gray

against,⁸⁷ any co-defendant. Thus, for example, where two or more are indicted for a conspiracy, the wife of none of them can testify against the others if the evidence connects her husband with the common plan or scheme.⁸⁸ But this rule of exclusion should be thus qualified. The wife of a co-defendant is only excluded in cases where the defendants are jointly tried, or where, though separately tried, the nature of the crime charged is such that the acquittal of one defendant would exonerate her husband, as in riots and conspiracies, in which the participation of two or more is necessary to constitute a crime.⁸⁹

Hence, where several are indicted for a crime which could have been committed by one person, as well as by several, the husband or wife of either may testify for or against an accomplice, jointly indicted, but only when his or her spouse is not a party to the record.⁴⁰ And generally where a wife may testify against an accomplice of her husband because, under the circumstances, her testimony will not injure the latter, she may testify for him, when he is separately tried.⁴¹

(Mass.) 555, 560; *Moffit v. State*, 2 Humph. (Tenn.) 99, 101, 36 Am. Dec. 301; *Mask v. State*, 32 Miss. 405, 410; *State v. Smith*, 2 Ired. (N. Car.) 402, 405; *Woodward v. State*, 84 Ark. 119, 104 S. W. 1109; *State v. Sargood*, 77 Vt. 80, 58 Atl. 971.

⁸⁷ *Whart. Crim. Ev.*, § 391; *Woods v. State*, 76 Ala. 35, 37, 38, 52 Am. 314; *Rex v. Smith*, 1 Mood. C. C. 289; *Dill v. State*, 1 Tex. App. 278, 283. *Contra*, *State v. Adams*, 40 La. Ann. 213, 3 So. 733.

⁸⁸ *Johnson v. State*, 47 Ala. 9; *Rex v. Smith*, 1 Mood. C. C. 289; *United States v. Hanway*, 2 Wall. Jr. (U. S.) 139, 26 Fed. Cas. 15299, 4 Am. Law J. (N. S.) 458.

⁸⁹ *Workman v. State*, 4 Sneed. (Tenn.) 425; *Moffit v. State*, 2 Humph. (Tenn.) 99, 101, 36 Am. Dec. 301. The wife of one of several defendants indicted jointly for a conspiracy is competent against the conspirators other than her husband

when he has pleaded guilty. *Graff v. People*, 108 Ill. App. 168.

⁴⁰ 1 Greenl. on Ev. 335; *Commonwealth v. Manson*, 2 Ashm. (Pa.) 31. Against an accomplice, *State v. Dyer*, 59 Me. 303; *State v. Anthony*, 1 McCord (S. Car.) 285; *Smith v. Commonwealth*, 90 Va. 759, 19 S. E. 843; *People v. Langtree*, 64 Cal. 256, 30 Pac. 813; *Moffit v. State*, 2 Humph. (Tenn.) 99, 101, 36 Am. Dec. 301; *Grimm v. People*, 14 Mich. 300; *Bluman v. State*, 33 Tex. Crim. App. 43, 21 S. W. 1027, 26 S. W. 75; *State v. Goforth*, 136 Mo. 111, 37 S. W. 801; *State v. Rainsbarger*, 71 Iowa 746, 31 N. W. 865; *State v. Wright*, 41 La. Ann. 600, 603, 6 So. 135. *Contra*, *State v. Smith*, 2 Ired. (N. Car.) 402, 405; *Munyon v. State*, 62 N. J. L. 1, 42 Atl. 577; *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586; *State v. Smith*, 5 Penn. (Del.) 1, 57 Atl. 368.

⁴¹ *Powell v. State*, 58 Ala. 362; *Moffitt v. State*, 2 Humph. (Tenn.) 99, 36

§ 189. **Valid marriage is necessary.**—The burden of proving that the marriage relation exists between the witness and the accused rests upon the party opposing the competency of the witness. Unless a marriage, valid or at least apparently valid in all respects, is shown to exist at the time the witness is offered, his or her testimony must be received. It is not enough that the parties, supposing the marriage to be valid, had lived together for years as man and wife, and had introduced each other to the world as such. The marriage must be actually and in fact valid, and must have existed in full force and vigor down to the date of the crime alleged.⁴² The validity of the marriage will be inquired into on the *voir dire* examination of the witness, and, if the relation of husband and wife is not found to exist, the witness is competent and must be permitted to testify.⁴³ And the fact that the parties have lived together in illicit relations, though holding themselves out to the world as husband and wife, is competent and admissible as an objection to the credibility of the witness.⁴⁴

§ 190. **Privilege as relating to the evidence of judicial officers.**—Because of the peculiar scope and nature of the duties of a judge presiding at a criminal trial it is usually considered objectionable,

Am. Dec. 301; Commonwealth v. Manson, 2 Ashm. (Pa.) 31; State v. Anthony, 1 McCord (S. Car.) 285, 286; United States v. Addatte, 6 Blatchf. (U. S.) 76, 24 Fed. Cas. 14422. Where a co-defendant is competent, his wife is also. Blackburn v. Commonwealth, 12 Bush (Ky.) 181.

⁴² State v. Samuel, 2 Dev. & Bat. (N. Car.) 177-184; Flanagan v. State, 25 Ark. 92; Rickerstricker v. State, 31 Ark. 207; State v. Patterson, 2 Ired. (N. Car.) 346, 355, 38 Am. Dec. 699; Wells v. Fletcher, 5 C. & P. 12; Wrye v. State, 95 Ga. 466, 22 S. E. 273; People v. McCraney, 6 Park. Cr. (N. Y.) 49; Commonwealth v. Mudgett, 174 Pa. St. 211, 34 Atl. 588; State v. Hancock, 28 Nev. 300, 82 Pac. 95; Porter v. United States, 7 Ind. Ter.

616, 104 S. W. 855; State v. Rocker, 130 Iowa 239, 106 N. W. 645. But in Dixon v. People, 18 Mich. 84, 91, it was said that evidence that an actual marriage existed, though only *prima facie* valid, and on which the prisoner had, with reason, relied and acted as such, will preclude the prosecution from attacking the validity of the marriage collaterally.

⁴³ Peat's Case, 2 Lew. C. C. 288; State v. Hancock, 28 Nev. 300, 82 Pac. 95; People v. Anderson, 26 Cal. 129; People v. Alviso, 55 Cal. 230.

⁴⁴ Mann v. State, 44 Tex. 642, 643, citing Ros. Cr. Ev., p. 148; 1 Phill. on Ev., pp. 69, 70; 1 Whart. Am. Cr. Law (6th Ed.) § 772; Hill v. State, 41 Ga. 484, 503; State v. Brown, 28 La. Ann. 279, 280.

if not indeed erroneous, for him to take the witness stand on the same trial. Aside from the general objection that judicial conduct should not be subject to cross-examination or comment, the peculiar duties of the judge in administering oaths to the witnesses in case the court has no clerk, and in deciding upon their competency, with his power to commit for contempt, render it unfair that he should assume the dual character of witness and judge in a criminal trial.⁴⁵ This rule, which is based rather upon the official character of the witness than upon the nature of the testimony which he may give, is not absolute, and if the judge shall testify, without objection from the accused, no error has been committed.⁴⁶

And these considerations, while they are reasonable, do not apply upon the trial of an indictment where the witness, though a judge, is not presiding. Hence it is the rule that a judge may testify under such circumstances to any matters which took place before him in open court,⁴⁷ as, for example, to prove the evidence of an absent or deceased witness given at a previous trial.⁴⁸

In some states there are statutes providing that a judge may be called as a witness by either party. Under such a statute it has been held that it is within the discretion of the judge who is called to be a witness, either to suspend the trial or to direct that

⁴⁵ *Rapalje on Witnesses*, § 45; *People v. Miller*, 2 Park. Cr. (N. Y.) 197; *Underhill on Ev.*, § 313.

⁴⁶ *People v. Dohring*, 59 N. Y. 374, 17 Am. 349. Even to permit one of several judges to testify may result in embarrassment and judicial scandal, and impede the course of justice. A judge upon the witness stand is subjected to all the duties of a witness, while at the same time possessing his rights and privileges. Who, then, shall decide what course shall be taken if, for reasons sufficient in his opinion, he shall decline to answer a question put to him as a witness? Shall he ascend the bench, and with unseemliness and illegality pass judicially upon his own conduct? Or ought he to be committed for con-

tempt, and the session of the court suspended? Either result must logically ensue, and both are equally impracticable. *People v. Dohring*, 59 N. Y. 374, 17 Am. 349; *Rogers v. State*, 60 Ark. 76, 87, 29 S. W. 894, 46 Am. St. 164, 31 L. R. A. 465n; *State v. DeMaio*, 69 N. J. L. 590, 55 Atl. 644.

⁴⁷ *State v. Duffy*, 57 Conn. 525, 18 Atl. 791; *People v. Dohring*, 59 N. Y. 374, 17 Am. 349; *Reg. v. Harvey*, 8 Cox Cr. Cas. 99.

⁴⁸ *Reg. v. Gazard*, 8 C. & P. 595. But a judge cannot be interrogated as to privileged communications with his colleagues. 1 *Wharton on Ev.*, § 600. Or as to the grounds upon which he decided a case. *Agan v. Hey*, 30 Hun (N. Y.) 591.

it shall proceed before another judge or not. In either case the judge is a competent witness under the statute, and he may, under such circumstances, testify to the same facts as other witnesses, except that he cannot be questioned as to consultations with his colleagues or similar matters.

For example, the judge holding the trial may, under the statute, testify that the testimony of the witness which he has just heard is or is not consistent with that given on a prior trial, and he may, if he can do so orally, state the evidence or state it after consulting the transcript made by the stenographer.⁴⁹

§ 191. Privilege as relating to grand jurors.—Proceedings before grand jurors may be regarded as privileged communications. The law requires that the preliminary inquiry into the guilt or innocence of the accused should be secret, in order that perfect freedom of discussion may be had, and that suspected persons may not be warned of their danger and enabled to make their escape.⁵⁰

Hence, in the absence of a statute permitting a disclosure, a grand juror is not compellable to testify as a witness to anything which took place in the jury room, and particularly to the testimony which was heard, unless it is absolutely necessary for him to do so in order to prevent a miscarriage of justice.⁵¹

He cannot be compelled to disclose as a witness the number of grand jurors concurring in the finding of an indictment,⁵² or to state the evidence on which it was found in order to impeach

⁴⁹ *State v. Houghton*, 45 Ore. 110, 75 Pac. 887.

⁵⁰ *Little v. Commonwealth*, 25 Gratt. (Va.) 921, 930; *Commonwealth v. Scowden*, 92 Ky. 120, 123, 17 S. W. 205, 13 Ky. L. 404. The free, impartial and unbiased administration of justice requires that proceedings of grand jurors shall be kept secret in order that perfect freedom of deliberation and opinion among jurors may be effectually obtained and an energetic administration of criminal justice be secured. *Commonwealth v. Hill*, 11 Cush. (Mass.) 137,

140, and see remarks of court in *State v. Baker*, 20 Mo. 338, 345.

⁵¹ *State v. Oxford*, 30 Tex. 428, 431; *State v. Hamlin*, 47 Conn. 95, 114, 115, 36 Am. 54; *State v. Davis*, 41 Iowa 311, 316; *Underhill on Evidence*, § 176. It is immaterial that the juror was not sworn to secrecy. *Little v. Commonwealth*, 25 Gratt. (Va.) 921, 930.

⁵² *Reg. v. Marsh*, 6 Ad. & E. 236, 250, 1 N. & P. 187, 2 H. & W. 366, 6 L. J. M. C. 153; *Reg. v. Russell*, 1 Carr. & M. 247; *State v. Baker*, 20 Mo. 338, 345; *State v. Johnson*, 115

it,⁵³ or what opinion any juror expressed, or how any juror voted on any question.

It is the policy of the law that all facts which are brought out in the preliminary inquiry before the grand jury should be forever secret. Persons who are present in the grand jury room but not under an oath of secrecy, as the clerk to the grand jury,⁵⁴ or the state's attorney,⁵⁵ the witnesses or any other persons,⁵⁶ are not competent as witnesses to prove anything that was said or done.

An indictment when found by the grand jury and filed in court is a judicial record presumptively true and correct. It cannot be collaterally impeached by evidence on the trial after the defendant has pleaded. But where justice requires it, an indictment or presentment will be set aside by the court on motion for proper cause. On such a motion a grand juror may testify that the indictment was indorsed "a true bill" by mistake,⁵⁷ or that the jury acted upon evidence and not upon their own knowledge or observation in making a presentment,⁵⁸ or that some mistake, misunderstanding or irregularity has occurred which would justify setting it aside.⁵⁹ The secrecy imposed by the common law and statutes on proceeding before a grand jury will not prevent the public or an individual from proving by members of the jury what passed before it when, after the purpose of secrecy has been effected, such disclosure becomes necessary in the furtherance of justice or the protection of public or individual rights.⁶⁰ So, a

Mo. 480, 22 S. W. 463. See, *contra*, Low's Case, 4 Greenl. (Me.) 439, 446, 453, 16 Am. Dec. 271n, holding that the concurrence of twelve or more in a bill is not a secret, but a result which the grand jury of necessity disclose publicly every time they promulgate their decision on any bill before them. See, also, Sparrenberger v. State, 53 Ala. 481, 486, 25 Am. 643.

⁵³ People v. Hulbut, 4 Denio (N. Y.) 133, 135, 47 Am. Dec. 244; State v. Comeau, 48 La. Ann. 249, 19 So. 130. See, *ante*, §§ 25-29.

⁵⁴ 12 Vin. Abr. 38.

⁵⁵ McLellan v. Richardson, 13 Me. 82.

⁵⁶ Chit. C. L. 317; Rosc. Cr. Ev. (7th ed.) 154; State v. Fasset, 16 Conn. 457, 470.

⁵⁷ State v. Horton, 63 N. Car. 595.

⁵⁸ Commonwealth v. Green, 126 Pa. St. 531, 536, 17 Atl. 878, 12 Am. St. 894n.

⁵⁹ People v. Hulbut, 4 Denio (N. Y.) 133, 136, 47 Am. Dec. 244; Commonwealth v. McComb, 157 Pa. St. 611, 27 Atl. 714; People v. Briggs, 60 How. Pr. (N. Y.) 17.

⁶⁰ State v. Campbell, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533n.

grand juror has been permitted to testify to what the defendant stated and confessed to the grand jury;⁶¹ that he manifested great anxiety to fix the charge upon another,⁶² and that a person named was not a witness before the grand jury.⁶³

§ 192. Statutory regulation of the competency of grand jurors.—

The common law obligation of secrecy incumbent upon grand jurors is generally, if not universally, confirmed by statutes in the several states, which, being remedial in their character, should be strictly construed. Their operation is usually confined, in express terms, to the evidence and the names of the witnesses who appear before the grand jury. As to other matters within the knowledge of its members, the common-law rules still suffice. Some states have, in recent years, enacted statutes permitting evidence given before the grand jury to be disclosed, and making a grand juror a competent witness in certain cases. First, where it is material to ascertain whether the testimony of a witness before the grand jury is consistent with or different from the evidence of the same witness at the trial,⁶⁴ and, second, to disclose the testimony given before them of any witness upon a charge against him of perjury. Statutes of this sort must be strictly construed, and it is doubtless the rule, that if such a statute expressly states in what cases a grand juror may disclose evidence which he has heard, he can do so in no other.⁶⁵ The cases, how-

⁶¹ *United States v. Porter*, 2 Cranch C. C. 60, 63, 27 Fed. Cas. 16072; *United States v. Charles*, 2 Cranch C. C. 76, 77, 25 Fed. Cas. 14786.

⁶² *State v. Broughton*, 7 Ired. (N. Car.) 96, 101, 45 Am. Dec. 507.

⁶³ *Commonwealth v. Hill*, 11 Cush. (Mass.) 137.

⁶⁴ *Little v. Commonwealth*, 25 Gratt. (Va.) 921, 931; *Commonwealth v. Mead*, 12 Gray (Mass.) 167, 170, 171, 71 Am. Dec. 741; *United States v. Reed*, 2 Blatchf. C. C. 435, 465, 27 Fed. Cas. 16134; *People v. Hulbut*, 4 Denio (N. Y.) 133, 135, 47 Am. Dec. 244; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157. The witness must be asked if he has not made

certain statements before the grand jury. *Jones v. Turpin*, 6 Heisk. (Tenn.) 181, 185; *Gordon v. Commonwealth*, 92 Pa. St. 216, 221, 37 Am. 672; *Reg. v. Gibson*, 1 Carr. & M. 672.

⁶⁵ *State v. Gibbs*, 39 Iowa 318, 322; *Commonwealth v. Scowden*, 92 Ky. 120, 122, 17 S. W. 205, 13 Ky. L. 404; *State v. Hayden*, 45 Iowa 11, 15; *Ruby v. State*, 9 Tex. App. 353, 356; *Spratt v. State*, 8 Mo. 247; *State v. Beebe*, 17 Minn. 241; *State v. Grady*, 84 Mo. 220; *Jenkins v. State*, 35 Fla. 737, 18 So. 182, 48 Am. St. 267; *State v. Campbell*, 73 Kan. 688, 85 Pac. 784.

ever, are not harmonious in construing such statutes, and in some of the states grand jurors have been permitted to divulge evidence given before them in cases that could by no means be brought under the statute.⁶⁶

Prosecutions for perjury committed by witnesses testifying before the grand jury have been comparatively rare. It is a well-settled rule, however, both at common law⁶⁷ and by statute, that any member of the grand jury may be compelled to testify to the evidence of the accused given before the grand jury. If this were not permitted it is very possible that untruthful witnesses would be able to commit perjury before the grand jury with perfect impunity, while subjecting all persons against whom they might cherish animosity to accusations and arrest.⁶⁸ The secrecy of the grand jury proceedings is due to the public alone and is to protect the jurors. It cannot be claimed as a privilege by a witness who testifies falsely before a grand jury and who is subsequently indicted for the perjury.⁶⁹

§ 193. Evidence of traverse jurors.—As regards traverse jurors the rule seems now to be that they may testify only to facts or communications referring to their actions as individuals while separated from their associates. They may testify to what third persons said or did to them as individual jurors. But the motives and reasons of the jury and the transactions and communications referring to the subject-matter under their consideration as an official body, and which were made in their capacity as jurors, are privileged, whether made in the jury room or elsewhere.⁷⁰

⁶⁶ *State v. Moran*, 15 Ore. 262, 14 Pac. 419; *State v. Broughton*, 7 Ired. (N. C.) 96, 45 Am. Dec. 507; *People v. Young*, 31 Cal. 563; *State v. Wood*, 53 N. H. 484; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157.

⁶⁷ *Thomp. & M. on Juries*, 744; *State v. Fasset*, 16 Conn. 457, 468; *United States v. Reed*, 2 Blatchf. C. C. 435, 466, 27 Fed. Cas. 16134; *People v. Young*, 31 Cal. 563.

⁶⁸ *State v. Broughton*, 7 Ired. (N. C.) 96, 101, 45 Am. Dec. 507; *Zeig-*

ler v. State, 2 Ga. App. 632, 58 S. E. 1066; *State v. Benner*, 64 Me. 267, 285.

⁶⁹ *People v. Young*, 31 Cal. 563, 564. On the incompetency of grand jurors as witnesses, see, *Thompson & Merriam on Juries*, § 701-707, where the subject is exhaustively discussed. *Pilgrim v. State* (Okla. Cr. App., 1909), 104 Pac. 383.

⁷⁰ *Commonwealth v. White*, 147 Mass. 76, 80, 16 N. E. 707. For a general discussion of this subject and cases, see *Underhill on Ev.*, § 176.

Evidence from the jurors to show their ignorance,⁷¹ or misconduct,⁷² or to impeach their verdict for the purpose of obtaining a new trial, cannot be received.⁷³ The admission of such evidence is contrary to public policy and injurious to the administration of justice. It would expose the jurors to offers of bribes if a new trial could be procured for the accused upon the affidavits of jurors. But the evidence of a juror may be introduced to show the misconduct or mistakes of others. Thus the affidavit of a juryman has been received to show that the foreman made a mistake in announcing a verdict, or the clerk a mistake in entering it, or to show the misconduct of the officer having the jury in charge. And the general rule that a verdict may not be impeached is not without exceptions,⁷⁴ as for example where it appeared that a verdict of guilty was rendered on insufficient evidence with the expectation of executive clemency. So it may be shown by a juror's testimony that the trial judge promised them if they would convict they might rely upon him to be clement to the prisoner.⁷⁵

⁷¹ *State v. Cobbs*, 40 W. Va. 718, 22 S. E. 310.

⁷² *State v. Wood*, 124 Mo. 412, 417, 27 S. W. 1114; *State v. Best*, 111 N. Car. 638, 643, 15 S. E. 930; *State v. McLeod*, 1 Hawkes (N. Car.) 344, 346; *Taylor v. Commonwealth*, 90 Va. 109, 117, 17 S. E. 812; *State v. Dusenberry*, 112 Mo. 277, 295, 20 S. W. 461; *State v. Plum*, 49 Kan. 679, 31 Pac. 308; *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. 50; *Heller v. People*, 22 Colo. 11, 43 Pac. 124; *Carr v. State*, 96 Ga. 284, 22 S. E. 570; *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367.

⁷³ In *Woodward v. Leavitt*, 107 Mass. 453, 461, 9 Am. 49, where this subject is fully discussed, the court says: "The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court; it is essential

to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable." No affidavit or other sworn statement will be received to impeach a verdict, to explain it or to show on what grounds it was rendered. *Kelly v. State*, 39 Fla. 122, 22 So. 303; *Weatherford v. State*, 31 Tex. Cr. App. 530, 536, 21 S. W. 251, 37 Am. St. 828; *McTyier v. State*, 91 Ga. 254, 260, 18 S. E. 140; *Smith v. State*, 59 Ark. 132, 140, 43 Am. St. 20; *State v. Senn*, 32 S. Car. 392, 408, 11 S. E. 292; *State v. Bennett*, 40 S. Car. 308, 311, 18 S. E. 886. As to testimony of judges and jurors as to identity of crime and prisoner, see § 197, *post*.

⁷⁴ *Crawford v. State*, 2 Yerg. (Tenn.) 60, 67, 24 Am. Dec. 467n.

⁷⁵ *McBean v. State*, 83 Wis. 206, 211, 53 N. W. 497.

CHAPTER XVI.

EVIDENCE OF FORMER JEOPARDY.

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| § 194. Plea of former conviction or acquittal. | 196. Essential facts to be shown. |
| 195. The record of the former trial as evidence. | 197. Identity of crime and person. |
| | 198. Criminal judgments as admissions. |

§ 194. **Plea of former conviction or acquittal.**—The pleas of *autrefois acquit* and *autrefois convict* are pleas in bar which are favorably regarded by the law. By a plea of *autrefois acquit* the accused in effect claims that he has already been acquitted of the identical crime with which he now stands indicted, while by the plea of *autrefois convict* he declares that he was formerly convicted of the same crime. Any extended consideration of the form of such pleas or of the order or method in which they must be made is manifestly out of place here. They will be found sufficiently discussed in works treating of the details of criminal trial procedure.¹ Here we can only consider what facts must be alleged and proved under these pleas and the mode of proving them.

§ 195. **The record of the former trial as evidence.**—In most of the states, a plea of former acquittal or conviction must be specially pleaded in bar. Such a plea is not proper as a defense nor can evidence be offered to show a former conviction or acquittal under a plea of not guilty. In other states it has been held that a defense of former acquittal or conviction may be shown under a plea of not guilty. A special plea in those states is unnecessary. A plea of former acquittal or conviction can only be pleaded after an actual acquittal or conviction. It cannot be based upon the fact that another indictment is pending for the same crime.²

If a statute provides that a prosecution shall be suspended upon the accused making restitution so far as he can, it will be pre-

¹Elliott Ev., § 2730; burden of proof of jeopardy, Elliott Ev., § 2731.

²1 Chitty Cr. L. 463.

sumed, where the accused in a subsequent prosecution for the same offense alleges former jeopardy, that he consented to the suspension, and the prosecution need not prove an express consent on his part.³

Though it is never necessary to prove a formal sentence to sustain a plea of former acquittal or conviction,⁴ it is always necessary to show that the trial came to an actual end.⁵ The best evidence of the fact that the trial was terminated is the judicial record of the prior proceedings. Ordinarily, this must be produced to show the former conviction or acquittal and parole evidence of its contents is usually not received, unless its loss or destruction is shown.⁶

If the record has not been made up, a continuance must be granted in order that the accused may have an opportunity by means of a mandamus to compel the clerk to make it up.⁷ Under all circumstances, the accused should have a reasonable time to enable him to produce the record.⁸ While it is true that the fact of former acquittal or conviction cannot be proved by parole, there are certain facts in connection with the former trial that must necessarily be proved by oral evidence.^{9a} For example, it may be shown orally that the verdict was not properly received;⁹ that the jury were discharged because they could not agree upon a verdict,¹⁰ or that the indictment was not maintained by the evidence at the trial.¹¹

³ *Burnett v. State*, 76 Ark. 295, 88 S. W. 956.

⁴ *State v. Elden*, 41 Me. 165, 168; *State v. Benham*, 7 Conn. 414; *Shepherd v. People*, 25 N. Y. 406, 420, 421.

⁵ *Lipscomb v. State*, 76 Miss. 223, 25 So. 158; *State v. Williams* (N. Car., 1909), 65 S. E. 908.

⁶ *Walter v. State*, 105 Ind. 589, 593, 5 N. E. 735; *Rocco v. State*, 37 Miss. 357; *State v. Orr*, 64 Mo. 339; *People v. Benjamin*, 2 Park. Cr. (N. Y.) 201; *Robbins v. Budd*, 2 Ohio 16, docket of justice; *State v. Hudkins*, 35 W. Va. 247, 13 S. E. 367; *Rex v. Bowman*, 6 C. & P. 101, 25 E. C. L. 342.

⁷ *Rex v. Bowman*, 6 C. & P. 101, 25 E. C. L. 342.

⁸ *Brady v. Commonwealth*, 1 Bibb. (Ky.) 517.

^{9a} *Jacobs v. State*, 4 Lea (Tenn.) 196; *Bailey v. State*, 26 Ga. 579, 581; *Brown v. State*, 72 Miss. 95, 97, 16 So. 202; *Walter v. State*, 105 Ind. 589, 593, 5 N. E. 735; *Farley v. State*, 57 Ind. 331; but compare, *Durland v. United States*, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. 508.

⁹ *State v. Scott*, 1 Kan. App. 748, 42 Pac. 264.

¹⁰ *Helm v. State*, 67 Miss. 562, 7 So. 487.

¹¹ *State v. Judge*, 42 La. Ann. 414, 7 So. 678.

Parol evidence is always admissible to show that there were fraud and collusion on a prior trial where the conviction or acquittal was the result of such fraud or collusion.¹² If it shall appear that the verdict of guilty on a former trial was subsequently set aside, the record is not admissible, for the verdict and all incidents stand or fall together.¹³

The record of the former trial so far as it is admissible is conclusive upon both parties, as to all issues which were raised or could have been raised on a former proceeding.¹⁴

The general rule that a prior judgment on the merits is conclusive upon the parties thereto, and that it will be deemed to have established all facts which were essential to the rendition of the judgment in any subsequent proceeding between the same parties, is applicable to criminal trial.¹⁵

§ 196. **Essential facts must be proved.**—The fact that a valid indictment was found against the accused, and that on pleading thereto he was regularly acquitted or convicted must be proved by relevant evidence to the satisfaction of the court. In the first place, it may be said that a plea of former acquittal or conviction is not good unless it shall substantially appear in evidence that the previous trial was upon the merits.¹⁶

Thus, the discharge of the accused on his prior trial because the prosecution was not commenced within the statute of limitation,¹⁷ or for failure to admonish the jury before their separa-

¹² *State v. Reed*, 26 Conn. 202; *Commonwealth v. Dascom*, 111 Mass. 404.

¹³ *Bailey v. State*, 26 Ga. 579, 581.

¹⁴ *Myers v. State*, 92 Ind. 390, 396; *Smurr v. State*, 105 Ind. 125, 133, 4 N. E. 445; *Commonwealth v. Evans*, 101 Mass. 25, 27; *Commonwealth v. Goddard*, 13 Mass. 455, 457; *State v. Kelsoe*, 11 Mo. App. 91, 92; *State v. Taylor* (Miss. 1898), 23 So. 34.

¹⁵ *Commonwealth v. Evans*, 101 Mass. 25, 27; *Commonwealth v. Austin*, 97 Mass. 595, 597; *State v. Lang*, 63 Me. 215, 220. If the prior trial was on the same indictment and in

the same court, but no judgment has been entered, accused must move that judgment be entered before he pleads a prior conviction. *De Leon v. State* (Tex.), 114 S. W. 828.

¹⁶ *Commonwealth v. Curtis*, Thach. Cr. Cas. (Mass.) 202; *Halloran v. State*, 80 Ind. 586, 591; *State v. Hodgkins*, 42 N. H. 474, 477; *State v. White*, 8 Wash. 230, 35 Pac. 1100; *Ballowe v. Commonwealth* (Ky.), 41 S. W. 646, 19 Ky. L. 1867; *People v. Fishman*, 64 Misc. (N. Y.) 256, 119 N. Y. S. 89.

¹⁷ *Nagel v. People*, 229 Ill. 598, 82 N. E. 315.

tion,¹⁸ or because the jury could not agree after repeated instructions,¹⁹ is not sufficient to sustain a plea of former jeopardy.

So, also, it is a general rule well sustained by the cases that a judgment in criminal and in civil cases in order to be conclusive as a bar on the parties in a subsequent proceeding, must have been rendered by a court having proper jurisdiction and whose proceedings were wholly regular.²⁰ If the indictment on a former trial was bad, so that a conviction thereon would be set aside because of the insufficiency of the indictment, a plea of former acquittal or conviction is not sustained.²¹

Usually the record is proper evidence to prove that the court had jurisdiction and in the absence of proof of its loss or destruction, its production to prove jurisdiction may be required as the best evidence of that fact.²²

§ 197. Identity of crime and person.—The accused must show by evidence independently of the record the identity of the crime for which he was convicted or acquitted with that for which he is now on trial as regards time,²³ place and character.²⁴

¹⁸ *State v. McKinney*, 76 Kan. 419, 91 Pac. 1068.

¹⁹ *Johnson v. State*, 54 Fla. 45, 44 So. 760; *Keerl v. State*, 213 U. S. 135, 53 L. ed. —, 29 Sup. Ct. 469, aff'g *State v. Keerl*, 33 Mont. 501, 85 Pac. 862.

²⁰ *McNeil v. State*, 29 Tex. App. 48, 14 S. W. 393; *Blyew v. Commonwealth*, 91 Ky. 200, 15 S. W. 356, 12 Ky. L. 742; *Alford v. State*, 25 Fla. 852, 6 So. 857; *Smith v. State*, 67 Miss. 116, 7 So. 208; *State v. Phillips*, 104 N. Car. 786, 10 S. E. 463; *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298; *State v. Hodgkins*, 42 N. H. 474, 477; *State v. Odell*, 4 Blackf. (Ind.) 156; *Commonwealth v. Peters*, 12 Met. (Mass.) 387; *Commonwealth v. Bosworth*, 113 Mass. 200, 202, 18 Am. 467; *Brown v. State*, 105 Ala. 117, 16 So. 929; *People v. Connor*, 142 N. Y. 130, 133, 36 N. E. 807; *Dulin v. Lillard (Dulin's Case)*, 91

Va. 718, 20 S. E. 821, 822; *State v. Sommers*, 60 Minn. 90; 61 N. W. 907. *Underhill on Ev.*, § 152.

²¹ *Timon v. State*, 34 Tex. Cr. App. 363, 30 S. W. 808, 1063; *State v. Littschke*, 27 Ore. 189, 40 Pac. 167; *United States v. Barber*, 21 D. C. 456; *Shepler v. State*, 114 Ind. 194, 198, 16 N. E. 521; *Ford v. State*, 7 Ind. App. 567, 570, 35 N. E. 34.

²² *State v. Salge*, 2 Nev. 321; *State v. Spencer*, 10 Humph. (Tenn.) 431, 432; *Brill v. State*, 1 Tex. App. 152.

²³ *People v. Gault*, 104 Mich. 575, 62 N. W. 724; *Reed v. State* (Tex. 1895), 29 S. W. 1085; *Bickham v. State*, 51 Tex. Cr. App. 150, 101 S. W. 210.

²⁴ *Wilkinson v. State*, 59 Ind. 416, 26 Am. 84; *Nagel v. People*, 229 Ill. 598, 82 N. E. 315; *Brown v. State*, 72 Miss. 95, 16 So. 202; *Henry, In re*, (Idaho) 99 Pac. 1054; *State v. Hudkins*, 35 W. Va. 247, 13 S. E. 367;

The identity of the person who stands accused with the person formerly acquitted or convicted must also be shown, and may be proved by parol evidence, though identity of name may usually be sufficient proof of identity of person in the absence of evidence to the contrary.²⁵ The burden of proof to show the fact of the former acquittal or conviction and also to show the identity of the person and of the crime is always upon the accused.²⁶

Whether the proof of former acquittal or conviction is sufficient is a question for the court to determine upon all the facts and usually, unless it is evident that gross injustice has been done, the determination of the court will not be reviewed.²⁷

If the accused offers no proof to sustain a plea of former acquittal or conviction, it is the duty of the court to direct the jury to find for the prosecution.²⁸

Parol evidence from a judge, juror or witness at the former trial is admissible to show the identity both of the person and of the crime.²⁹

Durland v. United States, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. 508; *Inman v. State*, 35 Tex. Cr. App. 36, 30 S. W. 219; *State v. Chinault*, 55 Kan. 326, 40 Pac. 662; *State v. Robinson*, 116 N. Car. 1046, 21 S. E. 701; *Reddy v. Commonwealth*, 97 Ky. 784, 31 S. W. 730, 17 Ky. L. 536; *State v. Waterman*, 87 Iowa 255, 54 N. W. 359; *State v. Wister*, 62 Mo. 592; *Burk v. State*, 81 Ind. 128; *King v. State*, 43 Tex. 351; *State v. Atkinson*, 9 Humph. (Tenn.) 677; *Davidson v. State*, 99 Ind. 366, 367; *Foster v. State*, 39 Ala. 229, 234; *Vowells v. Commonwealth*, 83 Ky. 193, 7 Ky. L. 176; *Sims v. State*, 21 Tex. App. 649, 1 S. W. 465; *Faulk v. State*, 52 Ala. 415, 417; *Jenkins v. State*, 78 Ind. 133, 134; *Beyerline v. State*, 147 Ind. 125, 45 N. E. 772.

²⁵ *State v. Kelsoe*, 11 Mo. App. 91, 92.

²⁶ *Faulk v. State*, 52 Ala. 415; *Emerson v. State*, 43 Ark. 372; *State v. Norman*, 135 Iowa 483, 113 N. W.

340; *Vowells v. Commonwealth*, 83 Ky. 193, 7 Ky. L. 176; *Cooper v. State*, 47 Ind. 61; *Commonwealth v. Wermouth*, 174 Mass. 74, 54 N. E. 352; *Brown v. State*, 72 Miss. 95, 97, 16 So. 202; *Commonwealth v. Daley*, 4 Gray (Mass.) 209; *Commonwealth v. Hoffman*, 121 Mass. 369; *State v. Ackerman*, 64 N. J. L. 99, 45 Atl. 27; *People v. Cramer*, 5 Park. Cr. (N. Y.) 171.

²⁷ *State v. Bradley*, 45 Ark. 31. See *Allen v. State*, 70 Ark. 22, 65 S. W. 933; *Daniels v. State*, 78 Ga. 98, 6 Am. St. 238n; *People v. Richards*, 44 Hun (N. Y.) 278; *State v. Bronkol*, 5 N. Dak. 507, 67 N. W. 680.

²⁸ *Territory v. West* (N. Mex. 1909), 99 Pac. 343.

²⁹ *Bainbridge v. State*, 30 Ohio St. 264; *Rocco v. State*, 37 Miss. 357; *Brown v. State*, 72 Miss. 95, 97, 16 So. 202; *Page v. Commonwealth*, 27 Gratt. (Va.) 954; *Commonwealth v. Chilson*, 2 Cush. (Mass.) 15; *Commonwealth v. Austin*, 97 Mass. 595.

§ 198. **Criminal judgments as admissions.**—A judgment in a criminal trial may under some circumstances be admissible in a subsequent civil proceeding. Thus, in an action to recover damages for an assault and battery, the plaintiff may prove that the defendant was arrested and placed on trial for the same, and also that he was tried and found guilty, or that he pleaded guilty and was sentenced. Such a determination, deliberately made, is of the highest value as evidence on the issue in the civil proceeding.⁸⁰

597; *Commonwealth v. Dillane*, 11 47, 49; *Walter v. State*, 105 Ind. 589, Gray (Mass.) 67; *State v. Waterman*, 87 Iowa 255, 257, 54 N. W. 359; 593, 5 N. E. 735; *State v. McIntyre* (Wash. 1909), 101 Pac. 710. *Ante*, *State v. Maxwell*, 51 Iowa 314, 1 N. §§ 190, 193.
 W. 666; *Emerson v. State*, 43 Ark. ⁸⁰*Green v. Bedell*, 48 N. H. 546, 372; *Swalley v. People*, 116 Ill. 247, 549.
 4 N. E. 379; *Dunn v. State*, 70 Ind.

CHAPTER XVII.

THE COMPETENCY OF WITNESSES.

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| <p>§ 199. Definition and formal requirements of the oath.</p> <p>200. When witness may affirm.</p> <p>201. Religious belief of the witness.</p> <p>202. Insanity—When disqualifying a witness.</p> <p>203. Mode of proving insanity of witness.</p> <p>204. Deaf mutes as witnesses.</p> <p>205. Children on the witness stand.</p> | <p>§ 206. Incompetency of witnesses caused by conviction of infamous crime.</p> <p>207. The pardon of the convict—When restoring competency.</p> <p>208. Mode of proving pardon—Parol evidence.</p> <p>209. Statutory regulations removing the incompetency of persons convicted of crime.</p> <p>210. Statutes construed.</p> |
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§ 199. **Definition and formal requirements of the oath.**—An oath has been defined as an “outward pledge given by the juror that his attestation [or promise] is made under an immediate sense of his responsibility to God.”¹ The definition just given. it may be noted, wholly omits the imprecatory elements of the oath which were so prominent in the definitions of the common law.² It is certainly consistent with the most modern ideas upon the subject, and less calculated to offend persons who may entertain conscientious scruples against invoking God’s wrath upon themselves.

In criminal courts of inferior jurisdiction, where the issues of fact are determined by the magistrate without the intervention of a jury, the oath is usually administered by the judge himself. In the higher courts this duty is performed by the clerk, the formula employed being usually “you do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, as a witness in this issue now joined between A. and B.”

¹ Tyler on Oaths, London, p. 15.

² 1 Stark. Ev., 22. In *Rex v. White*, 2 Leach Cr. L. 482 (1786), the court thus defines an oath: “A religious

asseveration by which a person renounces the mercy, and imprecates the vengeance of heaven, if he do not speak the truth.”

The witness expresses his assent to this affirmation by raising his hand only, or by placing it upon a copy of the Bible while the oath is being administered, and by kissing the book at its conclusion.³

But the main requirement is that the witness shall feel that he is bound by the oath, and if he feels that he is bound the formula is immaterial.⁴ If the court is informed by the witness or by any other person that the witness is an adherent of a religious system other than Christianity, he must be asked what form of oath he considers most binding on his conscience. If the court is satisfied that there is any peculiar form which the witness regards as more obligatory than that usually employed he should be sworn accordingly.⁵

A Chinaman is not incompetent as a witness on account of his inability to explain the nature of the oath which is ordinarily taken by witnesses. Usually he will or may be sworn according to the oath which he states is most binding on his conscience.⁶

§ 200. When witness may affirm.—The scriptural injunction, "Swear not at all" is considered by many as an express prohibition of oaths of every sort. Such persons on this account decline to participate in or give their assent to any form of words which involves or implies an invocation of God. The wishes and conscientious scruples of all such persons are carefully respected by the law, both common and statutory, and to them a question in the following form is put: "You do solemnly, sincerely and truly declare and affirm that you will state the truth, the whole truth and nothing but the truth, in the issue now joined between the

³ See Underhill on Ev., § 315, and cases there cited.

⁴ In *Omichund v. Barker*, Willes, p. 547, the court said: "It is very plain from what I have said that the substance of an oath has nothing to do with Christianity, only that by the Christian religion we are put still under great obligations not to be guilty of perjury. The forms indeed of an oath have been since varied, and have been always different in all countries, according to the different

laws, religion and constitution of those countries. But still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say."

⁵ *People v. Green*, 99 Cal. 564, 570, 34 Pac. 231; *State v. Chyo Chiagk*, 92 Mo. 395, 410, 48 S. W. 704; 1 Greenl., § 371; Whart. Cr. Ev. (9th ed.), § 354.

⁶ *State v. Lu Sing*, 34 Mont. 31, 85 Pac. 521.

people of the state, etc., and the defendant." The affirmative answer of the witness given to this question is equivalent to an oath,⁷ and renders him liable to a prosecution for perjury if he testifies falsely.⁸

A witness who is sworn before a separate trial is ordered, where several are jointly indicted, must be re-sworn when testifying at the separate trial of each.⁹

§ 201. Religious belief of the witness.—The common law, because of the great importance which in early times was attached

⁷State v. Welch, 79 Me. 99, 103, 8 Atl. 348.

⁸State v. Whisenhurst, 2 Hawks (N. Car.) 458, 459. If the witness, when sworn, fails to object to the form of oath as taken by him, he is still liable for perjury, though he did not consider himself bound thereby. State v. Whisenhurst, 2 Hawks (N. Car.) 458, 459. It is not error in a criminal trial, if the accused has assumed various *aliases*, for the clerk to repeat them in swearing a witness, stating also his true name. If the *aliases* are set forth in the indictment, it is difficult to understand how their repetition by the clerk in the hearing of the jurors will prejudice the accused. People v. Everhardt, 104 N. Y. 591, 596, 11 N. E. 62, 5 N. Y. St. 793, 2 Sil. App. (N. Y.) 506, 6 N. Y. Cr. 231.

⁹Abbott Trial Brief (Cr. Causes), § 337; Babcock v. People, 15 Hun (N. Y.) 347. On a trial for felony, it is error to swear a witness while the accused is not in court. Bearden v. State, 44 Ark. 331. See Underhill on Ev., §§ 346, 367. But the objection that a witness was not properly sworn cannot be raised for the first time when a motion is made for a new trial. Goldsmith v. State, 32 Tex. Cr. 112, 115, 22 S. W. 405.

In Omichund v. Barker, 1 Atkyns,

p. 33, the court quotes Puffendorf, 4th book, § 4, p. 122: "That part of the form in oaths under which God is invoked as a witness, or as an avenger, is to be accommodated to the religious persuasion which the swearer entertains of God; it being vain and insignificant to compel a man to swear by a God whom he doth not believe, and therefore doth not reverence; and no one thinks himself bound to the Divine Majesty in any other words, or under any other titles, than what are agreeable to the doctrines of his own religion, which, in his judgment is the only true way of worship. And hence, likewise, it is, that he who swears by false gods, yet such as were by him accounted true, stands obliged, and if he deceives, is really guilty of perjury; because, whatever his peculiar notions are, he certainly had some sense of the Deity before his eyes, and therefore by willfully forswearing himself, he violated, as far as he was able, that awe and reverence he owed to Almighty God; yet when a person, requiring an oath from another, accepts it under a form agreeable to that worship which the swearer holds true, and he himself holds for false, he cannot in the least be said hereby to approve of that worship."

to the religious element of an oath, declared all persons to be incompetent as witnesses who did not believe in a Deity who would punish perjury.¹⁰ And it was said with much vehemence that to require an oath to be taken by a person, who, like the atheist, denied his existence, was a mockery of justice. But every one born in a Christian land and educated under the influence of Christianity was presumed, until the contrary was shown, to possess sufficient religious faith to qualify him as a witness. In any case he was only required to believe in a God who would punish perjury, and it was immaterial whether he believed that the culprit would be punished in this life by the pangs of remorse or otherwise, or whether punishment would be inflicted beyond the grave.¹¹

The witness could not usually be asked directly as to his possession or lack of possession of a religious belief. His atheism or infidelity must always be shown by the evidence of other witnesses in whose presence and hearing he had voluntarily declared his irreligion,¹² though the fact that he had subsequently acquired sufficient religious faith to render him competent might also be shown.¹³

In almost every state of the Union statutes have been enacted, providing in substance that no person shall be incompetent as a witness because of his belief or disbelief in the tenets of any system of religious teaching, provided he understands the nature of an oath.

Where such statutory provisions prevail in conformity therewith, and having regard to the existing federal and state constitutional enactments which are intended to secure freedom of religious belief and worship,¹⁴ any question intended to discredit a witness by showing him to be an atheist or an agnostic would be very objectionable.¹⁵

¹⁰ *Rex v. White*, 2 Leach Cr. L. 482.

¹¹ *Cubbison v. McCreary*, 2 W. & S. (Pa.) 262; *Bush v. Commonwealth*, 80 Ky. 244, 248; *Commonwealth v. Hills*, 10 Cush. (Mass.) 530, 532; *Chappell v. State*, 71 Ala. 322, 324; *State v. Powers*, 51 N. J. L. 432, 433, 17 Atl. 660, 14 Am. St. 693.

¹² *Commonwealth v. Smith*, 2 Gray (Mass.) 516, 61 Am. Dec. 478.

¹³ *Atwood v. Welton*, 7 Conn. 66; as regards the reception of declarations to prove mental conditions, see *Underhill on Ev.*, §§ 51, 52.

¹⁴ U. S. Const. Amend., Art. I.

¹⁵ *People v. Copsey*, 71 Cal. 548, 550, 12 Pac. 721.

So, where it had been provided in the state constitution that no person shall be denied the enjoyment of any civil right or privilege on account of his religious principles, it has been held that the accused is not incompetent as a witness in his own behalf because he does not believe in a God who will punish him if he perjures himself.¹⁶

So, usually, where the competency of witnesses is regulated by a statute which fails to specify any religious test, the same rule will apply and the fact that the witness is an atheist or a disbeliever in a future state of existence beyond the grave will not render him incompetent.¹⁷

§ 202. Insanity—When disqualifying a witness.—Very little distinction, if any, was made by the common law between the numerous forms which insanity assumes. As regards the competency of a person as a witness, insanity of any kind, once established, seems to have been an insurmountable objection. It was immaterial whether the person mentally unsound was an imbecile or idiot, a furious maniac, or a quiet sufferer from melancholia, senile dementia, or from some harmless and perhaps temporary monomania.¹⁸

It is now held universally that the insanity or intellectual weakness of a witness, no matter what form it assumes, is not a valid objection to his competency if, at the time he is testifying, he has mental capacity to distinguish between right and wrong, so far as the facts in issue, and his testimony thereon, are involved, understands the nature and obligation of an oath, and can give a fairly intelligent and reasonable narrative of the matters about which he testifies.¹⁹

¹⁶ *Perry v. Commonwealth*, 3 Gratt (Va.) 632; *Hronek v. People*, 134 Ill. 139, 152, 24 N. E. 861, 23 Am. St. 652; *Ewing v. Bailey*, 36 Ill. App. 191; *Colter v. State*, 37 Tex. Cr. App. 284, 39 S. W. 576; *State v. Powers*, 51 N. J. L. 432, 433-436, 17 Atl. 969, 14 Am. St. 693.

¹⁷ *State v. Williams*, 111 La. 179, 35 So. 505.

¹⁸ 2 Elliott Ev., §§ 750-771; 1

Greenleaf on Evidence, § 365; *Roscoe's Crim. Evidence*, 118; *Best Ev.*, 168.

¹⁹ *Tucker v. Shaw*, 158 Ill. 326, 41 N. E. 914; *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458; *Reg. v. Hill*, 5 Eng. L. & Eq. 547, 5 Cox. C. C. 259, 266, 15 Jur. 470; *District of Columbia v. Armes*, 107 U. S. 519, 520-524, 7 L. ed. 618, 2 Sup. Ct. 840; *Coleman v. Commonwealth*, 25 Gratt. (Va.)

An inquisition of insanity,²⁰ or the fact that a person alleges and endeavors to prove his own insanity,²¹ does not conclusively render him incompetent as a witness.

A witness is not incompetent to testify upon the grounds of his insanity merely because he has been adjudged insane and has been confined in an insane asylum. Evidence of these facts is not conclusive of his insanity. They raise a *prima facie* presumption of incompetency which the party offering the witness must overcome. The question is one wholly for the trial court in determining the competency of the witness. There is no presumption that insanity shown to have existed has continued down to the date of the trial. The court should consider the conduct and actions of the witness in the court room and may also take into consideration his manner of giving testimony. If the witness appears rational and meets the tests imposed by law in case of the alleged insanity of a witness, he is competent, though it may appear that at one time he was in an asylum for the insane.²²

A witness examined out of court by a commission will be presumed to be sane. If evidence of his insanity is introduced when his deposition is offered to be read, the jury will be permitted to determine his mental capacity.²³

§ 203. Mode of proving insanity of witness.—The objecting party may prove the insanity of the witness either by examining him,²⁴ or by other witnesses,²⁵ or by written proof showing that he has been legally pronounced a lunatic.

The question of competency is of course judicial, while the credibility of the testimony is for the jury alone. If the inca-

865, 874, 875, 18 Am. 711; Walker v. State, 97 Ala. 85, 86, 12 So. 83; State v. Simes, 12 Idaho 310, 85 Pac. 914; Covington v. O'Meara (Ky. 1909), 119 S. W. 187.

²⁰ Kendall v. May, 10 Allen (Mass.) 59.

²¹ Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. 440, 24 L. R. A. 483. See *Ante*, §§ 159-163.

²² Covington v. O'Meara (Ky. 1909), 119 S. W. 187.

²³ Mayor, etc., v. Caldwell, 81 Ga. 76, 80, 7 S. E. 99.

²⁴ Reg. v. Hill, 5 Eng. L. & Eq. 547; 5 Cox C. C. 259, 15 Jur. 470. On his examination by the court in this case the witness claimed to be possessed of spirits who guided all his affairs yet recognizing the meaning and soundness of his oath his testimony was received.

²⁵ Livingston v. Kiersted, 10 Johns (N. Y.) 362.

capacity has intervened since the occurrence which the witness is called on to relate; if it is temporary, and a speedy restoration to sanity seems probable, the court may direct an adjournment.²⁶

If, in the course of the examination of a witness, it becomes apparent to the court that he is incompetent because of insanity, the court may stop the examination and instruct the jury to disregard his evidence, though it had on the preliminary examination to ascertain competency, pronounced him sane.²⁷

The testimony of insane witnesses has usually been received because of the necessity of the case and the absence of other witnesses. The jury may consider the mental condition of the witness at the time of the transaction he describes, and while he is testifying, in order to determine his capacity for observation, his powers of recollection and his disposition and ability to describe events correctly.²⁸ If they disbelieve him, and his testimony is uncorroborated, the jury should reject it altogether.²⁹

§ 204. Deaf mutes as witnesses.—The early common law regarded the deaf mute as an idiot.³⁰ He was *prima facie* devoid of intelligence or understanding, so that he was presumptively incompetent as a witness until it was clearly and affirmatively shown that he possessed a sufficient degree of intelligence to qualify him. The burden of proving him competent was on the party calling him to testify.

The intelligence of an ordinary deaf mute witness is for the jury and where the facts are placed before the jury, it is improper to permit another witness to express an opinion that the deaf mute is or is not intelligent. A witness may testify to any facts from which the condition of the deaf mute may be inferred, and while

²⁶ Wharton on Ev., § 402; Rex v. 512, 513, where a cross-examination was impossible because of the serious illness of the witness.

²⁷ Reg. v. Whitehead, L. R. 1 C. C. 33. If insanity, first showing itself during the direct examination, results in depriving either side of the right to cross-examine, all the testimony of the witness must be stricken out. People v. Cole, 43 N. Y. 508,

²⁸ People v. New York Hospital, 3 Abb. N. Cas. (N. Y.) 229, 249; Holcomb v. Holcomb, 28 Conn. 177, 181.

²⁹ Worthington v. Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407; Reg. v. Hill, 5 Eng. L. & Eq. 547, 5 Cox C. C. 259, 15 Jur. 470.

³⁰ 1 Bl. Com. 304.

by the ancient common law the deaf mute was presumed to be incompetent because of lack of intelligence, the modern rule is that there is no presumption either way but that the question is for the jury.

The party alleging lack of intelligence on the part of a deaf mute witness will have to produce some evidence and then the jury must decide upon the facts where there is a conflict of evidence as to the intelligence of the witness.⁸¹

At the present day the examination of a deaf mute upon the witness stand may be carried on by the use of signs, with the aid of an interpreter, properly qualified,⁸² and this may be done even where the witness can write.⁸³ His evidence is oral evidence, provided the writing is written or the signs made in open court.⁸⁴ Expert testimony is not necessary to show that a deaf mute is sufficiently intelligent in the opinion of the witness to testify as a witness. His competency can be proved by the testimony of a former employer or any other person who is acquainted with him who can testify to his intelligence and his knowledge of the sign language.⁸⁵

§ 205. Children on the witness stand.—The competency of a child under the age of fourteen years to testify in a criminal trial must be shown to the satisfaction of the court. He is presumptively incompetent, but if he is shown to be competent it is immaterial how young he may be when he testifies. He is competent if he possesses mental capacity and memory sufficient to enable him to give a reasonable and intelligible account of the transaction he has seen, if he understands and has a just appreciation of the

⁸¹ *State v. Rohn* (Iowa 1909), 119 N. W. 88.

⁸² *Skaggs v. State*, 108 Ind. 53, 56, 57, 8 N. E. 695; *Commonwealth v. Hill*, 14 Mass. 207; *Ruston's Case*, 1 Leach Cr. L. 455, 456; *State v. DeWolf*, 8 Conn. 93, 99, 20 Am. Dec. 90; *State v. Howard*, 118 Mo. 127, 144, 24 S. W. 41; *Kirk v. State* (Tex.), 37 S. W. 440; *People v. Weston*, 236 Ill. 104, 86 N. E. 188. See *Underhill on Ev.*, § 318.

⁸³ *State v. Howard*, 118 Mo. 127, 144, 24 S. W. 41; *Morrison v. Leonard*, 3 C. & P. 127.

⁸⁴ *Stephen's Digest*, art. 106; *Ritchey v. People*, 47 Pac. 272, 384, 23 Colo. 314.

⁸⁵ *State v. Weldon*, 39 S. Car. 318, 322, 17 S. E. 688, 24 L. R. A. 126n; *Underhill on Ev.*, § 186; 2 *Elliott Evid.*, § 764.

difference between right and wrong, and comprehends the character, meaning and obligation of an oath.⁸⁶

If the witness fulfills these requirements, it is immaterial as bearing upon his competency that he is unable to define the oath or to define testimony.⁸⁷ It is the duty of the court to examine the child witness in order to ascertain if he or she is competent. This is usually done by putting leading questions to the child and the answers to the questions are not objectionable because they may be couched in childish language. A child should be permitted to explain his understanding of the meaning and character of an oath in simple words and it would be unfair to reject such a witness because he does not state his meaning in the same language employed by adults or because the witness does not define the oath in the language that an attorney or other person educated in the law would employ. Intelligence and not age is the test of a child witness.⁸⁸

No fixed rule can be laid down as to the age a child under the age of fourteen must have attained to entitle him to testify. The question of his competency must be left to the legal discretion of the trial judge,⁸⁹ leaving it to the jury to determine the weight and credit of his evidence. In the absence of clear abuse the judicial discretion is not reviewable.⁴⁰

⁸⁶ 2 Elliott Evid., §§ 766-771, Brasier's Case, 1 Leach Cr. L. 237; Davis v. State, 31 Neb. 247, 47 N. W. 854; McGuff v. State, 88 Ala. 147, 151, 7 So. 35, 16 Am. St. 25; McGuire v. People, 44 Mich. 286, 287, 6 N. W. 669, 38 Am. 265; Holst v. State, 23 Tex. App. 1, 8, 3 S. W. 757, 59 Am. 770; Moore v. State, 79 Ga. 498, 503, 5 S. E. 51; Commonwealth v. Hutchinson, 10 Mass. 225; State v. Whittier, 21 Me. 341, 347, 38 Am. Dec. 272; Williams v. United States, 3 App. D. C. 335; Williams v. State, 109 Ala. 64, 19 So. 530; People v. Craig, 111 Cal. 460, 44 Pac. 186; State v. Cadotte, 17 Mont. 315, 42 Pac. 857; Gaines v. State, 99 Ga. 703, 26 S. E. 760; Territory v. DeGutman, 8 N. Mex. 92, 42 Pac. 68; Commonwealth v. Furman, 211 Pa.

549, 60 Atl. 1089, 107 Am. St. 574; Gordon v. State, 147 Ala. 42, 41 So. 847; Young v. State, 122 Ga. 725, 50 S. E. 996; Clinton v. State, 53 Fla. 98, 43 So. 312; Moore v. State, 49 Tex. Cr. App. 449, 96 S. W. 327; Eatman v. State, 139 Ala. 67, 36 So. 16.

⁸⁷ State v. Meyer, 135 Iowa 507, 113 N. W. 322, 124 Am. St. 291n.

⁸⁸ Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869, aff'g 109 Ill. App. 274; Clinton v. State, 53 Fla. 98, 43 So. 312.

⁸⁹ People v. Bradford (Cal. App. 1905), 81 Pac. 712; People v. Stout, 142 Cal. 146, 75 Pac. 780.

⁴⁰ People v. Frindel, 58 Hun (N. Y.) 482, 484, 12 N. Y. S. 498; Hawkins v. State, 27 Tex. App. 273, 11 S.

It is not only necessary to show that the child understands the nature and application of an oath, but it must also appear that the child is sufficiently intelligent to testify with an understanding mind of what he or she has seen or heard.

If the child does not, in the opinion of the court, appear to understand the nature and obligation of an oath, the court may in its discretion if the child seems to have the age and mental capacity to receive and profit by the instruction⁴¹ allow him to be instructed by a proper person as to the signification and obligation of a judicial oath.⁴² For the child is a competent witness if he is reasonably intelligent, though he may not have learned those facts which enable him to understand the obligation of an oath until he learns them in court.⁴³

W. 409; *Commonwealth v. Robinson*, 165 Mass. 426, 43 N. E. 121; *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831; *State v. Reddington*, 7 S. Dak. 368, 64 N. W. 170. "Children of this age usually have not sufficient development to understand the nature and effect of an oath, more especially if their parents have been neglectful of their care and education in religious and moral truths. They may have some knowledge that it is wrong to tell a lie, yet this may be so slight as to produce no decided or lasting impression on their minds, but leave them in a decidedly chaotic state, in which they may easily be led to believe that the things that others in authority over them instruct them to say are the indistinct thing called 'truth'; and therefore they must repeat just what they are told to say, or what has often been repeated in their presence. Not being amenable to the law for false swearing, and having no knowledge of moral responsibility, designing and wicked people may easily use them to further intrigues of their own, without fear of punish-

ment for subornation of perjury. They are as clay in the potter's hand, to be moulded, some to honor and some to dishonor. Lacking conscientiousness, they repeat with phonographic precision the things that have been told them to say, be they true or false." *State v. Michael*, 37 W. Va. 565, 569, 16 S. E. 803, 19 L. R. A. 605n. Leading questions are always admissible when propounded to a very young witness to ascertain his intelligence, competency and understanding of an oath. *Hodge v. State*, 26 Fla. 11, 7 So. 593. See as regards the discretionary power of the court, *Underhill on Ev.*, § 386.

⁴¹ *Clinton v. State*, 53 Fla. 98, 43 So. 312.

⁴² *Rex v. White*, 2 Leach Cr. L. 482; *Rex v. Wade*, 1 Mood. C. C. 86, 87; *Commonwealth v. Lynes*, 142 Mass. 577-580, 8 N. E. 408, 56 Am. 709, 2 Russ. Cr. (8th Am. Ed.) 969. *Contra*, *Rex v. Williams*, 7 C. & P. 320, 321; *Reg. v. Nicholas*, 2 C. & K. 246, 2 Cox C. C. 136.

⁴³ *Landthrift v. State*, 140 Ala. 114, 37 So. 287.

The jury may consider the youthfulness and intelligence of the witness.

§ 206. **Incompetency of witnesses caused by conviction of infamous crimes.**—Witnesses who had been convicted of murder, arson, perjury, piracy, forgery or other great and infamous crimes were by the common law regarded as incompetent to testify.

The commission of a crime of this character was conclusively presumed to indicate such a condition of moral perversion on the part of the person who had been convicted that his absolute incapacity to tell the truth could safely be assumed.

In other words, the probability that every witness who was guilty of the crimes above enumerated would perjure himself if he were permitted to testify was considered to be so great that the interests of truth and justice imperatively demanded his exclusion from the witness stand.⁴⁴

The common law required that the witness should have been convicted of some infamous crime, and the early writers usually denominated as such the offenses of treason, felony and the *crimen falsi*.⁴⁵ As regards treason, and that very large number of offenses which, in England, until the end of the eighteenth century, constituted felony at common law or by statute, little uncertainty existed. A conviction of perjury, of forgery or of a conspiracy to suppress testimony or to obstruct justice was always sufficient to exclude the guilty person from the witness stand.⁴⁶ Persons convicted of the *crimen falsi* were also incompetent. But the boundaries of this offense were somewhat vaguely defined at common law. Under the term *crimen falsi* many minor offenses such as criminal libel, barratry, maintenance and the like were grouped.

These crimes, while not amounting to felony at the common law, indicate such an inherent lack of respect for truth, or a de-

⁴⁴ 1 Greenleaf on Ev., § 372; 2 Elliott Evid., § 787.

⁴⁵ 7 Com. Dig. 461; Co. Lit., 6 b.; 2 Hale P. C. 277.

⁴⁶ Rex v. Priddle, 2 Leach C. L. 496, 497; Rex v. Edwards, 4 T. R. 440, 2 R. R. 427. Under the common law, the conviction of crime must be of

such a nature as would presumably exclude the guilty person from the stand. A conviction of statutory embezzlement is a misdemeanor only. Such a crime is a breach of trust and does not come within any of the classes mentioned in the text. United States v. Sims, 161 Fed. 1008.

liberate intention to interfere with and obstruct the administration of justice, or to employ the machinery of the law for improper purposes, that it was considered safe and proper to exclude the evidence of all persons convicted of having perpetrated them.⁴⁷

The conviction of a witness of a crime which will render him incompetent must be proved by producing the judgment of conviction or a certified copy thereof, and cannot be proved by his oral testimony on cross-examination.⁴⁸

§ 207. The pardon of the convict, when restoring competency.—

The incompetency to testify caused by a conviction of an infamous crime was always removable at common law by a full and unconditional pardon of the witness,⁴⁹ by the reversal of the judgment against him, and by a suspension of sentence.

But a pardon will not restore competency if the statute which prescribes the punishment for the crime also expressly provides that every person who is convicted under it shall forever be incompetent as a witness.⁵⁰

⁴⁷ 3 Russ. on Crimes (9th. Am. Ed.) 620; 1 Greenl. on Ev., § 375. In *Rex v. Priddle*, 2 Leach C. L. 496, 497, the court said: "It is now settled that it is the infamy of the crime which destroys the competency, and not the nature or mode of punishment." Cf. *State v. Green*, 48 S. Car. 136, 26 S. E. 234.

⁴⁸ *Grabill v. State* (Tex. Cr. App. 1906), 97 S. W. 1046; *United States v. Sims*, 161 Fed. 1008.

⁴⁹ *Boyd v. United States*, 142 U. S. 450, 453, 454, 35 L. ed. 1077, 12 S. Ct. 292, citing *United States v. Wilson*, 7 Pet. (U. S.) 150, 162, 8 L. ed. 640; *Singleton v. State*, 38 Fla. 297, 21 So. 21, 56 Am. St. 177, 34 L. R. A. 251n; *Ex parte Wells*, 18 How. (U. S.) 307, 315, 15 L. ed. 421; *Ex parte, Garland*, 4 Wall. (U. S.) 333, 380, 18 L. ed. 366; *Martin v. State*, 21 Tex. App. 1, 11, 17 S. W. 430; *United States v. Hall*, 53 Fed. 352, 354; *State v. Blaisdell*, 33 N. H. 388; *Rivers v.*

State, 10 Tex. App. 177, 182; *Hester v. Commonwealth*, 85 Pa. St. 139, 155. See, also, *Commonwealth v. Bush*, 2 Duv. (Ky.) 264, 266; *State v. Baptiste*, 26 La. Ann. 134, 136; 2 Hawks P. C. 547. A witness may be restored to competency even after he has suffered the whole punishment for his crime. *United States v. Jones*, 2 Wheeler Cr. Cas. (N. Y.) 451; *State v. Dodson*, 16 S. Car. 453, 461; *State v. Foley*, 15 Nev. 64, 69, 37 Am. 458; *People v. Bowen*, 43 Cal. 439, 442, 13 Am. 148; *Hunnicut v. State*, 18 Tex. App. 498, 518, 51 Am. 330; *United States v. Hughes*, 175 Fed. 238.

⁵⁰ *Rex v. Ford*, 2 Salk. 690; *Blanc v. Rodgers*, 49 Cal. 15; 3 Russell on Crimes (9th Am. Ed.) 621. In some states it is provided that no person convicted of perjury shall be rendered competent by a pardon. *Virginia Code*, 1904, § 3898; *Florida, Thompson Digest*, 334-5; *West Virginia*

A pardon may be granted for the sole purpose of rendering a convict competent to testify. And a pardon, if full and unconditional, is not ineffectual or in any way open to attack merely because it was granted solely to enable a witness to testify for the state in a criminal prosecution pending in a court which is under the jurisdiction of the pardoning power.⁵¹ An absolute pardon is irrevocable as soon as it is delivered and accepted by the grantee or his agent.⁵² If, however, the pardon is conditional, and something must be done before the pardon shall operate to restore competency, the party who calls the witness will be required to show that the condition has been performed.⁵³

Sometimes the statute provides that no person convicted of crime shall be a witness unless he has been pardoned or punished. Under a statute which provides that a person convicted of felony shall not be a witness unless he has been punished therefore, a person who has been fined, but who has not paid his fine, is not a competent witness.⁵⁴

§ 208. Mode of proving pardon—Parol evidence.—In accordance with the rule that the courts will take judicial notice of all public laws, a proclamation or statute granting a general amnesty need not be proved,⁵⁵ though an executive pardon of any particular individual, being in its nature a private deed or release, must be proved. This must be done by the production in court of the instrument itself or a certified or exemplified copy.⁵⁶

Code, ch. 152. The incompetency of a witness because of conviction of crime is not removed by a pardon which merely remits a part of the penalty. *State v. Richardson*, 18 Ala. 109, or which may be revoked by the pardoning power in case the convict is again convicted. *McGee v. State*, 29 Tex. App. 596, 16 S. W. 422. *Cf. People v. Pease*, 3 John. Cas. (N. Y.) 333.

⁵¹ *Boyd v. United States*, 142 U. S. 450, 453, 454, 35 L. ed. 1077, 12 Sup. Ct. 292.

⁵² *Rosson v. State*, 23 Tex. App. 287, 289, 4 S. W. 897, 6 Cr. L. Mag. 480.

⁵³ *Waring v. United States*, 7 Ct. Cl. (U. S.) 501; *State v. Keith*, 63 N. Car. 140, 142.

⁵⁴ *Quillin v. Commonwealth*, 105 Va. 874, 54 S. E. 333.

⁵⁵ *United States v. Hall*, 53 Fed. 352, 354; *United States v. Wilson*, 7 Pet. (U. S.) 150, 162, 8 L. ed. 640; *State v. Blalock*, Phil. (N. Car.) 242; *State v. Keith*, 63 N. Car. 140, 143. On judicial notice, see *Underhill on Ev.*, §§ 240, 242.

⁵⁶ *Hunnicut v. State*, 18 Tex. App. 408, 51 Am. 330; *United States v. Wilson*, 7 Pet. (U. S.) 150, 161, 8 L. ed. 640; *State v. Baptiste*, 26

A pardon is valid, though it incorrectly state the date of the conviction, or even state an impossible date, if it was intended to cover and does cover the offense.⁵⁷ Parol evidence is admissible to identify the person and the particular conviction of crime named in the pardon.⁵⁸

The incompetency resulting from a conviction of crime is no part of the punishment. Nor does a conviction disqualify the convicted person as a witness beyond the geographical limits of that state wherein judgment was rendered. Hence a person convicted in one state is not incompetent to testify in the courts of another state, unless the statutes of the latter declare that persons convicted of crime are not competent.⁵⁹

§ 209. Statutory regulations removing the incompetency of persons convicted of crime.—The common-law incompetency of persons convicted of crime to testify as witnesses is generally abolished by statute in this country. In many of the states the fact that the witness has been convicted of any crime, however his offense may show or imply an absolute lack of respect for the truth, is not a valid objection to his competency. But it is always permissible to prove the fact of his conviction by proper evidence, that the jury may be enabled the better to estimate his moral character, as a man, and the credibility of his evidence.⁶⁰

La. Ann. 134, 137; Underhill on Ev., §§ 142b, 320, citing cases. Parson v. Commonwealth (Ky.), 112 S. W. 617, 33 Ky. L. 1051.

⁵⁷ 1 Bish. Cr. L., § 906; Martin v. State, 21 Tex. App. 1, 11, 17 S. W. 430; Hunnicut v. State, 18 Tex. App. 498, 521, 51 Am. 330.

⁵⁸ Martin v. State, 21 Tex. App. 1, 11, 17 S. W. 430.

⁵⁹ Logan v. United States, 144 U. S. 263, 303, 36 L. ed. 429, 12 Sup. Ct. 617, citing Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. 1370; Commonwealth v. Green, 17 Mass. 515; Sims v. Sims, 75 N. Y. 466; National Trust Co. v. Gleason, 77 N. Y. 400, 410, 33 Am.

632n. *Contra*, Pitner v. State, 23 Tex. App. 366, 5 S. W. 210.

⁶⁰ This is the statute law in New York (Code Civ. Pro., § 832), Rhode Island (Gen. Laws 1896, ch. 244, § 40), Utah (Comp. Laws 1888, Vol. 2, tit. 10, ch. 2), Colorado (§ 7266, R. S. 1908), Georgia (Code, § 5269), Michigan (Comp. Laws 1897, §§ 10, 210), Illinois (R. S., ch. 51, § 1058, ed. 1909), Massachusetts (Rev. Laws 1902, ch. 175, §§ 20, 21), Minnesota (Rev. Laws 1905, § 4780), New Hampshire (Pub. Stat., ch. 224, § 26), Ohio (Bates' R. S., §§ 5240, 7284), Iowa (Rev. Code 1897, § 4601), Maine (Rev. St. 1903, ch. 84, § 119), Missouri (R. S. 1899, § 4680, con-

These statutes are not usually retroactive. So where a person is convicted of a crime which, under an existing statute renders him incompetent as a witness, a subsequent statute permitting those convicted of criminal crimes to testify, does not make him a competent witness.⁶¹ But where a statute provides that a conviction of any crime is not a valid objection to the competency of the person convicted one under sentence of imprisonment for life, may testify even though by statute he is deemed to be civilly dead.⁶²

A conviction of some crimes, as perjury, the commission of which involves an utter disregard for the obligation of an oath is still, in some states, an insuperable objection to the competency of a witness.⁶³ In a few of the states a witness who has been convicted of a capital crime or of certain felonies which involve or indicate great moral degeneration, such, for example, as burglary, forgery, rape, arson, perjury, bigamy, sodomy, etc., is by statute absolutely incompetent to testify.⁶⁴

These statutes are to be construed with strictness. The terms, descriptive of crimes, mentioned in them, will be presumed to have been used in the sense they possessed at common law.⁶⁵ Nor

strued in *State v. Myers*, 198 Mo. 225, 94 S. W. 242), Delaware (Laws, Vol. 17, ch. 598, § 3), Kansas (Gen. St. 1905, § 5219), Nebraska (Comp. St. 1903, title x, ch. 1, §§ 328, 330), Nevada (Comp. Laws 1900, § 3471), Montana (Code Civ. Pro., § 647), Oregon (Ann. Codes, St., § 722), Florida (Gen. St. 1908, § 1506), Connecticut (Gen. St., § 1098).

⁶¹ *State v. Landrum*, 127 Mo. App. 653, 106 S. W. 1111.

⁶² *Martin v. Territory*, 14 Okla. 593, 78 Pac. 88.

⁶³ This is the case in Alabama (Code 1907, § 4008), Florida (Gen. St. 1906, § 1504), Maryland (Pub. Gen. Laws, Art. 35, § 1), Mississippi (Code of 1906, § 1920), Pennsylvania (Code, § 2859), Vermont (R. S. 1880, § 1008), Washington (Ball. Code, §§ 5992-6940).

⁶⁴ Arkansas (Rev. Stat., § 2482), Tennessee (Code, § 5595), Texas (Code Crim. Pro., § 768), Virginia (Code of 1904, § 3898); *Quillin v. Commonwealth*, 105 Va. 874, 54 S. E. 333. In Pennsylvania, a person under sentence of death for murder is a competent person to testify as a witness. *Commonwealth v. Clemmer*, 190 Pa. St. 202, 42 Atl. 675.

⁶⁵ *Williams v. Dickenson*, 28 Fla. 90, 9 So. 847; *Commonwealth v. Minor*, 89 Ky. 555, 560, 13 S. W. 5, 11 Ky. L. 775. It seems that a person convicted of felony is competent, provided he has not been sentenced. *Hurley v. State*, 35 Tex. Cr. App. 282, 33 S. W. 354; *Evans v. State*, 35 Tex. Cr. App. 485, 34 S. W. 285; *Robinson v. State*, 36 Tex. Cr. App. 104, 35 S. W. 651; *State v. Dalton*, 20 R. I. 114, 37 Atl. 673; *Underwood v.*

should any of these statutes be construed to prevent the accused from testifying in his own behalf.⁶⁶

§ 210. Statutes construed.—The authorities are divided upon the question whether, under the existing statutes, the conviction of a witness for a crime which would not have rendered him incompetent at common law can be shown for the sole purpose of impeaching his credibility. A great deal depends upon the express terms of the statute. On the one hand it has been held that the witness may be discredited by showing him to have been guilty of a misdemeanor,⁶⁷ though of course, if a statute provides expressly that the witness may be interrogated as regards his "conviction of felony," proof of a conviction of misdemeanor is inadmissible.⁶⁸

But the current of the decisions supports the more logical doctrine that a conviction of those infamous crimes only can be shown which would have destroyed his competency at the common law.⁶⁹ Where a statute removes the common law disability arising from a conviction of infamous crime, the confession of a witness that he has perjured himself in the same matter as that in which he is now testifying constitutes no objection to his competency.⁷⁰

State, 38 Tex. Cr. App. 193, 41 S. W. 618.

* The interpretation and construction of writings are discussed in Underhill on Ev., § 206.

* State v. Pfefferle, 36 Kan. 90, 95, 12 Pac. 406; Commonwealth v. Ford, 146 Mass. 131, 133, 15 N. E. 153; Commonwealth v. Hall, 4 Allen (Mass.) 305; Helm v. State, 67 Miss. 562, 573, 7 So. 487; State v. Heusack, 189 Mo. 295, 88 S. W. 21.

* Hanners v. McClelland, 74 Iowa 318, 322, 37 N. W. 389; People v. White, 142 Cal. 292, 75 Pac. 828. Testimony as to facts learned while spying or eavesdropping, 17 L. R. A.

(N. S.) 451n; competency of defendant as witness, 38 Am. St. 895, 897n; competency as witness of declarant of dying declaration, 86 Am. St. 640-642n.

* Bennett v. State, 24 Tex. App. 73, 5 S. W. 527, 5 Am. St. 875; Bartholomew v. People, 104 Ill. 601, 44 Am. 97; Coble v. State, 31 Ohio St. 100; Commonwealth v. Dame, 8 Cush. (Mass.) 384; People v. Carolan, 71 Cal. 195, 12 Pac. 52; Williams v. State (Ala. 1906), 40 So. 405.

⁷⁰ People v. O'Neil, 109 N. Y. 251, 16 N. E. 68, 6 N. Y. Cr. 48, 14 N. Y. St. 829.

CHAPTER XVIII.

THE EXAMINATION OF WITNESSES.

- § 211. Direct examination—Leading questions.
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- 213. Forgetful witness may be asked leading questions.
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- 221. Cross-examination to test credibility.
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- 223. Re-direct examination.
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- 228. Improper reception of evidence by the jurors.
- 229. View by the jurors—Discretionary power of the court.
- 230. Purpose of the view is to afford evidence.
- 231. The right of the accused to be present during the taking of the view.
- 232. Presence of the accused while taking testimony.
- 233. Experiments in and out of court.

§ 211. **Direct examination—Leading questions.**—The witness, after being sworn, is asked his name and address, that his identity may be ascertained or confirmed. He may then be interrogated as to facts within his knowledge relevant to the guilt or innocence of the accused.

Usually in criminal cases, the material facts within the knowledge of a witness are elicited by questions put to him by the coun-

sel calling him. By this means, the evidence is readily limited and confined within the issue for the reason that the relevancy of the answer can in most cases be ascertained from the character of the question. But this is a matter of practice only and there is no legal principle which prevents a witness from giving his testimony in narrative form if he is requested to do so by counsel. The danger of giving testimony in narrative form is that irrelevant and other improper evidence may be interjected and a motion to strike out may become necessary. Even though evidence given is stricken out, it has had its effect and for this reason, testimony given in narrative form must be closely watched and the improper portion of it promptly objected to.¹

It is not usually allowable, on the direct examination, to ask leading questions, *i. e.*, questions which, by their form or character, "suggest to the witness the answer desired;"² as, for example, questions which are a statement of fact, and suggest that the witness is to deny or affirm its truth by answering "yes" or "no." Somewhat similar and equally inadmissible are questions which assume the truth of facts which are in issue, or which are material, which have not been proved, or certain answers to have been given to prior questions, when such answers have not been given.³

Except in the examination of experts, it is not permissible on the direct examination to question a witness upon matters not within his personal knowledge, or to endeavor, by assuming questions, to elicit his opinion on or inference from any matters of fact. Sometimes, however, leading questions may be asked on the examination-in-chief. The matter is largely in the control of

¹ *Horton v. State*, 120 Ga. 307, 47 S. E. 969. 443; and see *Underhill on Ev.*, p. 470.

² 1 *Greenl. on Ev.*, § 434.

³ *State v. Johnson*, 29 La. Ann. 717; *Hays v. State* (Tex.), 20 S. W. 361; *Chambers v. People*, 4 Scam. (Ill.) 351; *State v. Duffy*, 57 Conn. 525, 18 Atl. 791; *Bostic v. State*, 94 Ala. 45, 10 So. 602; *People v. Lange*, 90 Mich. 454, 51 N. W. 534; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Andrews v. State* (Ala.), 48 So. 858; *People v. Brow*, 90 Hun (N. Y.) 509, 35 N. Y. S. 1009, 11 N. Y. Cr.

Accused as Witness.—Compelling accused to cover or uncover his head or face, 94 Am. St. 339. Compelling accused to utter certain words or sounds, 94 Am. St. 341. Compelling accused to exhibit marks on his person, 94 Am. St. 340. Compelling accused to make footprints, 94 Am. St. 343. Compelling accused to try on shoes, 94 Am. St. 344. Compelling accused to give specimen of his handwriting, 94 Am. St. 344, 345.

the judge, who may and should exercise a sound discretion. The general rule should not be departed from without good reason. Least of all should the state be allowed to make out its case by putting evidence in the mouths of its witnesses. If the witness is intelligent, he must be asked general questions to save time and facilitate justice; and where leading questions on vital and material points are permitted to be put by the state, and no reason or necessity appears for them, the judicial discretion will be deemed to have been abused and a new trial may be ordered for this alone.⁴

§ 212. When leading questions may be asked on the direct examination.—The general rule is subject to some important exceptions. An exception is recognized in the case of an unwilling witness, or one who, on the direct examination, is hostile to the party calling him and refuses to answer fully, or one who colors his testimony to favor the opposing party, or attempts to conceal what he knows by ambiguous language.⁵

⁴ *Coon v. People*, 99 Ill. 368, 39 Am. 28; *Cannon v. People*, 141 Ill. 270, 30 N. E. 1027; *Brassell v. State*, 91 Ala. 45, 8 So. 639; *McClain v. Commonwealth*, 110 Pa. St. 263, 1 Atl. 45; *Commonwealth v. Chaney*, 148 Mass. 6, 18 N. E. 572; *Harvey v. State*, 35 Tex. Cr. 545, 34 S. W. 623; *App. v. State*, 90 Ind. 73; *Anderson v. State*, 104 Ala. 83, 16 So. 108; *Barnes v. State*, 37 Tex. Cr. 320, 39 S. W. 684; *State v. Knost*, 207 Mo. 18, 105 S. W. 616; *Craddick v. State*, 48 Tex. Cr. 385, 88 S. W. 347; *State v. Bateman*, 198 Mo. 212, 94 S. W. 843; *State v. Napper*, 141 Mo. 401, 42 S. W. 957; *Lyles v. State*, 130 Ga. 294, 60 S. E. 578; *State v. Kendall*, 143 N. Car. 659, 57 S. E. 340; *People v. Way*, 119 App. Div. 344, 104 N. Y. S. 277, 21 N. Y. Cr. 149; *State v. George*, 214 Mo. 262, 113 S. W. 1116; *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *State v.*

Dalton, 43 Wash. 278, 86 Pac. 590; *Shaffer v. United States*, 24 App. Cas. (D. C.) 417; *Taylor v. State*, 82 Ark. 540, 102 S. W. 367. For a very strong case where a witness who refused to answer was plied with leading questions by both the counsel and the court and was finally committed for his persistent contempt in refusing to answer, see *State v. Dalton*, 43 Wash. 278, 86 Pac. 590.

⁵ *People v. Caldwell*, 107 Mich. 374, 65 N. W. 213; *Fitzpatrick v. State*, 37 Tex. Cr. 20, 38 S. W. 806; *People v. Gillespie*, 111 Mich. 241, 69 N. W. 490; *Schuster v. State*, 80 Wis. 107, 49 N. W. 30; *State v. Tall*, 43 Minn. 273, 45 N. W. 449; *State v. Benner*, 64 Me. 267; *People v. Bernor*, 115 Mich. 692, 74 N. W. 184; *Hughes v. State*, 29 Ohio C. C. 237; *Johnson v. State*, 133 Wis. 453, 113 N. W. 674; *Caswell v. State* (Ga. App.), 63 S. E. 566; *Territory v. Meredith* (N.

And where a witness is very ignorant or refuses to answer, or answers in such a way that his answer is likely to be misunderstood by the jurors, or where for any reason the interests of justice seem to require it, a leading question or indeed, several leading questions, put by the court itself are not error.⁶

This exception to the general rule excluding leading questions is of particular value and is most often invoked where the prosecution must necessarily prove the guilt of the accused by the testimony of his friends or associates. So the prosecution may put leading questions to an accomplice who has turned state's evidence, but who equivocates or refuses to give his evidence in full under the belief that his answers may incriminate him. The exception is of the greatest importance where the material witnesses against the accused are members of his family, or his collateral kindred, or persons, not being of his kindred or family, with whom he has been on terms of intimate friendship. For example, a very slight unwillingness to answer, coupled with the fact that the unwilling witness is the wife or child of the accused, or his brother or sister will be sufficient to permit leading ques-

Mex.), 91 Pac. 731; Underhill on Ev., § 335, p. 474. In *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317, the court said: "The court have no doubt that it is within the discretion of a judge at the trial, under particular circumstances, to permit a leading question to be put to one's own witness, as where he is manifestly reluctant and hostile to the interests of the party calling him, or where he has exhausted his memory without stating the particular required, where it is a proper name, or other fact, which cannot be significantly pointed to by a general interrogatory, or where the witness is a child of tender years, whose attention can be called to the matter required, only by a pointed or leading question. So a judge may, in his discretion, prohibit certain leading questions from being put to an adversary's witness, where the witness

shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say whatever is most favorable to that party. The witness may have purposely concealed such bias, in favor of one party, to induce the other to call him and make him his witness; or the party calling him may be compelled to do so, to prove some single fact necessary to his case. This discretionary power to vary the general rule is to be exercised only so far as the purposes of justice plainly require it, and is to be regulated by the circumstances of each case."

⁶ *People v. Bernor*, 115 Mich. 692, 74 N. W. 184; *Hughes v. State*, 29 Ohio C. C. 237; *Johnson v. State*, 133 Wis. 453, 113 N. W. 674; *Caswell v. State* (Ga. App.), 63 S. E. 566; *Territory v. Meredith* (N. Mex.), 91 Pac. 731.

tions.⁷ And so where a woman with whom the accused had maintained illicit relations was called to testify to a conversation she had had with him, any unwillingness on her part to disclose the answers of the accused may justify leading questions.⁸

As a general rule, the latitude allowed the state in respect of leading questions in the examination of a witness apparently hostile is largely in the discretion of the trial court.⁹

§ 213. Forgetful witnesses may be asked leading questions.—Leading questions may, in the discretion of the court, be put to a forgetful witness, or to one who simulates forgetfulness. And if, by reason of the stupidity or ignorance of the witness, real or assumed, or his inclination to prevaricate, the general questions which have been put fail to bring specific answers, leading questions may lawfully be propounded.¹⁰ Leading questions are often allowed in the examination of witnesses of tender years who may be incapable, because of inexperience and the embarrassment attendant on a public judicial examination, of framing their knowledge in intelligible language.¹¹ But this exception is not univer-

⁷ *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396, 116 Am. St. 621.

⁸ *State v. Walker*, 133 Iowa 489, 110 N. W. 925.

⁹ *Ward v. State*, 85 Ark. 179, 107 S. W. 677. "The district attorney was permitted to cross-examine and impeach his own witnesses, the defendant's wife and daughter. The reason of the rule upon which that contention is based suggests the exceptions that are necessary to its practical application. The party who calls a witness certifies his credibility. Therefore, a witness may not be impeached by the party at whose instance he testifies. This general rule is subject, however, to the exception that, when a witness proves hostile or unwilling, the party calling him may probe his conscience or test his recollection, to the end that the whole truth may be laid bare; and

the extent to which this may be done depends upon judicial discretion exercised in the light of the circumstances in which the question arises. That these two persons, wife and daughter of the defendant, were unwilling witnesses against him was manifest from their relations to him and from their apparent lack of recollection. It was, therefore, permissible for the district attorney to ply them with leading questions, and even to cross-examine them." *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396, 116 Am. St. 621.

¹⁰ *Coon v. People*, 99 Ill. 368, 39 Am. 28; *Mann v. State*, 23 Fla. 610, 3 So. 207; *Navarro v. State*, 24 Tex. App. 378, 6 S. W. 542; *Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087; *Barker v. State*, 1 Ga. App. 286, 57 S. E. 989.

¹¹ *Hodge v. State*, 26 Fla. 11, 7 So.

sally recognized, and it would seem that the tender age of a witness may furnish a reason why leading questions should not be asked, because of the ease with which young persons and children may be misled thereby.¹²

Leading questions may also be put to a witness whose memory, while clear and strong, as regards the main facts of a complicated transaction, is weak and indistinct as to minor accompanying facts, such as places or dates.¹³

So, to refresh the memory of one's own witness, counsel may ask if the witness did not at some prior date state facts which may be inconsistent with his present testimony.¹⁴ If the memory of a witness is faint, he may be plied with leading questions on unimportant and irrelevant, but suggestive facts. He may be asked what his uniform habit or routine of acting was in connection with certain transactions, if the evidence of the unimportant fact or routine suggests to him a relevant but forgotten fact.¹⁵ In the introductory portion of the direct examination, leading questions are allowed. Thus counsel are permitted, instead of asking what was said, to ask a witness whether specific statements were made

593; *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *Proper v. State*, 85 Wis. 615, 55 N. W. 1035; *Paschal v. State*, 89 Ga. 303, 15 S. E. 322; *State v. Megorden*, 49 Ore. 259, 88 Pac. 306; *Leak v. State* (Tex. Cr.), 97 S. W. 476; *McCann v. People*, 226 Ill. 562, 80 N. E. 1061; *ante*, § 205. In *State v. Megorden*, 49 Ore. 259, 88 Pac. 306, it is said: "Considering the youth of these witnesses, one being 18 years of age and the other 14, and the fact that they were testifying upon the trial of their father for killing their mother, we think there was no error in permitting such questions.

¹² *Coon v. People*, 99 Ill. 368, 39 Am. 28.

¹³ In a prosecution for rape or seduction, or for an indecent assault, where it is difficult to induce the fe-

male, who is usually the principal witness for the state, to relate the details of the crime, because of the natural timidity and female modesty, which prompt her to remain silent as regards these indelicate details, proof of which is necessary to convict, leading questions are very properly put to her. *State v. Bauerkemper*, 95 Iowa 562, 64 N. W. 609; *Callison v. State*, 37 Tex. Cr. 211, 39 S. W. 300; *State v. Simes*, 12 Idaho 310, 85 Pac. 914.

¹⁴ *Schuster v. State*, 80 Wis. 107, 49 N. W. 30; *State v. Cummins*, 76 Iowa 133, 40 N. W. 124; *People v. Durrant*, 116 Cal. 199, 48 Pac. 75.

¹⁵ *Prentiss v. Bates*, 88 Mich. 567, 50 N. W. 637; *People v. Sherman*, 133 N. Y. 349, 31 N. E. 107, 16 N. Y. S. 782, 40 N. Y. St. 831, 10 N. Y. Cr. 53.

in his hearing, for the purpose of contradicting a witness who had testified that they were not made.¹⁶

The objection to the question as leading is an objection to the form of the question, not to the competency of the evidence which may be given in answer to it. If the court rules that the question which is alleged to be leading is proper, it will be presumed that the answer is competent in the absence of an objection, to its competency. If the counsel desires to object to the competency of the answer, he should do so, before it is given or having objected on one ground only, he cannot subsequently take advantage of another.¹⁷

§ 214. Questions put to the witness by the court.—The interests of public justice and the punishment and prevention of crime on the one hand, and principles of fairness toward the prisoner on the other, demand that the presiding judge should not entertain, or, at least, should not manifest, any partiality for or against the accused during the examination of the witnesses.

It is necessary here to distinguish carefully between the competency of evidence and its credibility. The admissibility of evidence is usually a judicial question with which the jury has no concern.¹⁸ It is the right, therefore, of the judge in a criminal trial to determine all preliminary questions bearing on the competency of evidence or of a witness, and to enable him to do this he may have to question the witness. And the court, in ruling on the competency of evidence, may state the reasons and grounds for offering¹⁹ and receiving or rejecting it, or may declare its probable effect if it had been received where it is excluded, if no language is employed which will improperly influence the minds of the jurors against the prisoner.²⁰

¹⁶ *Shultz v. State*, 5 Tex. App. 390; *Cannon v. People*, 141 Ill. 270, 30 N. E. 1027. See *Underhill on Ev.*, p. 475, § 335, note 3. If a question calls for evidence which may or may not be relevant, and sometimes even when no question has been asked, and the witness has neither been sworn nor examined, the court may, in its discretion, on application by the other party, require counsel ex-

amining to disclose the substance of what is proposed to prove. *People v. White*, 14 Wend. (N. Y.) 111; *State v. Small*, 26 Kan. 209; *Wood v. State*, 92 Ind. 269.

¹⁷ *Sweet v. State*, 75 Neb. 263, 106 N. W. 31.

¹⁸ *Underhill on Ev.*, §§ 11-13.

¹⁹ *Armstrong v. State*, 14 Ind. App. 566, 43 N. E. 142.

²⁰ *State v. Milling*, 35 S. Car. 16.

With these qualifications no rule of law exists which limits the power of a judge in a criminal trial to interrogate a witness during his examination. He may ask any question which either the state or the accused had a right to ask, or which it was their duty to ask, but which has been omitted, if the answer may be relevant. Where anything material has been omitted, it is the duty of the court to bring it out.²¹ But the court should be very careful to let fall no remarks, and to put no questions which assume the prisoner's guilt, for experience teaches all persons that jurors, particularly in evenly balanced cases, are extremely prone to be influenced by such judicial intimations, and to defer to them in rendering their verdict.²²

The court may, in a criminal case, properly cross-examine the witnesses for the accused. Questions put by the court should follow the rules as to form observed on criminal trials.²³ The judicial power to cross-examine should be carefully exercised so as not to prejudice the accused. Questions by the court on examination or cross-examination which assume the prisoner's guilt, or which assume his witnesses are testifying falsely, or which give to jury the impression that the court has determined that the accused is guilty, furnish, in most cases, a basis for a reversal.²⁴

For example, where the defense was an alibi, the action of the court in questioning at very great length a witness who swore to the alibi, asking him *inter alia* if he were absolutely sure and certain he had seen the defendant at a certain place, telling him to

14 S. E. 284; *Hodge v. State*, 26 Fla. 11, 7 So. 593.

²¹ *Colee v. State*, 75 Ind. 511; *De Ford v. Painter*, 3 Okla. 80, 41 Pac. 96, 30 L. R. A. 722; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *Epps v. State*, 19 Ga. 102; *State v. Lee*, 80 N. Car. 483; *State v. Caron*, 118 La. 349, 42 So. 960; *Caswell v. State* (Ga. App.), 63 S. E. 566; *Miller v. Territory*, 15 Okla. 422, 85 Pac. 239.

²² *People v. Williams*, 17 Cal. 142; *Durham v. State*, 2 Ga. App. 401, 58 S. E. 555; *Rouse v. State*, 2 Ga. App. 184, 58 S. E. 416; *Holt v. State*, 2 Ga. App. 383, 58 S. E. 511. Cf.

contra, *State v. Milling*, 35 S. Car. 16, 14 S. E. 284.

²³ *Hopperwood v. State*, 39 Tex. Cr. 15, 44 S. W. 841.

²⁴ *Komp v. State*, 129 Wis. 20, 108 N. W. 46. To an objection on appeal that the manner of the judge in asking a proper question was such as to convince the jury that he believed the accused was guilty, the court said: "It is as yet impossible for the tone and manner of a presiding judge to be transmitted to a court of review." *Caswell v. State* (Ga. App.), 63 S. E. 566.

think carefully a moment and see if he were not mistaken, assuring him at the same time that he had a right to correct his testimony if he were wrong and advising him to do so if there were any doubt in his mind, was very prejudicial to the rights of the accused and he is entitled to a new trial where the jury find him guilty.²⁵

But no remark by the judge made during the examination of a witness can be urged as ground for a new trial which refers solely to competency, to the relevancy of testimony, or to the reason for its exclusion or admission.²⁶ The active participation of the court in the examination of a witness, even to suggesting the proper form of a question, is not reversible error.²⁷

The witness may always be asked by the court whether he understands a question which has been put to him,²⁸ and the court may, in order to facilitate and expedite the administration of justice, peremptorily check or silence the irrelevant evidence of a voluble or abusive witness,²⁹ or interpose *sua sponte* to stop the prolonged and unnecessary examination of a witness,³⁰ to exclude incompetent evidence, particularly where the accused has no counsel, or he is a child of tender years.³¹

Sometimes jurors are permitted to interrogate a witness and his answers, if relevant, are not incompetent because thus informally obtained. A lengthy examination by a juror, during which

²⁵ *Glover v. United States*, 147 Fed. 426, 77 C. C. A. 450.

²⁶ *State v. Young*, 105 Mo. 634, 16 S. W. 408; *Patterson v. State*, 86 Ga. 70, 12 S. E. 174; *Lewis v. State*, 90 Ga. 95, 15 S. E. 697; *Commonwealth v. Ward*, 157 Mass. 482, 32 N. E. 663; *Arnold v. State*, 81 Wis. 278, 51 N. W. 426; *Butler v. State*, 91 Ga. 161, 16 S. E. 984; *State v. Turner*, 36 S. Car. 534, 15 S. E. 602; *State v. Barnes*, 48 La. Ann. 460, 19 So. 251; *State v. Hayward*, 62 Minn. 474, 65 N. W. 63; *Carter v. State*, 2 Ga. App. 254, 58 S. E. 532, in which case it was held that the action of the court in rebuking one of the witnesses for the accused in the presence of the jury for remaining in court for a few

minutes after an order had been made excluding the witnesses was not error.

²⁷ *Hodge v. State*, 26 Fla. 11, 7 So. 593; *Sanders v. Bagwell*, 37 S. Car. 145, 15 S. E. 714, 16 S. E. 770.

²⁸ *State v. Mathews*, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135; *Washington v. State*, 46 Tex. Cr. 184, 79 S. W. 811.

²⁹ *Robinson v. State*, 82 Ga. 535, 9 S. E. 528; *Bowden v. Bailes*, 101 N. Car. 612, 8 S. E. 342.

³⁰ *People v. Turcott*, 65 Cal. 126, 3 Pac. 461; *State v. Southern*, 48 La. Ann. 628, 19 So. 668; *State v. Caron*, 118 La. 349, 42 So. 960.

³¹ *McClure v. Commonwealth*, 81 Ky. 448.

his mental attitude or bias towards the accused, or towards the issue is exhibited, should not be permitted or encouraged.⁸²

§ 215. Judicial remarks upon the demeanor or credibility of a witness during his examination.—The credibility and weight of evidence are for the jury exclusively. All judicial observations or remarks upon the personal character of a witness or the nature, credibility or weight of his evidence, made during his examination, are improper, and furnish grounds for objection.⁸³ It is immaterial that the judicial observations were inadvertently made if the accused was substantially prejudiced,⁸⁴ though it seems that the error may be cured by a prompt withdrawal or retraction of the objectionable words,⁸⁵ or by an instruction to the jury to disregard them.⁸⁶

⁸² The accused is sometimes allowed by statute to make a personal statement of his defense under oath. He is not a witness in such a case, and cannot be examined or cross-examined by jurors or counsel. The court must protect him *sua sponte* from the questioning or interference of counsel, or of others, and its neglect to do this, if objection is promptly made, is ground for reversing a conviction. *Bond v. State*, 21 Fla. 738; *Miller v. State*, 15 Fla. 575; *Hawkins v. State*, 29 Fla. 554, 10 So. 822.

⁸³ *State v. Philpot*, 97 Iowa 365, 66 N. W. 730; *Sharp v. State*, 51 Ark. 147, 10 S. W. 228, 14 Am. St. 27n; *State v. Raymond*, 53 N. J. L. 260, 21 Atl. 328; *People v. Wood*, 126 N. Y. 249, 27 N. E. 362; *Shepherd v. State*, 31 Neb. 389, 47 N. W. 1118; *State v. Jacobs*, 106 N. Car. 695, 10 S. E. 1031; *Campbell v. State*, 30 Tex. App. 645, 18 S. W. 409; *People v. Nino*, 149 N. Y. 317, 43 N. E. 853; *State v. Lucas*, 24 Ore. 168, 33 Pac. 538; *People v. Hull*, 86 Mich. 449, 49 N. W. 288; *Bone v. State*, 86 Ga. 108, 12 S. E. 205. A remark by the court that "witness has contradicted him-

self several times," is very objectionable. *People v. Willard*, 92 Cal. 482, 28 Pac. 585; *Grant v. State*, 122 Ga. 740, 50 S. E. 946.

⁸⁴ *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. 232.

⁸⁵ *Johnson v. State*, 94 Ala. 35, 10 So. 667; *Reinhold v. State*, 130 Ind. 467, 30 N. E. 306; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; *Commonwealth v. Ward*, 157 Mass. 482, 32 N. E. 663; *State v. Black*, 42 La. Ann. 861, 8 So. 594.

⁸⁶ *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; *Vann v. State*, 83 Ga. 44, 9 S. E. 945.

"The more serious question relates to the remarks made by the court, in passing upon the objection. The remarks were made, it is true, in the heat of the trial, and were, no doubt, called out by something that was said by counsel, either in the objections interposed, or in the arguments made in support thereof, and were not uttered with intent to prejudice the case, or prejudice the effect of the witness' testimony. But it is a matter of common knowledge that jurors hang tenaciously upon remarks made by

§ 216. Answers must be responsive.—The questions put should be neither vague nor ambiguous.³⁷ So the answers should be responsive, stating all facts called for, and no more, and generally without any expression of opinions, inferences or conjectures.³⁸ If the answer given is so irresponsible that it wholly or in part fails to convey all the facts which were required, or if it states facts or opinions not required, it may be stricken out on motion as far as it is not responsive, and the refusal of this motion when seasonable objection is made by the accused is reversible error.³⁹

The court may always in its discretion direct a witness to answer a relevant question responsively if he persists in replying evasively,⁴⁰ and should promptly rebuke a witness who persists in stating his opinion as to the guilt of the prisoner.⁴¹

§ 217. Refreshing the memory of a forgetful witness by memorandum.—A witness will generally be permitted to speak of those facts only that are within his personal knowledge and recollection. There are, however, two sorts of recollection which the witness may employ on the stand. They may be concisely described as past recollection and present recollection. In the case of past recollection, the witness has no present recollection of relevant facts, while he is on the witness stand, but remembers that at sometime in the past he did have knowledge and recollection of certain events and that he made a record thereof. Having no present recollection, however, he cannot use this record to refresh his recollection, but if he can swear that when he made it,

the court during the progress of the trial, and if, perchance, they are enabled to discover the views of the court regarding the effect of a witness' testimony, or the merits of the case, they almost invariably follow them." *State v. Philpot*, 97 Iowa 365, 66 N. W. 730.

³⁷ *Hill v. State*, 91 Tenn. 521, 19 S. W. 674; *Mann v. State*, 23 Fla. 610, 3 So. 207.

³⁸ *People v. Smith*, 106 Mich. 431, 64 N. W. 200. See *Underhill on Ev.*, p. 476, note 2; *Smith v. State* (Tex. Cr.), 99 S. W. 100.

³⁹ *Chicago, etc., R. Co. v. Woodward*, 47 Kan. 191, 27 Pac. 836.

⁴⁰ *State v. Farley*, 87 Iowa 22, 53 N. W. 1089. Whether the answer is or is not responsive is for the court alone.

⁴¹ A witness, in his excitement, accused the prisoner of being guilty of the murder for which he was being tried. The court need not stop the trial if the jury are properly cautioned to disregard the accusation. *Commonwealth v. Gilbert*, 165 Mass. 45, 42 N. E. 336.

it was a true statement of the facts as he then recollected them, the record may, under certain circumstances, be admissible as evidence in itself and aside from anything the witness may testify to orally. The using of the evidence of a past recollection embodied in a writing which the witness swears was true to his knowledge when he made it, but about which he has no present recollection whatever, depends upon certain rules which have nothing to do with the use of memorandum to refresh the recollection and consequently demand no discussion in this place.

A present recollection of past events may be strong or weak according to circumstances. These circumstances are the character of the events, whether of striking interest or of mere commonplace routine; and also on the remoteness of the events in point of time. In the case of events of great importance and interest, particularly if the witness was himself an interested person, the present recollection is apt to be vivid and no refreshing is required. Events of routine or commonplace character are very apt to be faint in the recollection of a witness who may have participated in them and for this reason, the rule that he may refresh his memory when necessary was enunciated. For a witness may aid or refresh his memory, meaning thereby his present recollection of past events, if he has a present recollection where it is weak or faint by consulting, on the witness stand, a writing or memorandum whether it was made by himself or some other person; if after examining the memorandum and because of what he has read thereon, he is able to testify of his present recollection thus renewed and revived.⁴²

If the memorandum is one whose sole use is to refresh the memory, it is not usually competent evidence and a memorandum or other writing which is admitted to be incompetent may always be used to refresh the memory. The question of its relevancy and materiality should not be considered.⁴³ It ought not to be read to the jury as evidence,⁴⁴ though it has been held that the

⁴² *Jenkins v. State*, 31 Fla. 196, 12 So. 677; *Kingory v. United States*, 44 Fed. 669; *Commonwealth v. Clancy*, 154 Mass. 128, 27 N. E. 1001; *State v. Collins*, 28 R. I. 439, 67 Atl. 796; *Johnson v. State*, 125 Ga. 243, 54 S.

E. 184; *O'Brien v. United States*, 27 App. Cas. D. C. 263.

⁴³ *Flood v. Mitchell*, 68 N. Y. 507; *Pickard v. Bryant*, 92 Mich. 430, 52 N. W. 788.

⁴⁴ *Raynor v. Norton*, 31 Mich. 210.

jurors may examine it, not as evidence in the case but to test the credibility of the witness by seeing from it whether it was of such a nature that it could have refreshed the recollection of the witness.⁴⁵

The opposite party is always entitled to cross-examine the witness in order to ascertain if he has testified truthfully after consulting the memorandum, but he cannot introduce the memorandum for the purpose of establishing the facts therein or for the purpose of contradicting the witness. And inasmuch as the writing is solely to aid the memory if the witness can swear that he has a full present recollection of the facts he should not be allowed to inspect the writing.⁴⁶

A witness in a criminal trial will be allowed to consult a writing to refresh his memory under the following circumstances: *First*. If he, while retaining no independent recollection of the facts transcribed, remembers having made the memorandum, or, when it was made by another, if he remembers having seen it, and that, when he saw it, he knew it was correct.⁴⁷

⁴⁵ *Commonwealth v. Haley*, 13 Allen (Mass.) 587.

⁴⁶ *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318.

⁴⁷ "The opposite party is entitled to inspect it, and he may cross-examine the witness in regard to it; and it may be shown to the jury, not for the purpose of establishing the facts therein contained, but for the purpose of showing that it could not properly refresh the memory of the witness." *Commonwealth v. Jeffs*, 132 Mass. 5. "But by resort to some memorandum or writing, his memory may be so stimulated and refreshed as to enable him to recollect the fact, and where this is so, it is not proper to introduce the writing in evidence, or read it in the presence of the jury, because it forms no part of the testimony, being used only for the purpose of aiding the mental effort of the witness to recollect the particular

transaction. *State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152n.

⁴⁸ *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566; *Watters v. State* (Tex. Cr.), 94 S. W. 1038, 116 Am. St. 476; *State v. Colwell*, 3 R. I. 132; *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102; *Owens v. State*, 67 Md. 307, 10 Atl. 210, 302; *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561; *Hartley v. Cataract, etc., Co.*, 64 Hun 634, 19 N. Y. S. 121; *Card v. Foot*, 56 Conn. 369, 15 Atl. 371, 7 Am. St. 311. See *Underhill on Ev.*, p. 478. In *Dugan v. Mahoney*, 11 Allen (Mass.) 572, the court said: "It is obvious that this species of evidence must be admissible in regard to numbers, dates, sales, and deliveries of goods, payments and receipts of money, accounts, and the like, in respect to which no memory could be expected

The other class of cases includes writings which the witness does not remember having seen before, and of whose contents he has no present recollection, but, being able to identify the handwriting as his own or as that of some other person, and knowing it to be genuine, he is able on consulting the writing, and because of its aid and his confidence in its genuineness, to swear independently, and of his own knowledge, to the facts. Suppose, for example, a subscribing witness recognizes his signature to an attestation clause of a will. His memory refreshed, he may be able to testify to the facts of acknowledgment or publication and subscription by the testator and to other accompanying circumstances, though he may have no independent memory thereof. In regard to the first class of writings, it is clear that, under certain circumstances, they may be admissible as independent evidence forming a part of the *res gestæ*. What the requirements are, which must be fulfilled before declarations will be receivable as a part of the *res gestæ*, is fully explained elsewhere.

§ 218. Character of memoranda employed to refresh the memory.—

The writing used to refresh the memory should ordinarily be contemporaneous with the transactions or facts which are mentioned in it.⁴⁸ This is the rule which has received the support of the majority of cases. But many authorities hold that the writing need not have been made *precisely* at the time of the events it describes, if it was made before the memory of the person making it had become weakened and unreliable by lapse of time.⁴⁹

to be sufficiently retentive, without depending upon memoranda, and even memoranda would not bring the transaction to present recollection. In such cases, if the witness on looking at the writing is able to testify that he knows the transaction took place, though he has no present memory of it, his testimony is admissible."

* Williams v. Wager, 64 Vt. 326, 24 Atl. 765; Weston v. Brown, 30 Neb. 609, 46 N. W. 826; Commonwealth v. Clancy, 154 Mass. 128, 27 N. E. 1001, and Underhill on Ev., § 338.

* Sisk v. State, 28 Tex. App. 432, 13 S. W. 647; Culver v. Scott, etc., Lumber Co., 53 Minn. 360, 55 N. W. 552; McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. 149; Adams v. Board of Trustees, 37 Fla. 266, 20 So. 266; Wilber v. Scherer, 13 Ind. App. 428, 41 N. E. 837; Dwight v. Cutting, 91 Hun 38, 36 N. Y. S. 99, 71 N. Y. St. 114. Testimony before the grand jury, taken four months after the occurrences to which it relates, cannot be used to refresh the memory of witnesses called to prove those occurrences. Putnam

Sometimes copies of a writing or memorandum made at the time of the facts which are transcribed have been used to refresh the memory when the copy was made after the original, but only if the witness could swear of his own knowledge to their accuracy,⁵⁰ and the absence of the original is properly accounted for.⁵¹ So a newspaper reporter, testifying as a witness, may refresh his memory by reading a printed article published from manuscript furnished by him, on proof that the original was destroyed.⁵²

If on the examination of a witness for the prosecution, it turns out that his memory is actually or apparently weak and particularly where, as very frequently happens, he outlines the framework of his evidence for the prosecution but omits details such as dates and places, his memory may be refreshed by asking him whether, on prior occasions he has not made statements containing the forgotten facts before the grand jury or to some of the prosecuting officials or to police officials. His memory, having been refreshed, he may then testify; but if he denies having made the statements he cannot be contradicted by the prosecution by proof that he has made them.⁵³

§ 219. Purpose and importance of cross-examination.—As a means of ascertaining truth, cross-examination is correctly deemed to be at once effective and impartial.⁵⁴ Writers on evidence have fre-

v. United States, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. 923, 52 Am. St. 149. Counsel have been permitted to refresh the memory of a forgetful witness by reading or having the witness read his evidence on a former trial or from the stenographer's notes. *Ehrisman v. Scott*, 5 Ind. App. 596, 32 N. E. 867; *Battishill v. Humphreys*, 64 Mich. 514, 38 N. W. 581. The same rule applies to evidence taken on the preliminary examination. *State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152n; and to notes taken by counsel or other persons. *State v. Dean*, 72 S. Car. 74, 51 S. E. 524, or a statement made and signed by him before the grand jury. *Smith v. State*,

46 Tex. Cr. 267, 81 S. W. 936, 108 Am. St. 991.

⁵⁰*Stavinow v. Home Ins. Co.*, 43 Mo. App. 513; *Watson v. Miller*, 82 Tex. 279, 17 S. W. 1053; *Bonnet v. Gladfelt*, 24 Ill. App. 533; *Flint v. Kennedy*, 33 Fed. 820; *People v. Munroe*, 100 Cal. 664, 35 Pac. 326, 38 Am. St. 323, 24 L. R. A. 33n;

⁵¹*Anderson v. Imhoff*, 34 Neb. 335, 51 N. W. 854; *Birmingham v. McPoland*, 96 Ala. 363, 11 So. 427.

⁵²*Hawes v. State*, 88 Ala. 37, 7 So. 302.

⁵³*Thomasson v. State*, 80 Ark. 364, 97 S. W. 297. *Supra*, p. 397, note 40.

⁵⁴"Cross-examination is the right of the party against whom the witness is called, and the right is a valuable

quently adverted to its peculiar efficacy and excellence, as a means of investigating the motives and personal prejudices of the witness, his relation to the accused or to the prosecution, or to the criminal transaction which is under investigation.

By this process his knowledge and general intelligence, the vividness of his memory, his impartiality or bias towards the accused, his means of observation and his opportunities for obtaining accurate and full information may all be explored and ascertained for the consideration of the jurors to assist them in determining the weight they shall give to his evidence.⁵⁵ Whether a witness has been examined so that the opposite party shall be entitled to cross-examine is sometimes an important question. A witness who has been sworn, but to whom no questions have been put, cannot be cross-examined.⁵⁶ This is the case where the only object of calling the witness is to procure a writing which is to be proved by another witness.⁵⁷

One of several jointly indicted and tried may be required to cross-examine the state's witnesses and produce his own before the same is done by his co-defendants.⁵⁸

§ 220. When right to cross-examine is lost—Cross-examination confined to matters brought out on direct.—Where either party has a right to cross-examine in civil cases, it is reversible error for the court to refuse to permit the exercise of the right. But the right of cross-examining is usually but not universally waived by the party making the witness his own.⁵⁹

one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and is a means of ascertaining the order of the events as narrated by the witness in his examination in chief, and the time and place, when and where they occurred, and the attending circumstances; and of testing the intelligence, memory, impartiality, truthfulness and integrity of the witness." *The Ottawa*, 3 Wall. (U. S.) 268, 18 L. ed. 165.

Cross-examination of accused in

criminal prosecutions, see 38 Am. St. 895-897. Right to cross-examine accused who has taken the witness stand as to a confession not admissible in evidence, see 10 L. R. A. (N. S.) 604.

⁵⁵ 1 Greenl. on Ev., § 446; 1 Stark. on Ev., §§ 160, 161.

⁵⁶ *Austin v. State*, 14 Ark. 555.

⁵⁷ *Rush v. Smith*, 1 Cr. M. & R. 94; *Underhill on Evid.*, p. 481.

⁵⁸ *State v. Howard*, 35 S. Car. 197, 14 S. E. 481.

⁵⁹ *Hemminger v. Western Assur. Co.*, 95 Mich. 355, 54 N. W. 949.

A party's right to cross-examine is not lost because he fails to object to a direct examination had out of the regular order.⁶⁰ The remedy for a defendant who has, for any reason, been deprived of an opportunity to cross-examine is to move to strike out the evidence given on the direct examination and to request an instruction that the jury should disregard it.⁶¹

Though a party cannot usually cross-examine his own witness, in criminal cases it has been held discretionary with the court to permit the prosecuting attorney to do so where the witness is unexpectedly hostile, or where the prosecuting attorney can show that he is disappointed by the testimony of a witness whom he expected to testify to facts showing the guilt of the accused.⁶²

The scope and right of a cross-examination are generally limited to subjects upon which the witness has been interrogated on the direct examination. That is, counsel cross-examining will not be permitted to ask leading or general questions on matters which, though involved in the general issue of the prisoner's guilt, were not touched on in the direct examination.⁶³

⁶⁰ *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286. So. 1032; *State v. Williams*, 111 La. 205, 35 So. 521; *State v. Farrington*, 90 Iowa 673, 57 N. W. 606; *Gale v. People*, 26 Mich. 157; *State v. Wilingham*, 33 La. Ann. 537; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Sheehan v. People*, 131 Ill. 22, 22 N. E. 818; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *Gemmell v. State*, 16 Ind. App. 154, 43 N. E. 909; *State v. Case*, 96 Iowa 264, 65 N. W. 149; *State v. Judiesch*, 96 Iowa 249, 65 N. W. 157; *State v. Zimmerman*, 3 Kan. App. 172, 42 Pac. 828; *State v. Lewis*, 136 Mo. 84, 37 S. W. 806; *People v. Edwards* (Cal.), 73 Pac. 416; *Brown v. State*, 46 Fla. 159, 35 So. 82; *Lewis v. State*, 55 Fla. 54, 45 So. 998, and cases fully cited Underhill on Ev., p. 482. In Texas, it has been held that the prosecution cannot go outside of the direct examination of a witness for the accused who testifies in her husband's favor, under the statute in

⁶¹ *People v. Cole*, 43 N. Y. 508.

⁶² *State v. Church*, 199 Mo. 605, 98 S. W. 16; *State v. Hughes*, 8 Kan. App. 631, 56 Pac. 142.

⁶³ *Wood v. State*, 92 Ind. 269; *Britton v. State*, 115 Ind. 55, 17 N. E. 254; *Adams v. State*, 28 Fla. 511, 10 So. 106; *State v. Chamberlain*, 89 Mo. 129, 1 S. W. 145; *State v. Zeilman*, 75 N. J. L. 357, 68 Atl. 468; *Saffer v. United States*, 87 Fed. 329, 31 C. C. A. 1, 59 U. S. App. 311; *State v. Rodriguez*, 115 La. 1004, 40 So. 438; *Morse v. Odell*, 49 Ore. 118, 89 Pac. 139; *State v. Nugent*, 116 La. 99, 40 So. 581; *Harrold v. Territory*, 18 Okla. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604n; *Linnehan v. State*, 120 Ala. 293, 25 So. 6; *State v. Heidelberg*, 120 La. 300, 45 So. 256; *Stewart v. State*, 52 Tex. Cr. 273, 106 S. W. 685; *Stone v. White*, 55 Fla. 510, 45

Whether a question put on the cross-examination calls for a collateral fact, or whether it is within the scope of the direct examination, is always for the court to determine. Its discretion, where properly exercised, will not be interfered with. The test to determine whether a question is or is not collateral seems to be that if the party cross-examining would under the rules of practice be entitled to prove it, as a part of his case, it is collateral to the cross-examination and cannot be inquired into. Thus, for illustration, if the plea of the defendant in a case of homicide is self-defense, counsel cross-examining a witness for the state will not be permitted to question him as to facts tending to establish that plea, unless the direct examination of that witness relates exclusively to the sanity of the accused.⁶⁴

In all cases where a witness testifies to part of a conversation on his direct examination, the other side must be permitted on cross-examination to bring out the entire conversation so far as it is relevant to the facts in issue.⁶⁵ But this rule does not permit or encourage the bringing out of evidence not within the scope of the direct examination by asking the witness to make experiments in court which will call upon him to give evidence which the state should prove as part of its case.⁶⁶

While counsel may cross-examine on relevant facts gone into on the direct examination, he may not open his own case and present evidence to support it by cross-examining the adverse witnesses. If he wants their evidence he must call them as witnesses.⁶⁷ This rule, as we shall see, is qualified by the principle which permits seemingly irrelevant questions on cross-examination for the purpose of testing credibility and bias.

A witness may be pressed for an answer when, on cross-exami-

that state which provides that a husband and wife shall not testify against each other. If the wife of the accused goes on the stand to testify in favor of her husband she may be cross-examined as to all matters involved in her direct examination. She cannot under the statute be cross-examined on matters not touched on in her direct examination. *Stewart v. State*, 52 Tex. Cr. 273, 106 S. W. 685.

⁶⁴*Ferguson v. State*, 72 Neb. 350, 100 N. W. 800.

⁶⁵*Lahue v. State*, 51 Tex. Cr. 153, 101 S. W. 1008.

⁶⁶*State v. Snyder*, 67 Kan. 801, 74 Pac. 231.

⁶⁷*Eacock v. State*, 169 Ind. 488, 82 N. E. 1039. This rule obtains in a criminal prosecution as well as in a civil action. *Poston v. State*, 83 Neb. 240, 110 N. W. 520.

nation, he avoids replying or parries the questions. And counsel should not be allowed to interpose frivolous objections in order to prevent a rapid cross-examination and to afford the witness an opportunity to fabricate evidence.⁶⁸ The extent, however, to which the same question may be asked, is largely in the discretion of the court.⁶⁹

§ 221. Cross-examination to test credibility.—Though the refusal or allowance of cross-examination upon irrelevant matters bearing wholly on credibility is largely within the discretion of the court, the right to cross-examine upon transactions directly relevant which have been brought out in the examination-in-chief is absolute. And the fact that relevant evidence, which is elicited by a proper question put on the direct examination, has been improperly stricken out, furnishes no basis for a claim that other strictly competent evidence of the same transaction should be expunged when stated by the witness on the cross-examination.⁷⁰

The limits within which either party may cross-examine upon matters not strictly relevant, but which affect the credibility of the evidence, is largely discretionary,⁷¹ and a reasonable exercise of this discretion in limiting the duration or modifying the method of the cross-examination, or in admitting seemingly immaterial questions tending to explain the motives,⁷² opportuni-

⁶⁸ State v. Duncan, 116 Mo. 288, 22 S. W. 699.

⁶⁹ Brown v. State, 72 Md. 477, 20 Atl. 140; McGuire v. Lawrence Mfg. Co., 156 Mass. 324, 31 N. E. 3; Wood v. State, 92 Ind. 269.

⁷⁰ Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499.

⁷¹ State v. Morris, 109 N. Car. 820, 13 S. E. 877; State v. Miller, 93 Mo. 263, 6 S. W. 57; Bessette v. State, 101 Ind. 85; Wachstetter v. State, 99 Ind. 290, 50 Am. 94n; United States v. Ball, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. 1192; Davidson v. People, 90 Ill. 221; People v. Knight (Cal.), 43 Pac. 6; State v. McGowan, 66 Conn. 392, 34 Atl. 99; State v. Osborne, 96 Iowa 281, 65 N. W. 159;

State v. Weems, 96 Iowa 426, 65 N. W. 387; Commonwealth v. Flynn, 165 Mass. 153, 42 N. E. 562; State v. Rutledge, 135 Iowa 581, 113 N. W. 461; State v. High, 116 La. 79, 40 So. 538; State v. Smith, 106 Iowa 701; 77 N. W. 499; Bess v. Commonwealth, 118 Ky. 858, 26 Ky. L. 839, 82 S. W. 576; Hill v. State, 146 Ala. 51, 41 So. 621; State v. Caron, 118 La. 349, 42 So. 960; State v. Stukes, 73 S. Car. 386, 53 S. E. 643; Harrold v. Territory, 18 Okla. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604n; State v. Ross, 77 Kan. 341, 94 Pac. 270, and see Underhill on Ev., p. 483.

⁷² People v. Thomson, 92 Cal. 506; Sims v. State, 88 Tex. Cr. 637, 44 S. W. 522.

ties,⁷³ and powers of observation, the knowledge,⁷⁴ memory or recollection,⁷⁵ reliability or good faith of the witness,⁷⁶ will always be allowed. Questions put to the witness for the purpose of ascertaining his relations, business, social or otherwise, with the accused and his state of mind, whether hostile or friendly towards him, are unobjectionable.⁷⁷

Thus, for example, on cross-examination a witness for the prosecution may be asked if he has not contributed money to aid in the prosecution,⁷⁸ or if he does not expect to receive a share of the reward offered for the conviction of the prisoner, or if he has not been promised payment for his services.⁷⁹ Where evidence from which an inference unfavorable to the prisoner is given upon the direct examination, everything within the knowledge of the

⁷³ For example, a witness to a nocturnal homicide may be asked if the moon was shining, to ascertain his facilities for observing the movements of deceased and all the surrounding circumstances. *State v. Avery*, 113 Mo. 475, 21 S. W. 193. The courts, while guarding against any abuse of the right to cross-examine, must watch with care against attempts to evade or restrict it. *Robnett v. People*, 16 Ill. App. 299; *Tracy v. People*, 97 Ill. 101; *Holmes v. State*, 88 Ala. 26, 7 So. 193, 16 Am. St. 17.

⁷⁴ *Williams v. State*, 32 Fla. 251, 13 So. 429.

⁷⁵ *State v. Duffy*, 57 Conn. 525, 18 Atl. 791; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; *Harrold v. Territory*, 18 Okla. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604n; *State v. Brown*, 111 La. 170, 35 So. 501. A witness may be required to repeat on cross-examination his evidence to a particular point given on his direct examination to test his memory and to ascertain if he will contradict himself. *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373.

⁷⁶ *State v. Philpot*, 97 Iowa 365, 66 N. W. 730; *Commonwealth v. Flynn*, 165 Mass. 153, 42 N. E. Rep. 562; *State v. Hayward*, 62 Minn. 474, 65 N. W. 63; *State v. Weems*, 96 Iowa 426, 65 N. W. 387; *Besette v. State*, 101 Ind. 85; *Murray v. Great Western Ins. Co.*, 72 Hun 282, 25 N. Y. S. 414, 55 N. Y. St. 748; *Heninburg v. State*, 151 Ala. 26, 43 So. 959.

⁷⁷ *Commonwealth v. Lyden*, 113 Mass. 452; *Commonwealth v. Shaw*, 4 Cush (Mass.) 593; *People v. Thomson*, 92 Cal. 506, 28 Pac. 589; *United States v. Cross*, 20 D. C. 365; *Holmes v. State*, 88 Ala. 26, 7 So. 193, 16 Am. St. 17, and *Underhill on Ev.*, p. 483; *State v. Rutledge*, 135 Iowa 581, 113 N. W. 461; *Isaac v. United States*, 7 Ind. T. 196, 104 S. W. 588; *Kipper v. State*, 45 Tex. Cr. 377, 77 S. W. 611; *Beal v. State*, 138 Ala. 94; 35 So. 58; *Sylvester v. State*, 46 Fla. 166, 35 So. 142; *Jackson v. State (Ala.)*, 47 So. 77.

⁷⁸ *Miller v. Territory*, 15 Okla. 422, 85 Pac. 239.

⁷⁹ *State v. Mulch*, 17 S. Dak. 321, 96 N. W. 101.

witness and which may raise an inference to rebut, may be brought out on cross-examination.⁸⁰

Questions on the cross-examination of a witness tending to show that some particular person had tampered with him, are competent; but a question to a witness for the prosecution if some person interested in the case had not tried to get him to testify falsely, was too general. The question should point out the particular person who is alleged to have tampered with the witness.⁸¹ A prosecuting witness may always be asked on cross-examination any question which tends to show that he had made a mistake in bringing the charge against the accused.⁸²

The court may, in its discretion, refuse to permit the cross-examination to be unreasonably prolonged,⁸³ or it may refuse to allow a question to be repeated when it has been answered satisfactorily,⁸⁴ or may exclude questions designed solely to ascertain what witnesses it may be advantageous to call.⁸⁵

The rule under which evidence of collateral facts is excluded during the direct examination is not applied with strictness to the cross-examination. The theory upon which the latter is conducted is that its primary object is the ascertainment of truth, not by eliciting positive evidence directly bearing on the facts, but by furnishing a means of testing the truthfulness and credibility of the witness.

⁸⁰ *State v. Harvey*, 130 Iowa 394, 106 N. W. 938. Questions on cross-examination put to the witness as to whether he told the truth in making certain statements on the direct examination should be excluded. *Wright v. State*, 149 Ala. 28, 43 So. 575.

⁸¹ *Sue v. State*, 52 Tex. Cr. 122, 105 S. W. 804.

⁸² *State v. Dalcourt*, 112 La. 420, 36 So. 479.

⁸³ *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *State v. Wren*, 121 La. 55, 46 So. 99; *State v. Rodriguez*, 115 La. 1004, 40 So. 438; *Fuqua v. Commonwealth*, 118 Ky. 578, 81 S. W. 923, 26 Ky. L. 420;

Carothers v. State, 75 Ark. 574, 88 S. W. 585; *State v. Blee*, 133 Iowa 725, 111 N. W. 19. Though a liberal cross-examination should be allowed where a witness is called to impeach or sustain another by proof of general character, the extent to which it may go is largely within the discretion of the trial court. *State v. Harris*, 209 Mo. 423, 108 S. W. 28.

⁸⁴ *Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. 303; *Hughes v. Ward*, 38 Kan. 452, 16 Pac. 810; *Mason v. Hinds*, 19 N. Y. S. 996, 47 N. Y. St. 163.

⁸⁵ *United States v. Cross*, 20 D. C. 365.

Questions may be put to an adverse witness on his cross-examination to show his prejudice in favor of, or against the accused without laying any predicate for them.⁸⁶

§ 222. When answers to questions involving collateral matters asked in cross-examination may be contradicted—Hostility or friendship towards the accused.—It is never permissible to cross-examine upon matters wholly irrelevant and collateral to the crime merely for the purpose of contradicting the witness on those points by other evidence. And if the cross-examiner shall happen to bring out irrelevant facts he is concluded thereby, and cannot contradict them.⁸⁷ It is proper, however, to ask the witness if he did not at a particular time and place, which must be mentioned, give a different account of relevant facts to that which he gave on his direct examination. If he denies that he has done so, a sufficient foundation is laid for his impeachment, which may then be accomplished by the testimony of a witness who was present and heard the contradictory statement.⁸⁸

The feelings, bias and relationship of the witness are never collateral.⁸⁹ A witness may be interrogated on cross-examina-

⁸⁶ *Telfair v. State* (Fla.), 47 So. 863; *State v. Nieuhaus*, 217 Mo. 332, 117 S. W. 73.

⁸⁷ 1 *Greenl. on Ev.*, p. 484; *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *Moore v. People*, 108 Ill. 484; *Bresler v. People*, 117 Ill. 422, 8 N. E. 62; *People v. Hillhouse*, 80 Mich. 580, 45 N. W. 484; *Commonwealth v. Hourigan*, 89 Ky. 305, 12 S. W. 550, 11 Ky. L. 509; *Batten v. State*, 80 Ind. 394; *Crittenden v. Commonwealth*, 82 Ky. 164; *State v. Reick*, 43 Kan. 635, 23 Pac. 1076; *People v. Tiley*, 84 Cal. 651, 24 Pac. 290; *People v. Dye*, 75 Cal. 108, 16 Pac. 537; *State v. Dunn* (Ore.), 100 Pac. 258; *People v. Darr*, 3 Cal. App. 50, 84 Pac. 457; *People v. Van Tassel*, 26 App. Div. (N. Y.) 445, 50 N. Y. S. 53; *Smalls v. State*, 102 Ga. 31, 29 S. E. 153; *Ferguson v. State*, 72 Neb. 350,

100 N. W. 800; *Saffer v. United States*, 59 U. S. App. 311, 87 Fed. 329, 31 C. C. A. 1.

⁸⁸ *People v. Williams*, 18 Cal. 187; *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *State v. Talbott*, 73 Mo. 347; *State v. Zimmerman*, 3 Kan. App. 172, 42 Pac. 828. See *Underhill on Ev.*, § 350, for civil cases. Where a witness makes a statement on cross-examination he may be asked if he did not give different testimony on a former trial.

⁸⁹ *Crumpton v. State*, 52 Ark. 273, 12 S. W. 563; *United States v. Post*, 128 Fed. 950; *Cook v. State*, 152 Ala. 66, 44 So. 549; *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *Brown v. State*, 119 Ga. 572, 46 S. E. 833; *State v. Nieuhaus*, 217 Mo. 332, 117 S. W. 73.

tion as to his interest, bias or prejudice, that is to say, if the sole purpose of the question is to elucidate the existing or previous relationship, feeling or conduct of the witness toward the crime, the accused, or the prosecutors.

The witness may be asked generally, if he has not expressed or, perhaps, entertained feelings of hostility, or acted in an unfriendly manner towards or quarreled with the accused. So, for example, a prosecuting witness may be asked if he has not had the accused arrested before,⁹⁰ or if he has not quarreled with the accused,⁹¹ and if he has not retained counsel to aid the state in the trial which is pending.⁹² He should be allowed to explain his motives in hiring counsel.⁹³

If the witness refuses to answer such questions,⁹⁴ or answers them in the negative, the contrary fact may be shown by the evidence of others.⁹⁵ But where a witness states that though once hostile he is so no longer, evidence of his previous hostility, being too remote, is irrelevant.⁹⁶

On the cross-examination of a witness for the state it may properly be shown that he had come a long distance without a subpoena and that his railroad fare had been paid by the prosecution.⁹⁷ The general rule is that where a witness on his direct examination shows a violent hatred towards the accused, or where he has been very active in securing evidence against him, the ac-

⁹⁰ *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859.

⁹¹ *Sasser v. State*, 129 Ga. 541, 59 S. E. 255.

⁹² *People v. Blackwell*, 27 Cal. 65; *United States v. Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. 1192; *Miller v. Territory*, 15 Okla. 422, 85 Pac. 239.

⁹³ *People v. Blackwell*, 27 Cal. 65.

⁹⁴ *State v. McFarlain*, 41 La. Ann. 686, 6 So. 728.

⁹⁵ *State v. Johnson*, 48 La. Ann. 437, 19 So. 476; *Lyle v. State*, 21 Tex. App. 153, 17 S. W. 425; *People v. Gillis*, 97 Cal. 542, 32 Pac. 586; *Bonnard v. State*, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. 431; *Scott v.*

State, 64 Ind. 400; *Crumpton v. State*, 52 Ark. 273, 12 S. W. 563; *People v. Thompson*, 92 Cal. 506, 28 Pac. 589; *Newcomb v. State*, 37 Miss. 383; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *Cornelius v. Commonwealth*, 15 B. Mon. (Ky.) 539; *Commonwealth v. Byron*, 14 Gray (Mass.) 31; *Kent v. State*, 6 Cr. L. Mag. 520. In *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189, it was held that the hostility of an adverse witness might be shown without questioning him, and see *Underhill on Ev.*, § 354 b.

⁹⁶ *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104.

⁹⁷ *Sylvester v. State*, 46 Fla. 166, 35 So. 142.

cused should be permitted the widest latitude on cross-examination.⁹⁸

And a witness who is called to contradict a statement by a prosecuting witness that he is not hostile to the accused must do so by evidence of facts within his own knowledge showing the disposition and attitude of the prosecuting witness. He may prove declarations or acts showing hostility, but his opinion that the witness is hostile is not admissible.⁹⁹

§ 223. Re-direct examination.—A party calling a witness may re-examine him after he has been cross-examined. On this re-examination the witness may be questioned as to contradictions, and inconsistent statements made on his cross-examination; and he may state and explain the motives for his acts which he described on cross-examination.¹⁰⁰

And where on the cross-examination of a witness for the prosecution new testimony develops which is unfavorable to the state, on the re-direct examination it is permitted for the prosecution to go fully into the new matter testified to on the cross-examination.¹ Thus, if on cross-examination the prosecuting witness admits that he has charged another than the accused with the crime, the court must on the re-direct permit him to explain why he did so.²

The introduction on cross-examination of any evidence which tends to impeach the witness cross-examined permits counsel on the other side on the re-direct to introduce questions which will tend to overcome the prejudicial inference thus created. For example, when the witness admits on cross-examination that immediately after the crime he left the state, his reasons for doing so may be shown on the re-direct.³ So, too, where a witness,

⁹⁸ State v. Griffin, 43 Wash. 591, 86 Pac. 951.

⁹⁹ Burnett v. State, 53 Tex. Cr. 515, 112 S. W. 74.

¹⁰⁰ Commonwealth v. Dill, 156 Mass. 226, 30 N. E. 1016; Wilson v. People, 94 Ill. 299; State v. Hicks, 20 S. Car. 341; Kroell v. State, 139 Ala. 1, 36 So. 1025; Carwile v. State, 148 Ala. 576, 39 So. 220; Craig v. State, 78 Neb. 466, 111 N. W. 143; People

v. Tubbs, 147 Mich. 1, 110 N. W. 132; State v. Lymens, 138 Iowa 113, 115 N. W. 878.

¹ State v. Williams, 111 La. 179, 35 So. 505; State v. Banner, 149 N. E. 519, 63 S. E. 84.

² People v. Darr, 3 Cal. App. 50, 84 Pac. 457.

³ Sims v. State, 146 Ala. 109, 41 So. 413.

being a police officer, stated on his cross-examination by counsel for the accused that he was desirous of convicting accused, the prosecution can show on the re-direct examination of the witness that he had no interest in convicting the accused except that of a public officer.⁴ A prosecuting witness, having been asked on his cross-examination and having answered a question which showed or tended to show that he had employed money for the purpose of securing evidence against the accused, should be allowed on his re-direct examination to explain the whole transaction.⁵

Questions may be put on the re-direct examination for the purpose of ascertaining the real meaning of the language used on the cross-examination. From this it will often appear that the inconsistent or contradictory character of the statements is more apparent than real.⁶

The party calling the witness ought on the examination-in-chief to interrogate him on all material matters. No new questions can be put on the re-direct examination which are not connected in some way with the cross-examination. But the courts of original jurisdiction have varied this rule, and it remains for them to determine whether in any particular case the facts warrant a departure therefrom. This discretion the appellate court will not interfere with except in the case of its gross abuse, when manifest injustice would surely ensue.⁷ But on the re-direct examination counsel will be permitted to ask questions which will explain all answers which were brought out on the cross-examination from which wrong inferences might be drawn by the jury, or which have a tendency to cast doubt upon the credibility of the evidence of the witness.⁸

⁴ *People v. Wenzel*, 189 N. Y. 275, 82 N. E. 130. *Iowa* 567, 57 N. W. 418; *Springfield v. Dalby*, 139 Ill. 34, 29 N. E. 860.

⁵ *Wheeler v. State*, 79 Neb. 491, 113 N. W. 253.

⁶ *Smith v. State*, 21 Tex. App. 277, 17 S. W. 471; *State v. Reed*, 89 Mo. 168, 1 S. W. 225; *People v. Ryan*, 152 Cal. 364, 92 Pac. 853.

⁷ *Sartorius v. State*, 24 Miss. 602, 609; *Schaser v. State*, 36 Wis. 429. *Cf. Miller v. Illinois & C. R. Co.*, 89

People v. Buchanan, 145 N. Y. 1, 39 N. E. 846; *State v. McGahey*, 3 N. Dak. 293, 55 N. W. 753; *Bracken v. State*, 111 Ala. 68, 20 So. 636, 56 Am. St. 23; *Collins v. State*, 46 Neb. 37, 64 N. W. 432; *United States v. 18 Barrels of High Wines*, 8 Blatchf. (U. S.) 475; *Kidd v. State*, 101 Ga. 528, 28 S. E. 990. When the pros-

Where the defendant brings out on the cross-examination a part of a conversation which is material to the crime, the prosecution on the re-direct may bring out all the conversation.⁹ One who on cross-examination admits one conversation with the accused may be questioned on his re-direct examination as to another conversation if the latter is material.¹⁰ If an incriminating fact is brought out by the defendant on cross-examination of the state's witness, the prosecution may on re-direct examination bring out all the testimony which is material thereto.¹¹

But where a witness testifies on his cross-examination to previous difficulties and disputes with the accused from which it may have been inferred that he was hostile to the accused and prejudiced against him, the state cannot show on the re-direct examination any fact which furnishes a ground for such hostility.¹²

A suggestive mode of questioning a witness on the re-direct examination, though sometimes permitted,¹³ and always in the discretion of the court, is not to be commended. Counsel should not be allowed to extricate an untruthful witness from the difficulties and inconsistencies into which he has plunged by repeating to him his evidence on the direct examination, and asking him if the statements made on the cross-examination are consistent therewith.¹⁴ If the court permits a witness to answer irrelevant questions or to give irrelevant replies on the cross-examination, the party calling him has the right to question him on such matters on the re-direct examination.¹⁵ In case the ad-

ecuting witness, a minor, admitted on cross-examination that a writing signed by her had been prepared by the district attorney and signed at his bidding, she was allowed, on the re-direct examination, to state that the statement was wholly voluntary and true, and that its language was substantially her own. *People v. Mills*, 94 Mich. 630, 54 N. W. 488. See, also, *Underhill on Ev.*, p. 487.

⁹ *Simmons v. State*, 145 Ala. 61, 40 So. 660; *Hudson v. State*, 137 Ala. 60, 34 So. 854.

¹⁰ *People v. Majoine*, 144 Cal. 303, 77 Pac. 952.

¹¹ *People v. Noblett*, 184 N. Y. 612, 77 N. E. 1193, aff'g 96 App. Div. 293, 89 N. Y. S. 181, 18 N. Y. Cr. 476.

¹² *State v. Judd*, 132 Iowa 296, 109 N. W. 892.

¹³ *Smith v. State*, 21 Tex. App. 277, 17 S. W. 471; *State v. Vickers*, 209 Mo. 12, 106 S. W. 999; *Smith v. State*, 52 Tex. Cr. 344, 106 S. W. 1161.

¹⁴ *Smith v. State*, 21 Tex. App. 277, 17 S. W. 471; *Stoner v. Devilbiss*, 70 Md. 144, 16 Atl. 440; *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

¹⁵ *People v. McNamara*, 94 Cal. 509,

verse party desires to re-examine the witness he may then do so on the re-cross-examination, but must restrict himself to new matter brought out on the re-direct examination.

§ 224. Recalling witnesses.—Whether a witness, after he has left the stand, shall be allowed to be recalled by the party in whose behalf he testified, or for further cross-examination,¹⁶ is wholly discretionary with the court,¹⁷ and this discretion was held not to have been abused where a witness was recalled after a direct cross, re-direct and re-cross-examination,¹⁸ and even after both the state and the defense had rested.¹⁹ Where a witness is unable to answer positively or definitely, while on the stand, the court may properly refuse to permit his recall for additional examination,²⁰ or to permit a witness, who has already testified fully and exhaustively, to be recalled solely for the purpose of having

29 Pac. 953; *State v. Cardoza*, 11 S. Car. 195; *Schaser v. State*, 36 Wis. 429; *Parks v. State*, 46 Tex. Cr. 100, 79 S. W. 301. See *Underhill on Ev.*, § 34r.

¹⁶ *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *People v. Parton*, 49 Cal. 632.

¹⁷ *State v. Robinson*, 32 Ore. 43, 48 Pac. 357; *Faust v. United States*, 163 U. S. 452, 41 L. ed. 224, 16 Sup. Ct. 1112; *Pigg v. State*, 145 Ind. 560, 43 N. E. 309; *Chapman v. James*, 96 Iowa 233, 64 N. W. 795; *Robbins v. Springfield & C. R. Co.*, 165 Mass. 30, 42 N. E. 334; *Lafferty v. State* (Tex. Cr.), 35 S. W. 374; *Riley v. State*, 88 Ala. 193, 7 So. 149; *State v. Dilley*, 15 Ore. 70, 13 Pac. 648; *Humphrey v. State*, 78 Wis. 569, 47 N. W. 836; *Snodgrass v. Commonwealth*, 89 Va. 679, 17 S. E. 238; *State v. Huff*, 76 Iowa 200, 40 N. W. 720; *Hollingsworth v. State*, 79 Ga. 605, 4 S. E. 560; *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770; *Upton v. State*, 48 Tex. Cr. 289, 88 S. W. 212;

Hammond v. State, 147 Ala. 79, 41 So. 761; *Bellamy v. State* (Fla. 1908), 47 So. 868; *State v. Thompson*, 68 S. Car. 133, 46 S. E. 941. *Underhill on Ev.*, § 342, citing civil cases. The prosecutrix, in a trial for rape, may be recalled to testify to non-consent after both sides have rested. *State v. Case*, 96 Iowa 264, 65 N. W. 149. In *State v. Clyburn*, 16 S. Car. 375, it was held that the judicial discretion was properly exercised when a witness for the state was recalled to prove a single fact, though the examination of the witnesses for the accused was thereby interrupted. *State v. Laycock*, 141 Mo. 274, 42 S. W. 723.

¹⁸ *State v. Jacobs*, 28 S. Car. 29, 4 S. E. 799; *Brown v. State*, 72 Md. 468, 20 Atl. 186.

¹⁹ *Cochran v. United States*, 14 Okla. 108, 76 Pac. 672.

²⁰ *Bonnet v. Gladfeldt* (Glattfeldt), 24 Ill. App. 533, 120 Ill. 166, 11 N. E. 250.

him repeat his testimony or to obtain cumulative evidence.²¹ If there is a dispute as to what testimony a witness has given, or if the jurors did not understand or have forgotten what he said it is very proper to allow him to restate his testimony, even after the case is closed.²² But the practice is open to the serious objection that it may lead to injustice to the prisoner by placing too much emphasis on some material evidence against him. If a witness is recalled for further direct examination, or for further cross-examination, the other side has the right of further cross-examination or of further re-direct examination.

After a witness for the prosecution has left the witness stand he may be recalled by the counsel for the accused at any time during the trial to lay a foundation for his impeachment.²³ The prosecuting attorney has the same right. The fact that a party recalls a witness for this purpose does not make him the witness of the party recalling him.²⁴

The rule that evidence which is not apparently relevant, or which is apparently irrelevant, may be received by the court, upon the promise of the party offering it that he will show the relevancy and connection later on, is applicable to criminal trials. But the matter is within the discretion of the court who may require that the relevancy be shown at once by introducing some evidence which will connect. The party offering evidence apparently irrelevant may be required to state at once its connection with other facts, and to promise to connect, and if he does not do so, the evidence should be stricken out.²⁵

§ 225. Exclusion and separation of witnesses.—The presiding judge may, when it shall seem necessary for the due administration of justice, order a separation of the witnesses, and the ex-

²¹ *Chicago &c. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93.

²² *Bennefield v. State*, 62 Ark. 365, 35 S. W. 790; *Hayes v. State*, 36 Tex. Cr. 146, 35 S. W. 983; *Lafferty v. State* (Tex. Cr.), 35 S. W. 374; *State v. Johnson*, 89 Iowa 1, 56 N. W. 404; *Dillard v. State*, 58 Miss. 368; *Haddix v. State*, 76 Neb. 369, 107 N. W. 781. A witness may usually be recalled for

the purpose of laying a foundation for his impeachment. *State v. Brown*, 111 La. 696, 35 So. 818.

²³ *Johnson v. State*, 55 Fla. 46, 46 So. 154; *Vann v. State*, 140 Ala. 122, 37 So. 158.

²⁴ *Hammond v. State*, 147 Ala. 79, 41 So. 761.

²⁵ *Ross v. State*, 169 Ind. 388, 82 N. E. 781.

clusion of all witnesses, expert,²⁶ or otherwise, from the courtroom while any witness is under examination.²⁷ The value and importance of this order in criminal trials to prevent collusion among witnesses are self-evident, and can hardly be overestimated. In the absence of statute the order is not of right. But it is seldom refused if it appears that the ascertainment of truth will be advanced. The matter, however, is wholly one of judicial discretion and neither side can claim it as matter of right. Hence the refusal of the court to exclude all the witnesses for the prosecution except the witness who is testifying is not reversible error which will entitle the accused to a new trial upon his conviction.²⁸ Thus the court does not err in refusing to exclude a detective who caused the arrest of the accused, and he may remain in court and assist the district attorney in framing questions based upon what he has found out in searching for the guilty party.²⁹

If a witness returns after leaving the court, or remains through inadvertence after the separation of witnesses has been ordered, the court may, in its discretion, refuse to permit him to be ex-

²⁶ *Vance v. State*, 56 Ark. 402, 19 S. W. 1066; *Reg. v. Frances*, 4 Cox C. C. 57.

²⁷ *Commonwealth v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *State v. Whitworth*, 126 Mo. 573, 29 S. W. 595; *State v. Fitzsimmons*, 30 Mo. 236; *State v. Davis*, 48 Kan. 1, 28 Pac. 1092; *Barnes v. State*, 88 Ala. 204, 7 So. 38, 16 Am. St. 48; *Kelly v. People*, 17 Colo. 130, 29 Pac. 805; *Nelson v. State*, 2 Swan (Tenn.) 237; *Heath v. State*, 7 Tex. App. 464; *Roberts v. Commonwealth*, 94 Ky. 499, 22 S. W. 845, 15 Ky. L. 341; *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8; *Talley v. State*, 2 Ga. App. 395, 58 S. E. 667; *Joseph v. Commonwealth*, 99 S. W. 311, 30 Ky. L. 638; *Conley v. State* (Tex. Cr.), 116 S. W. 806; *State v. Pell* (Iowa), 119 N. W. 154.

²⁸ See, generally, *McGuff v. State*, 88 Ala. 147, 7 Sp. 35, 16 Am. St. 25; *Barnes v. State*, 88 Ala. 204, 7 So. 38, 16 Am. St. 48; *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N. E. 471; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778; *State v. Davis*, 48 Kan. 1, 28 Pac. 1092; *People v. Machen*, 101 Mich. 400, 59 N. W. 664; *Murphey v. State*, 43 Neb. 34, 61 N. W. 491.

²⁹ *People v. Burns*, 67 Mich. 537, 35 N. W. 154.

As to exclusion of attorneys who are also witnesses see *Allen v. Commonwealth* (Ky.), 9 S. W. 703, 10 Ky. L. 582; *Powell v. State*, 13 Tex. App. 244; *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

aminated,⁸¹ and its action will not be reversible error unless serious injustice is done the prisoner, as, for example, where he is deprived of the evidence of a material witness.⁸² But this rule is not universally recognized. It is manifestly unfair to deprive one not at fault, of testimony on which he relies, and which may prove him innocent of a heinous and often capital crime, merely because his witness, through carelessness, obstinacy or caprice, refuses or neglects to obey the court. So when the defendant is not to blame the witness cannot be prevented from testifying.⁸³

If, however, the accused detains one of his witnesses in court or by any sort of connivance encourages the witness to remain in court after an order has been made to exclude the witnesses for the accused it has been held not error for the court to refuse to permit the witness to testify.⁸⁴

After witnesses not under examination have been ordered to withdraw, the court may permit one or more of them to remain, as circumstances may require. An exception must always be made in the case of the accused, if he is a witness, because of his constitutional right to be present and to confront the witnesses against him.⁸⁵ So an exception is always made in the case of

⁸¹ *State v. Fitzsimmons*, 30 Mo. 236; *State v. Brookshire*, 2 Ala. 303; *McLean v. State*, 16 Ala. 672; *Kelly v. People*, 17 Colo. 130, 29 Pac. 805; *Trujillo v. Territory*, 6 N. M. 589, 30 Pac. 870; *Hey v. Commonwealth*, 32 Gratt. (Va.) 946, 34 Am. 799; *Taylor v. State*, 131 Ga. 765, 63 S. E. 296; *State v. High*, 122 La. 521, 47 So. 878; *State v. Pell* (Iowa), 119 N. W. 154; *Fouse v. State*, 83 Neb. 258, 119 N. W. 478.

⁸² *Carlton v. Commonwealth* (Ky), 18 S. W. 535, 13 Ky. L. 946; *Cook v. State*, 30 Tex. App. 607, 18 S. W. 412; *Turner v. State* (Tex.), 32 S. W. 700.

⁸³ *Parker v. State*, 67 Md. 329, 10 Atl. 219, 1 Am. St. 387; *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103;

Cunningham v. State, 97 Ga. 214, 22 S. E. 954; *Bow v. People*, 160 Ill. 438, 43 N. E. 593; *State v. Jones*, 47 La. Ann. 1524, 18 So. 515; *Hellem v. State*, 22 Ark. 207; *Taylor v. State*, 130 Ind. 66, 29 N. E. 415; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *Grant v. State*, 89 Ga. 393, 15 S. E. 488; *Sartorius v. State*, 24 Miss. 602; *Pleasant v. State*, 15 Ark. 624; *State v. King*, 9 S. Dak. 628, 70 N. W. 1046; *Ashwood v. State*, 37 Tex. Cr. 550, 40 S. W. 273. The disobedient witness may be punished for contempt. *Lassiter v. State*, 67 Ga. 739.

⁸⁴ *Jackson v. State*, 14 Ind. 327; *State v. Gesell*, 124 Mo. 531, 27 S. W. 1101.

⁸⁵ *Boatmeyer v. State*, 31 Tex. Cr. 473, 20 S. W. 1102.

counsel, or a sheriff,³⁹ or other officer of the court,³⁷ or a juror³⁸ who is also a witness.³⁹

The fact that a witness comes into and remains in court, in ignorance of the rule, does not of necessity render him in contempt or make his testimony incompetent. This was so held where a witness for the prosecution through ignorance disobeyed the rule.⁴⁰

And in conclusion it may be said that the fact that witnesses, whether for the state or for the accused, have been put under the rule and excluded from the court-room, does not prevent the attorney who has called them from consulting with them.⁴¹

§ 226. Refusal to testify.—If a witness refuses to attend,⁴² or, if he attend and refuse to be sworn,⁴³ or to answer a relevant question without a satisfactory excuse,⁴⁴ or acts insolently or disrespectfully towards the court or the grand jury,⁴⁵ he is guilty of a contempt.

The power to punish a contumacious witness for refusing to testify is limited to courts of record and to legislative bodies, in the absence of any statute conferring it on other officials whose

³⁹ *Askew v. State*, 3 Ga. App. 79, 59 S. E. 311; *Webb v. State*, 100 Ala. 47, 14 So. 865.

³⁷ *Kelly v. People*, 17 Colo. 130, 29 Pac. 805; *State v. Hopkins*, 50 Vt. 316; *Green v. State*, 49 Tex. Cr. 645, 98 S. W. 1059; *People v. Nunley*, 142 Cal. 441, 76 Pac. 45; *Jackson v. State*, 55 Tex. Cr. 79, 115 S. W. 262; *Smith v. State*, 52 Tex. Cr. 80, 105 S. W. 501; *State v. Pell* (Iowa), 119 N. W. 154. See *People v. McGarry*, 136 Mich. 316, 99 N. W. 147, 11 Det. Leg. N. 10.

³⁸ *State v. Vari*, 35 S. Car. 175, 14 S. E. 392, and see *Underhill on Ev.*, p. 468, n. 4.

³⁹ The court will not prohibit excluded witnesses from reading newspapers containing accounts of the trial. *Commonwealth v. Hersey*, 2 Allen (Mass.) 173.

⁴⁰ *State v. Watson*, 36 La. Ann. 148; *Cook v. State*, 30 Tex. App. 607, 18 S. W. 412.

⁴¹ *Bryan v. Commonwealth* (Ky.), 33 S. W. 95, 17 Ky. L. 965; *Allen v. State*, 61 Miss. 627; *Williams v. State*, 35 Tex. 355; *Jones v. State*, 3 Tex. App. 150; *Brown v. State*, 3 Tex. App. 294.

⁴² *Burr's Trial*, 354; *Langdon, Ex parte*, 25 Vt. 680; *Ellerbe, In re*, 13 Fed. Rep. 530; *Judson, Ex parte*, 3 Blatchf. C. C. 89. An attachment will not issue to compel an expert witness or an interpreter to attend. *Roelker, In re*, Sprague Dec. 276.

⁴³ *Stice, Ex parte*, 70 Cal. 51, 11 Pac. 459.

⁴⁴ *United States v. Coolidge*, 2 Gall. C. C. (U. S.) 364, 25 Fed. Cas. 14853.

⁴⁵ *United States v. Caton*, 1 Cranch C. C. 150.

duty it may be to interrogate witnesses.⁴⁶ A court may punish as a contempt the refusal of a witness to testify before a commissioner appointed by it to take depositions,⁴⁷ or before the grand jury over which it exercises control,⁴⁸ and it may do so often as the witness refuses.⁴⁹ When the witness has the statutory right to answer pertinent questions only, he cannot be committed for contempt if he refuses to answer those which are not pertinent.⁵⁰ If the court has not obtained jurisdiction, a witness who refuses to testify is not in contempt.⁵¹

§ 227. *Interpreting the language of the witness.*—The employment of an interpreter when the witness is unable to speak or to understand the English language,⁵² and the manner in which the examination through the interpreter shall be conducted,⁵³ are discretionary with the court when not expressly regulated by statute. But, where a party in a civil trial was deprived of the testimony of a material witness (and a *fortiori* this rule would seem applicable where one is accused of crime), by the refusal of the court to accept an interpreter who was offered, a new trial was granted.⁵⁴

⁴⁶ *People v. Rice*, 57 Hun (N. Y.) 62, 10 N. Y. S. 270, 32 N. Y. St. 7; *White v. Morgan & Co.*, 119 Ind. 338, 21 N. E. 968; *Llewellyn's Case*, 13 Pa. Co. Ct. 126; *Woodworth*, *Ex parte*, 29 W. L. Bul. 315, and cases in *Underhill on Ev.*, p. 468.

⁴⁷ *Robb's Petition*, 11 Pa. Co. Ct. 442. "A justice of the peace, though he cannot commit a witness for contempt, may bind a party refusing to testify to answer an indictment for obstructing justice." *Albright v. Lapp*, 26 Pa. St. 99.

⁴⁸ *United States v. Caton*, 1 Cranch C. C. 150; *Harris*, *Ex parte*, 4 Utah 5, 5 Pac. 129; *People v. Fancher*, 2 Hun 226; *People v. Kelly*, 24 N. Y. 74; *Stice*, *Ex parte*, 70 Cal. 51, 11 Pac. 459.

⁴⁹ *Stice*, *Ex parte*, 70 Cal. 51, 11 Pac. 459.

⁵⁰ *Zeehandelaar*, *Ex parte*, 71 Cal. 238, 12 Pac. 259.

⁵¹ *People v. Warner*, 51 Hun 53, 3 N. Y. S. 768. A publisher of a newspaper who refuses to testify or give the real name of the author of a libelous article may be punished for contempt, though he himself is under indictment for the libel. *Pledger v. State*, 77 Ga. 242, 3 S. E. 320.

⁵² *Horn v. State*, 98 Ala. 23, 13 So. 329; *State v. Severson*, 78 Iowa 653, 43 N. W. 533; *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552; *Thomason v. Territory*, 4 N. Mex. 150, 13 Pac. 223.

⁵³ *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695. See *People v. Salas*, 2 Cal. App. 537; 84 Pac. 295, where under Code § 1884 the court had the right to appoint a resident of the county as an interpreter.

⁵⁴ *Chicago & C. R. Co. v. Shenk*, 131

A witness may act as interpreter.⁵⁵ But every non-official interpreter should be sworn to interpret truly.⁵⁶ The accuracy of the interpretation is a question for the jury,⁵⁷ and either side may impeach its accuracy by cross-examining the interpreter, or by producing another claimed to be more accurate.⁵⁸

§ 228. **Improper reception of evidence by the jurors.**—For the jury in a criminal trial to seek or to receive evidence out of court is in the highest degree improper. Such action prejudicing the accused will, if the verdict might have been influenced thereby, be ground for a new trial.

Jurors will not be permitted to experiment,⁵⁹ or take a private and unauthorized view, or to communicate with other persons.

Ill. 283, 23 N. E. 436. Cf. *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37.

⁵⁵ One of several witnesses summoned before the grand jury may act as an interpreter for the others. *People v. Ramirez*, 56 Cal. 533, 38 Am. 73. A juror may, with the defendant's consent, act as interpreter. *People v. Thiede*, 11 Utah 241, 39 Pac. 837; *Thiede v. Utah Territory*, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. 62; *Chicago & C. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436.

⁵⁶ *People v. Dowdigan*, 67 Mich. 95, 38 N. W. 920. Cf. *United States v. Gibert*, 2 Sumn. (U. S.) 19. The fact that the interpreter is assisted by one or more bystanders who are unsworn, and when he is doubtful uses their knowledge as an aid to his own judgment, rendering his own version finally to the court, is not error. *United States v. Gibert*, 2 Sumn. (U. S.) 19.

⁵⁷ *Schnier v. People*, 23 Ill. 11.

⁵⁸ *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695. The fact that evidence in a criminal trial is received through an interpreter does not render it hearsay. *State v. Hamilton*, 42 La. Ann. 1204,

8 So. 304; *Nioum v. Commonwealth*, 128 Ky. 685, 108 S. W. 945, 33 Ky. L. 62. Though the appointment of an interpreter is usually discretionary in the absence of statute one is almost always appointed if the necessity is at all apparent. Usually it is the accused who needs the interpreter and if he has any difficulty in understanding English an interpreter ought to be appointed in justice to him. The fact that he understands or speaks the English language to a limited extent ought not to deprive him of the services of an interpreter if necessary to enable him to make his defense.

⁵⁹ *Yates v. People*, 38 Ill. 527; *Forehand v. State*, 51 Ark. 553, 11 S. W. 766; *People v. Conkling*, 111 Cal. 616, 44 Pac. 314; *State v. Sanders*, 68 Mo. 202, 30 Am. 782. Where the question was, could the prisoner's voice have been heard on a certain occasion, the experiment of stationing a man outside the jury-room, who was to listen and report if he could hear the voices of the jurors through a closed door, was held ground for a new trial. *Jim v. State*, 4 Humph. (Tenn.) 289.

and particularly with witnesses.⁶⁰ But communications by jurors with outsiders may be disregarded if it clearly appears that no injustice has resulted to the accused.⁶¹

Neither party to a criminal trial has the right to submit documentary or other evidence to the jury except during the trial and in the presence of the court. The reception of evidence out of court may cause a conviction to be reversed. And with much better reason, writings which are no part of the evidence, such as newspapers,⁶² maps or diagrams,⁶³ scientific books,⁶⁴ or legal publications,⁶⁵ are not permitted to be perused by the jury.⁶⁶ The jurors may, when out of court, consult memoranda or notes of the judge's charge,⁶⁷ and all papers which are in evidence,⁶⁸ including the indictment.⁶⁹

⁶⁰ *Epps v. State*, 19 Ga. 102; *State v. Fruge*, 28 La. Ann. 657; *March v. State*, 44 Tex. 64; *Collier v. State*, 20 Ark. 36. If a juror has knowledge of the facts or of the character of a witness, he should be called as a witness. Where the verdict is based upon or influenced by statements of facts known to the juror made in the jury-room, which would be relevant evidence if he were a witness, a new trial will be granted. *Taylor v. State*, 52 Miss. 84; *Anschicks v. State*, 6 Tex. App. 524; *McKissick v. State*, 26 Tex. App. 673, 9 S. W. 269; *Lucas v. State*, 27 Tex. App. 322, 11 S. W. 443.

⁶¹ *People v. Boggs*, 20 Cal. 432; *Epps v. State*, 19 Ga. 102.

⁶² *State v. Robinson*, 20 W. Va. 713, 43 Am. 799.

⁶³ *State v. Hartmann*, 46 Wis. 248, 250, 50 N. W. 193; *State v. Lantz*, 23 Kan. 728, 33 Am. 215.

⁶⁴ *State v. Gillick*, 10 Iowa 98.

⁶⁵ *Phillips v. State* (Tex., 1896), 34 S. W. 539; *State v. Wilson*, 40 La. Ann. 751, 5 So. 52, 1 L. R. A. 795; *State v. Smith*, 6 R. I. 33; *Bernhardt v. State*, 82 Wis. 23, 51 N. W. 1009; *Harris v. State*, 24 Neb. 803, 40 N. W. 317; *State v. Hopper*, 71 Mo. 425;

Johnson v. State, 27 Fla. 245, 9 So. 208; *State v. Gillick*, 10 Iowa 98.

⁶⁶ See *Underhill on Ev.*, p. 490, citing cases. The mere presence of law books, etc., in the jury-room is not enough, if the jury did not read them. *State v. Harris*, 34 La. Ann. 118; *State v. Tanner*, 38 La. Ann. 307. This must be shown. It will not be presumed. *Jones v. State*, 89 Ind. 82. Cf. *Mulreed v. State*, 107 Ind. 62, 7 N. E. 884.

⁶⁷ *State v. Thompson*, 83 Mo. 257, 261; *Hurley v. State*, 29 Ark. 17.

⁶⁸ *People v. Formosa*, 61 Hun 272, 16 N. Y. S. 753; *Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *United States v. Wilson*, 69 Fed. 584; *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *State v. Raymond*, 53 N. J. L. 260, 21 Atl. 328; *Baker v. Commonwealth* (Ky.), 17 S. W. 625, 13 Ky. L. 571; *State v. Tompkins*, 71 Mo. 613; *People v. Cochran*, 61 Cal. 548; *Cargill v. Commonwealth*, 93 Ky. 578, 20 S. W. 782, 14 Ky. L. 517. Depositions, however, may be excluded. *State v. Carr*, 20 W. Va. 679; *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *Baker v. Commonwealth* (Ky.), 17 S. W. 625.

⁶⁹ *Stout v. State*, 90 Ind. 1.

The impropriety and unfairness of permitting jurors to take in the jury-room articles of personal property which have been used to explain the evidence, and from which they may draw, in the absence of judge, counsel and accused, erroneous and unjust inferences will be admitted. Hence, by the majority of the cases it is held that for the jury to take into the jury-room a weapon, alleged to have been employed by the accused, is reversible error.⁷⁰ There are cases, however, which hold the contrary, and if the accused consent, it seems that articles, as clothing, not in evidence, may be taken by the jury to aid them in their deliberations.⁷¹

§ 229. View by the jurors—Discretionary power of the court.—

The court is sometimes permitted by statute to direct the jury trying a criminal to be taken in a body, in charge of proper officers, to the place where the crime was committed, or where a material fact or transaction occurred, or they may be taken out of court to view some bulky article of personal property, as a wagon, which cannot be brought into the court-room. The exercise of the statutory power is usually altogether discretionary,⁷² and a refusal to grant a view is not error unless it clearly appear that it was necessary and practicable, and that the denial of the request substantially injured the accused.

A view cannot, however, be ordered by the court in the absence of statute without the consent of all parties.⁷³ Sometimes

⁷⁰ Forehand v. State, 51 Ark. 553, 11 S. W. 766; Yates v. People, 38 Ill. 527; Forehand v. State, 51 Ark. 553, 11 S. W. 766; People v. Thornton, 74 Cal. 482, 16 Pac. 244; English v. State, 31 Fla. 340, 12 So. 689; McCoy v. State, 78 Ga. 490, 3 S. E. 768; compare *contra*, State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223; Powell v. State, 61 Miss. 319; Jack v. Washington Territory, 2 Wash. Ter. 101, 3 Pac. 832.

⁷¹ People v. Mahoney, 77 Cal. 529, 20 Pac. 73.

⁷² Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n; People v. Hawley, 111 Cal. 78, 43 Pac. 404; State v. Adams, 20 Kan.

311; People v. Bonney, 19 Cal. 426; Benton v. State, 30 Ark. 328; Chure v. State, 19 Minn. 271. See also, Underhill on Ev., § 344; State v. Hunter, 18 Wash. 670, 52 Pac. 247.

⁷³ State v. Bertin, 24 La. Ann. 46; Bostock v. State, 61 Ga. 635; Commonwealth v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491. In Smith v. State, 42 Tex. 444, it was held that a view cannot, in the absence of a statute, be ordered on the request of the state, even if the accused consents, as it will be presumed he consented because he did not wish to show a lack of confidence in the jury's powers of observation.

the statutory power may be exercised *sua sponte*. Usually the view can be directed only on request or with the consent of all parties. Whether in any case a request or consent is necessary depends upon the express terms of the statutes, which should be consulted.⁷⁴

§ 230. **Purpose of the view is to afford evidence.**—The authorities are divided upon the question whether the purpose of taking the view is to furnish new evidence or to enable the jurors to comprehend more clearly in the light of fuller knowledge, and by the aid of visible objects, the evidence received in court. The latter proposition is well supported,⁷⁵ and seems more consistent with the conservative theories on which the rules of evidence and procedure in jury trials are based.⁷⁶ But the contrary opinion that the purpose of the view is to supply evidence is also held and supported by the majority of the cases.⁷⁷ Indeed, where the evidence regarding the *locus in quo* is at all contradictory, it is a mental impossibility for the jury to view it without receiving some knowledge through their eyes which, so far as it modifies the facts proved, or reconciles conflicting evidence, is itself evidence.⁷⁸

§ 231. **The right of the accused to be present during the taking of the view.**—From this diversity of opinion it follows that the right of the accused to be present at the view is not settled. If the purpose of the view is to obtain evidence the view is a part

⁷⁴ *Conrad v. State*, 144 Ind. 290, 43 N. E. 221.

⁷⁵ *Shular v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. 211; *Sasse v. State*, 68 Wis. 530, 32 N. W. 849; *State v. Adams*, 20 Kan. 311; *O'Berry v. State*, 47 Fla. 75, 36 So. 440.

⁷⁶ In *Close v. Samm*, 27 Iowa 503, it is said: The purpose is to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same and thereby the more intelligently to apply the testimony to the issues on trial before

them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party. See cases cited in note 1, p. 282, and civil cases *Underhill on Ev.*, p. 491.

⁷⁷ *State v. Bertin*, 24 La. Ann. 46; *Smith v. State*, 42 Tex. 444; *Benton v. State*, 30 Ark. 328. See cases cited in note.

⁷⁸ *People v. Bush*, 68 Cal. 623, 10 Pac. 169.

of the trial and the presence of the accused is indispensable, even where the statute is silent, as he has a constitutional right to confront the witnesses, to hear the evidence and to observe the actions of the jury.⁷⁹ While if the view does not furnish evidence his presence, while allowable, is not indispensable,⁸⁰ for it is then held that taking the view is no part of the trial, but rather a part of the jury's deliberation, during which the accused has no right to be present. The accused cannot be compelled to be present, at least in those states where the view is not regarded as furnishing evidence. He may either expressly, or by laches in claiming his right, waive the right to be present.⁸¹

A view may be had after the summing up,⁸² but no oral evidence should be brought before the jury, nor should they be separated while it is taken.⁸³ The duty of the showmen of the view, who are usually officers sworn for the purpose, though a witness,⁸⁴ or a juror who is familiar with the scene, may serve.⁸⁵ It is only to point out the place.⁸⁶ It is always the safer and better course for the presiding judge to be present at the view.⁸⁷ His absence has, in one instance at least, been held reversible error.⁸⁸

⁷⁹ *Benton v. State*, 30 Ark. 328; *People v. Bush*, 71 Cal. 602, 12 Pac. 781, 68 Cal. 623, 634, 10 Pac. 169; *People v. Palmer*, 43 Hun 397, 109 N. Y. 413, 17 N. E. 213; *Rutherford v. Commonwealth*, 78 Ky. 639; *State v. Congdon*, 14 R. I. 267; *State v. Sanders*, 68 Mo. 202, 30 Am. 782; *Eastwood v. People*, 3 Park. Cr. Rep. 25; *Sasse v. State*, 68 Wis. 530, 32 N. W. 849; *Carroll v. State*, 5 Neb. 31; *Foster v. State*, 70 Miss. 755, 12 So. 822; *Conrad v. State*, 144 Ind. 290, 43 N. E. 221. *Contra*, under statute *Shular v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. 211. A person accused of crime is deprived of his right of appearing in person and of being confronted by the witnesses if the jury view the *locus in quo* without his presence. *People v. Lowrey*, 70 Cal. 193, 11 Pac. 605.

⁸⁰ *Commonwealth v. Knapp*, 9 Pick.

(Mass.) 496, 20 Am. Dec. 491; *People v. Bonney*, 19 Cal. 426; *State v. Ah Lee*, 8 Ore. 214; *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103; *State v. Adams*, 20 Kan. 311.

⁸¹ *State v. Reed*, 3 Idaho 754, 35 Pac. 706; *State v. Moran*, 15 Ore. 262, 14 Pac. 419; *Sasse v. State*, 68 Wis. 530, 32 N. W. 849.

⁸² *Patchin v. Brooklyn*, 2 Wend. (N. Y.) 377.

⁸³ *People v. Hull*, 86 Mich. 449, 49 N. W. 288; *State v. Landry*, 29 Mont. 218, 74 Pac. 418.

⁸⁴ *People v. Bush*, 71 Cal. 602, 12 Pac. 871.

⁸⁵ *State v. Adams*, 20 Kan. 311.

⁸⁶ *State v. Lopez*, 15 Nev. 407; *Hayward v. Knapp*, 22 Minn. 5.

⁸⁷ *Benton v. State*, 30 Ark. 328.

⁸⁸ *People v. Yut Ling*, 74 Cal. 569, 16 Pac. 489. A view may be granted though the place does not lie in the

§ 232. Presence of the accused while taking testimony.—In order that a verdict of guilty of a felony shall stand, it is absolutely necessary that the examination of witnesses shall take place only during the actual presence of the accused in the court-room.⁸⁹ He must be present when the witness is sworn,⁹⁰ and an error in receiving evidence in his absence is not cured by the repetition of the questions and answers on his return.

Whether the prisoner was prejudiced by the testimony given in his absence is immaterial. Though the court has excluded the evidence which he did not hear, or has caused it to be repeated in his presence, still he has been deprived of his right to see the witness, and to watch and to observe his every look, gesture and motion. The court must see that the prisoner is present, and must allow nothing to be done in his absence. As soon as his absence is noticed, the trial should be suspended or adjourned.⁹¹

But this rule, while designed to secure him in his constitutional right to confront the witnesses, should not be invoked to delay the trial. He may not indulge in disorderly actions or noisy and outrageous behavior, and shelter himself behind his privilege. No step which is original in character can be taken in the prisoner's absence. But after the evidence is in, and the jury has been instructed and has retired, the stenographer may read the evidence to the jury from his notes in the prisoner's absence. This is merely a repetition of what has already been said in his presence.⁹²

county where the case is on trial. *People v. Bush*, 71 Cal. 602, 12 Pac. 781.

⁸⁹ *Jackson v. Commonwealth*, 19 Gratt. (Va.) 656; *State v. Moran*, 46 Kan. 318, 26 Pac. 754; *Adams v. State*, 28 Fla. 511, 10 So. 106; *State v. David*, 14 S. Car. 428.

⁹⁰ *Bearden v. State*, 44 Ark. 331; *Simpson v. State*, 31 Ind. 90 (a child witness); *People v. McNair*, 21 Wend. (N. Y.) 608.

⁹¹ *Richards v. State*, 91 Tenn. 723, 20 S. W. 533, 30 Am. St. 907; *People v. Kohler*, 5 Cal. 72; *Rolls v. State*, 52 Miss. 391; *Garman v. State*, 66 Miss.

196, 5 So. 385; *State v. Greer*, 22 W. Va. 800. Where the accused is by mistake taken from the court room while the competency of a witness is under discussion an error is made. The accused has a right to hear the argument on the admissibility of evidence as well as the evidence itself, and the fact that the court directs it to be gone over cannot place him in the position of having heard what was said in his absence. *Adams v. State*, 28 Fla. 511, 10 So. 106.

⁹² *State v. Haines*, 36 S. Car. 504, 15 S. E. 555.

The record must show that the prisoner was in court during the trial, though it need not show his presence was continuous and uninterrupted. If the record shows he was in court when the trial began, his continuous presence during the taking of testimony will be presumed in the absence of evidence to the contrary.⁹³

§ 233. Experiments in and out of court.—A non-expert witness will not be permitted to testify to the results of experiments made out of court.⁹⁴ But, if the conditions and circumstances existing or alleged to exist in the case, and surrounding the subject-matter, are reproduced for the experiment, a witness who is an expert may accompany his statement of opinion with a statement of the result of an experiment out of court.⁹⁵

So, in a murder trial, the state may prove the result observed after shooting a bullet through material identical with the clothing worn by the deceased, the same weapon being employed.⁹⁶

⁹³ *Brown v. State*, 29 Fla. 543, 10 So. 736; *Sylvester v. State*, 71 Ala. 17; *Simpson v. State*, 56 Miss. 297. One accused of misdemeanor may in the court's discretion be tried in his absence. *Sharp v. Commonwealth (Ky.)*, 30 S. W. 414, 16 Ky. L. 840; *State v. Lucker*, 40 S. Car. 549, 18 S. E. 797.

⁹⁴ *State v. Justus*, 11 Ore. 178, 8 Pac. 337, 50 Am. 470; *Smith v. State*, 46 Tex. Cr. 267, 81 S. W. 936, 108 Am. St. 991.

⁹⁵ *Commonwealth v. Piper*, 120 Mass. 185; *Boyd v. State*, 14 Lea (Tenn.) 161; *State v. Jones*, 41 Kan. 309, 21 Pac. 265; *Underhill on Ev.*, p. 296. Where the question is, were the fatal wounds found upon the skull of the deceased caused by a blow from a poker which is in evidence, the defendant cannot prove the results of an experiment with a different poker on the skull of a dead body. The different motives with which the actual criminal and the experimenting

witness must have handled the weapons must be considered. *Commonwealth v. Twitchell*, 1 Brewst. (Pa.) 551. See also *Lillie v. State*, 72 Neb. 228, 100 N. W. 316; *State v. Nowells*, 135 Iowa 53, 109 N. W. 1016; *State v. Bean*, 77 Vt. 384, 60 Atl. 807. Comprehensive notes on experiments as evidence, see 53 Am. St. 375, 14 L. R. A. 221; discretion of court in admitting or rejecting evidence of experiments, 53 Am. St. 384.

⁹⁶ *Sullivan v. Commonwealth*, 93 Pa. St. 284; *Commonwealth v. Sullivan*, 13 Phil. 410. Cf. *Evans v. State*, 109 Ala. 11, 19 So. 535. On a trial for poisoning a horse a witness was permitted to state that, after the horse died, he gave some of the contents of its stomach to a hen, which died at once. *State v. Isaacson*, 8 S. Dak. 69, 65 N. W. 430. An experiment, otherwise admissible, is not to be excluded because the defendant was not present when it was made. *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046.

An expert may be allowed to conduct an experiment in court to illustrate or emphasize his testimony, if it appears independently that the exact conditions alleged to have existed are reproduced before the jury.⁹⁷

If the conditions under which the experiment is made out of court do not correspond with those existing at the time of the crime, evidence derived from the experiment must be rejected. So where the point at issue was whether the witnesses had seen a certain occurrence in a field, the evidence of a witness who several months later went to the field and looked about and who testified that the view was obstructed by trees and bushes so that he could not see the field, will not be received.⁹⁸

And articles with which experiments have been made are not admissible in evidence unless they are similar in character to the articles proved to have been connected with the commission of the crime.⁹⁹ But the reproduction in the experiments of the conditions and circumstances existing, or alleged to have existed in the case, need not be exact in all particulars if the material circumstances and conditions are reproduced. So, where an ex-

⁹⁷ *State v. Smith*, 49 Conn. 376; *Siberry v. State*, 133 Ind. 677, 33 N. E. 681; *State v. Fletcher*, 24 Ore. 295, 33 Pac. 575; *People v. Hope*, 62 Cal. 291; *Hisler v. State*, 52 Fla. 30, 42 So. 692; *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654; *State v. Ronk*, 91 Minn. 419, 98 N. W. 334; *Spires v. State*, 50 Fla. 121, 39 So. 181. In case the experiment will consume some time it is not an abuse of judicial discretion for the court to refuse to permit an experiment to be made in open court. *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631. The matter is largely in the judicial discretion. *Polin v. State*, 14 Neb. 540, 16 N. W. 898. In the very recent case of the *People v. Luetgert*, the trial of which in the city of Chicago, Ill., has just terminated in a disagreement of the jury, the relevancy and propriety of evidence of experiments conducted

out of court received much attention. The prosecution alleged that the prisoner, after killing his wife, immersed her body for a lengthy period in a chemical preparation contained in a vat located in a factory of which he was the proprietor, the effect of which was to dissolve and disintegrate it to such an extent that only a few small pieces of bone were subsequently found intact. The accused was permitted to offer in evidence the results of an experiment made by immersing the body of a woman in a chemical preparation admitted to be the same as that alleged to have been used by the accused.

⁹⁸ *Sherrill v. State*, 138 Ala. 3, 35 So. 129. Note on experiments before jury during view, 42 L. R. A. 384.

⁹⁹ *Hisler v. State*, 52 Fla. 30, 42 So. 692.

periment was made by firing bullets from a pistol which was found at the scene of the crime, the bullets thus fired might be offered in evidence in comparison with the bullets extracted from the body of the person whom the accused was alleged to have killed, though the pistol which was used had been cleaned after its discovery at the scene of the crime.¹⁰⁰

Evidence procured by means of experiments is usually offered in homicide upon the question of the manner in which the fatal shot was fired or wound inflicted and particularly as to the nearness of the weapon to the body of the deceased. A witness, whether an expert or a non-expert, may testify that, having measured the powder marks surrounding a gunshot wound which cause death he experimented with the pistol alleged to have been used by the deceased, or with a weapon of similar caliber, by discharging it at an object substantially similar in character to the skin or flesh of the human body. He may then testify to the extent and character of the bullet hole and powder marks which resulted from his experiment, and may compare them with the condition of the body of the deceased. If an expert, he may give his opinion in connection with evidence of the experiment as to how near the weapon was to the deceased when it was discharged.¹

One who was present at the time and place of the crime may be able to describe what took place, without being able to give in detail everything that he could have seen there. This constitutes no valid objection to the competency of his evidence, though it may be considered in determining his credibility. If it becomes material to identify certain objects at the scene of the crime, a witness may be permitted to revisit it in charge of an officer of the court and, thus having refreshed his memory, by going over the ground, he may describe the objects which he saw. Of course, this is proper only where it is proved that the condition of the scene of the crime has not been materially changed since the crime.²

¹⁰⁰ *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

¹ *State v. Nagle*, 25 R. I. 105, 54 Atl.

1063, 105 Am. St. 864; *State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

² *State v. DeHart*, 38 Mont. 211, 99 Pac. 438.

CHAPTER XIX.

THE IMPEACHMENT OF WITNESSES.

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§ 234. **Impeachment of witnesses—General rule.**—A party in whose behalf a witness is called to testify will not, as a general rule (to which, however, there are some exceptions), be permitted to impeach the veracity or credibility of the witness.

The law presumes that he is acquainted with the character of his own witness, and knows before he calls him whether he is a truthful man or the reverse. So, too, the party must or ought to be thoroughly aware whether or no his witness has any knowledge of the facts in issue, and if he calls him to prove any particular fact he is concluded by his testimony and cannot contra-

dict him as to that fact. Hence, applying this rule to criminal prosecutions, it cannot be presumed that the state's attorney, in the performance of his duty to secure the punishment of criminals, will stoop to offer untruthful testimony for that purpose. Nor can we with justice suppose that the accused, whom the law presumes innocent until his guilt is proved beyond a reasonable doubt, contemplates or intends the willful introduction of perjured testimony. Hence, the mere calling of a witness by either side is, in law, an implied representation that the witness is worthy of belief.

The rule, as thus stated, is applicable to exclude direct impeachment alone. That is, the party cannot show that the reputation of his own witness for veracity is bad, nor prove that he made contradictory statements out of court, nor contradict him, solely for the purpose of impeachment. The party may be compelled by the exigencies of the case to impeach his witness incidentally and indirectly. He may have to do this or lose the opportunity of proving relevant facts which are vitally important in their bearing upon the guilt or innocence of the accused. The law does not forbid the proof of any relevant fact which may have a tendency to show the truth merely because the proof of that fact indirectly, though positively, contradicts, and thus, of necessity, discredits and impeaches the testimony of some other witness to that or some other relevant fact.¹ Nor is it material that the result of such an incidental conflict of evidence is to show that one or the other of the witnesses is totally unworthy of credit.

§ 235. The impeachment of necessary witnesses and those unexpectedly hostile.—If either party is, by law, under the circumstances of the case, compelled to call a particular person to prove any fact, the party calling him cannot be said to vouch for this witness that the law forces upon him. Accordingly, a party who is compelled to prove the execution of a writing by producing the subscribing witnesses under a statute requiring this proof is

¹ *United States v. Watkins*, 3 Ga. 754, 13 S. E. 87; *Reyes v. State*, Cranch C. C. 441, 28 Fed. Cas. 16649; 48 Tex. Cr. 346, 88 S. W. 245. For *Chism v. State*, 70 Miss. 742, 12 So. 852; *State v. Cummins*, 76 Iowa 133, 40 N. W. 124; *Dixon v. State*, 86 Ga. 754, 13 S. E. 87. For a discussion of the double meaning of the word "impeach," see Underhill on Evidence, p. 500, § 347.

not concluded by the answers of such witnesses. If the subscribing witnesses deny their signatures or their presence at the execution, the party who called them may directly contradict them by other witnesses, or their reputation for veracity may be impeached.² Another exception to the rule forbidding a party to contradict his own witness occurs where the witness is treacherous and proves unexpectedly hostile in his testimony upon the stand. In such circumstances it would be most unfair to the accused, if the witness has been called in his behalf, to permit him to be convicted merely because a witness on whom he has depended for exculpation has betrayed him at a critical moment in his defense. The witness may have been, or may be when he testifies, in the secret employment or under the control of a prosecuting attorney who may have permitted professional zeal to overcome his sense of justice and right, or he may be a secret enemy of the prisoner, desirous of revenging himself in this underhand manner. On the other hand, the consciousness existing in the mind of the accused that he is guilty may, and no doubt frequently does, impel him to practice such an artifice by which the case against him will unexpectedly be broken down.

A man who deliberately engages in such an enterprise, with the purpose and intention of giving evidence when on the stand by which the party who calls him will be routed and confounded, may have stated the facts differently out of court for the express purpose of luring the party into calling him. If he then gives a widely variant version of relevant facts, to the surprise of the party in whose favor he was called, his extra-judicial declarations may be proved, but solely for the purpose of impeachment.^{2a}

The party must first show that the evidence, as given, has taken him by surprise and that the witness is hostile. The witness may then be asked if he has made contradictory statements out of court, the times, places and circumstances of the statements being described to him in detail.³ But the fact that a witness, when

² Shorey v. Hussey, 32 Me. 579, 581; Orser v. Orser, 24 N. Y. 51; Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253, and cases cited in Underhill on Evidence, p. 502, § 348.

^{2a} Sylvester v. State, 46 Fla. 166, 35 So. 142.

³ Conway v. State, 118 Ind. 482, 488, 21 N. E. 285; Rhodes v. State, 128 Ind. 189, 192, 27 N. E. 866; Williams v. State, 25 Tex. App. 76, 90, 7 S. W. 661; Schuster v. State, 80 Wis. 107, 117, 49 N. W. 30; State v. Tall, 43 Minn. 273, 275, 45 N. W.

on the stand, seems ignorant of some or all the facts he was expected to know will not permit the examining party to prove that he made the desired statements out of court.⁴ In order that one's own witness may be contradicted, mere silence or ignorance on his part is not enough. The witness must testify expressly, and in terms to facts which are in direct contradiction to his prior extra-judicial statements.⁵

The rule by which one's own witness, who unexpectedly proves hostile, may be impeached by proving contradictory statements made out of court has been confirmed by statute in some states. The rule applies to criminal as well as to civil cases.⁶ But such statutes, being somewhat in derogation of common-law principles, usually receive a strict construction.⁷ All the circumstances of time, place and person ought to be detailed to the witness. It is not enough merely to ask him if he made contradictory statements to a particular person,⁸ without stating where and when they were made.

449; *People v. Sweeney*, 55 Mich. 586, 591, 22 N. W. 50; *People v. Jacobs*, 49 Cal. 384; *State v. Sortor*, 52 Kan. 531, 34 Pac. 1036; *McAlpine v. State*, 117 Ala. 93, 23 So. 130; *Barber v. State*, 3 Ga. App. 598, 60 S. E. 285. For example, a witness for the state, proving hostile, may be asked if he did not make contradictory statements before the grand jury. *People v. O'Neill*, 107 Mich. 556, 65 N. W. 540. But see *contra*, the divided opinion of the court in *Putnam v. United States*, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. 923.

⁴ *Adams v. State*, 34 Fla. 185, 15 So. 905; *Chism v. State*, 70 Miss. 742, 12 So. 852; *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106.

⁵ *Gibson v. State*, 34 Tex. Cr. 218, 29 S. W. 471. *Contra* *Southworth v. State*, 52 Tex. Cr. 532, 109 S. W. 133. To entitle the prosecution to impeach one of its witnesses by contradictory statements it must prove that having taken due steps to inquire of the wit-

ness what he would testify to it has been deceived and surprised. If the state's attorney relies solely for information as to the expected testimony of his witness upon what outside parties tell him the witness will say, and neglects to talk to his witness, he cannot plead surprise. *Dunk v. State*, 84 Miss. 452, 36 So. 609.

⁶ *State v. Sederstrom*, 99 Minn. 234, 109 N. W. 113.

⁷ *Williams v. State*, 25 Tex. App. 76, 7 S. W. 661; *Blackburn v. Commonwealth*, 12 Bush (Ky.) 181, 184, 185; *Underhill on Evidence*, p. 503, note 3.

⁸ *Commonwealth v. Thyng*, 134 Mass. 191; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *Underhill on Evidence*, § 342. A statute permitting a "person" introducing a witness, where he proves hostile, to impeach him, permits the state to do this in a criminal case. *Brown v. State* (Tex. Cr. 1908), 114 S. W. 820. The prosecution in the case of

The extent to which the impeachment of one's own witness may be carried is largely a matter of judicial discretion. It must appear that the witness is hostile and not merely reluctant to give testimony.⁹ Unless the testimony is actually prejudicial to the party calling the witness, he cannot be impeached.¹⁰

And in all cases the court ought to limit the impeaching testimony to the purpose for which it is introduced. Its purpose is not so much to break down the credibility of all the testimony of the hostile witness as to supply material facts which the hostile witness was expected but failed to prove. The credibility of the hostile witness is still for the jury.¹¹

§ 236. Impeachment of adverse witness by showing bad reputation for veracity—Belief under oath.—Independent evidence tending directly to show that a witness possesses a bad reputation for veracity is always admissible to impeach an adverse witness after he has been examined in chief by the party calling him.¹² The same rule applies where a showing is made for an absent witness and received as evidence.¹³ The impeaching witness ought to be called from among those persons who are resident near the domicile of the witness to be impeached. He must first be asked if he knows the general reputation of the witness, and if he does not know it he is incompetent. If the court believes he knows the reputation of the witness for veracity he may then state what that reputation is.¹⁴ Evidence of reputation for truthfulness or the reverse is not admissible, unless it relates to the reputation of the witness which is prevalent in the locality where he resides.¹⁵ The reputation proved must be recent. The fact

an unexpectedly hostile witness may show that he had testified differently at the inquest. *State v. Jennings*, 48 Ore. 483, 87 Pac. 524.

⁹ *Southworth v. State*, 52 Tex. Cr. 532, 109 S. W. 133.

¹⁰ *Nathan v. State*, 130 Ga. 48, 61 S. E. 994.

¹¹ *Sapp v. State* (Tex. Cr. 1903), 77 S. W. 456.

¹² *Hoge v. People*, 117 Ill. 35, 6 N. E. 796.

¹³ *Gregory v. State*, 140 Ala. 16, 37

So. 259. *Contra*, *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668, where evidence taken on the preliminary examination was read at the trial.

¹⁴ *State v. Johnson*, 41 La. Ann. 574, 7 So. 670; *People v. Markham*, 64 Cal. 157, 30 Pac. 620, 49 Am. 700; *Cole v. State*, 59 Ark. 50, 26 S. W. 377; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320n.

¹⁵ *Brown v. United States*, 164 U. S. 221, 41 L. ed. 410, 17 S. Ct. 33;

that a witness was reputed to be truthful when he was a boy by no means tends to show that he is credible, when, as a man, he testifies upon the witness stand. But evidence of good or bad reputation existing two or three years prior to the trial is admissible. It cannot reasonably be presumed that a man of mature age and settled habits would acquire a new reputation in that comparatively short time.¹⁶

The evidence of the impeaching witness must be confined strictly to the general reputation of the witness for veracity, i. e., to what he has heard people say regarding this trait of character. He will not be allowed to prove the commission of specific acts of untruthfulness or other bad conduct.¹⁷

A witness who is called to prove the bad reputation of another may, after he has testified to that reputation, be asked if he would believe the witness under oath.¹⁸ Though the reputation

State v. Rugan, 5 Mo. App. 592; real, 7 Cal. App. 37, 93 Pac. 385; State v. Beal, 68 Ind. 345, 346, 34 Am. 263; Mershon v. State, 51 Ind. 14; State v. Kirkpatrick, 63 Iowa 554, 559, 19 N. W. 660; State v. Johnson, 41 La. Ann. 574, 577, 7 So. 670; Jackson v. State, 78 Ala. 471; Combs v. Commonwealth, 97 Ky. 24, 29 S. W. 734; State v. Norman, 135 Iowa 483, 113 N. W. 340; Alford v. State, 47 Fla. 1, 36 So. 436.

¹⁶ Davis v. Commonwealth, 95 Ky. 19, 21, 23 S. W. 585, 44 Am. St. 201; Mynatt v. Hudson, 66 Tex. 66, 17 S. W. 396; People v. Nunley, 142 Cal. 441, 76 Pac. 45.

¹⁷ People v. O'Brien, 96 Cal. 171, 31 Pac. 45; People v. Ryan, 55 Hun (N. Y.) 214, 8 N. Y. S. 241; State v. Rogers, 108 Mo. 202, 18 S. W. 976; State v. Barrett, 40 Minn. 65, 41 N. W. 459; People v. Wolcott, 51 Mich. 612, 17 N. W. 78; Randall v. State, 132 Ind. 539, 542, 32 N. E. 305; Conley v. Meeker, 85 N. Y. 618; State v. Gesell, 124 Mo. 531, 27 S. W. 1101; McArthur v. State, 59 Ark. 431, 27 S. W. 628; People v. Mon-

¹⁸ Mayes v. State, 33 Tex. Cr. 33, 24 S. W. 421; Ware v. State, 36 Tex. Cr. 597, 38 S. W. 198; State v. Christian, 44 La. Ann. 950, 952, 11 So. 589; State v. Boswell, 2 Dev. (N. Car.) 209, 211; Hudspeth v. State, 50 Ark. 534; People v. Ryder, 151 Mich. 187, 114 N. W. 1021; Douglass v. State (Tex. Cr. 1906), 98 S. W. 840. An affirmative answer to the question, "Would you believe the witness under oath?" may be considered as sustaining the veracity of the witness. Taylor v. State, 5 Ga. App. 237, 62 S. E. 1048. For civil cases see Underhill on Evidence, page 505. Contra, Walton v. State, 88 Ind. 9,

of the witness is shown to be bad, his credibility is still a question for the jury, who may believe him though he has a bad reputation for telling the truth.¹⁹ The fact that they may believe him to have a bad reputation does not justify an instruction that they must disregard all his evidence.²⁰

No man can, with fairness, be required without warning to defend or to disprove particular actions perhaps long since forgotten by him.²¹ It is not necessary that the impeaching witness should be personally acquainted with the witness whose credibility he attacks.²² He may be cross-examined as to the sources from which he has derived his knowledge of the reputation which he has testified to, and he, in his turn, may have his reputation investigated.²³

It is not permissible in a criminal case to ask a witness whether his own general character for veracity is good.²⁴

§ 237. Impeachment by showing the general bad character of the witness aside from truthfulness.—A few authorities reject all evidence to prove the good or bad character of a witness, except so far as it is confined to his reputation for truthfulness, or the reverse.²⁵ If the witness possesses no knowledge of that particu-

19; *State v. Miles*, 15 Wash. 534, 46 Pac. 1047; *Cline v. State*, 51 Ark. 140, 10 S. W. 225. But the witness will not generally be permitted to state that he would not believe a person under oath, unless he knows that person's reputation for veracity, and is able to testify that his reputation is bad. *Spies v. People*, 122 Ill. 1, 208, 12 N. E. 865, 17 N. E. 898. See also, *Mitchell v. State*, 94 Ala. 68, 10 So. 518.

²⁰ *Taylor v. State*, 5 Ga. App. 237, 62 S. E. 1048; *Peaden v. State*, 46 Fla. 124, 35 So. 204.

²¹ *Pentecost v. State*, 107 Ala. 81, 18 So. 146.

²² See Underhill on Evidence, page 506, n. 2. It may be shown that the witness was intoxicated when he observed the events which he describes

on the stand. But if, though intoxicated, his evidence is corroborated, or if his recollection appears to be clear and distinct he ought to be believed. *State v. Castello*, 62 Iowa 404, 407, 17 N. W. 605.

²³ *State v. Turner*, 36 S. Car. 534, 15 S. E. 602.

²⁴ *State v. Perkins*, 66 N. Car. 126; *Nelson v. State*, 32 Fla. 244, 13 So. 361.

²⁵ *Glass v. State*, 147 Ala. 50, 41 So. 727.

²⁶ *State v. Clawson*, 30 Mo. App. 139; *State v. Coffey*, 44 Mo. App. 455; *State v. Jackson*, 44 La. Ann. 160, 162, 10 So. 600; *Briggs v. Commonwealth*, 82 Va. 554; *People v. Abbott*, 97 Mich. 484, 56 N. W. 862, 37 Am. St. 360; *Commonwealth v. Lawler*, 12 Allen (Mass.) 585; *State*

lar trait of character he is incompetent. But the majority of the cases allow greater latitude. In most cases evidence involving the whole moral character of the witness will be received upon the reasonable theory that a man who is addicted to vicious habits, or who is prone to commit immoral acts, may be presumed to have lost respect for truth, and to be ready to perjure himself when it is to his interest to do so.²⁶

The rule that, in proving character, the witness will be confined to general reputation in the neighborhood, applies where a witness is called to impeach another witness by proof of bad character. The evidence of bad reputation may be supplemented by proof of a report that the witness who is attacked had com-

v. Perkins, 66 N. Car. 126; Holmes v. State, 88 Ala. 26, 7 So. 193, 16 Am. St. 17; State v. Grove, 61 W. Va. 697, 57 S. E. 296; Elliott Evidence, § 2721. Comprehensive note on evidence and instructions as to character of accused, see 20 L. R. A. 609. Note on evidence of specific instances to prove character, 14 L. R. A. (N. S.) 708.

²⁶ Wachstetter v. State, 99 Ind. 290, 298, 50 Am. 94n; Boyle v. State, 105 Ind. 469, 475, 5 N. E. 203, 55 Am. 218; McTyier v. State, 91 Ga. 254, 18 S. E. 140; State v. Hart, 67 Iowa 142, 25 N. W. 99; State v. Kirkpatrick, 63 Iowa 554, 19 N. W. 660; State v. McClintic, 73 Iowa 663, 35 N. W. 696; State v. Froelick, 70 Iowa 213, 30 N. W. 487; Gilliam v. State, 1 Head. (Tenn.) 39; State v. Miller, 93 Mo. 263, 6 S. W. 57; State v. Boswell, 2 Dev. (N. Car.) 209, 210; State v. Jackson, 44 La. Ann. 160, 162, 10 So. 600; Mitchell v. State, 94 Ala. 68, 10 So. 518; Commonwealth v. Lee, 143 Mass. 100, 9 N. E. 11; People v. Webster, 139 N. Y. 73, 34 N. E. 730; People v. Harrison, 93 Mich. 594, 597, 53 N. W. 725; Crump v. Commonwealth, 14 Ky. L. 450, 20

S. W. 390; Hawk v. State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Henderson v. State, 37 Tex. Cr. 79, 38 S. W. 617, 39 S. W. 116; State v. Blackburn, 136 Iowa 743, 114 N. W. 531; Sweatt v. State, 156 Ala. 85, 47 So. 194; State v. Sassaman, 214 Mo. 695, 114 S. W. 590; State v. Thompson, 127 Iowa 440, 103 N. W. 377. The fact that a female witness is a prostitute may also be shown. People v. Mills, 94 Mich. 630, 54 N. W. 488; Paul v. Paul, 37 N. J. Eq. 23, 25. While the fact that a witness is of very bad moral character may call for a careful scrutiny and consideration of his testimony, the jury are not bound in law, for that reason, to disregard it if they believe it is in itself credible; or if having a doubt of his credibility they believe he is corroborated by the circumstances or by the credible testimony of other witnesses. People v. Mills, 94 Mich. 630, 54 N. W. 488; Duncan v. State, 97 Ga. 180, 25 S. E. 182; State v. Van Vliet, 92 Iowa 476, 66 N. W. 748; Douglass v. State (Tex. 1896), 33 S. W. 228; Schanzenbach v. Brough, 58 Ill. App. 526.

mitted larceny, but no evidence as to the details of the larceny will be received.²⁷

The court should instruct on the impeachment of witnesses by proof of their bad reputation, but an instruction which in effect tells the jury that the witnesses for the defendant are disreputable or lawless and criminal persons because evidence has been introduced attacking their reputation is error. Whether the proof of bad reputation or of lawless and criminal practices on the part of the witnesses has impeached their testimony is for the jury alone to determine.²⁸

§ 238. Impeachment of the adverse witness by showing contradictory statements—Necessity for foundation.—The witness whom it is desired to impeach may, upon his cross-examination, be asked if he has not made statements out of court relevant to the guilt of the accused which are inconsistent with or contradictory of his testimony given on direct examination. All the circumstances attendant upon the extra-judicial declarations must be embodied in the question. If he does not admit that, upon the particular occasion designated, he made the statement, it may be proved that he did in fact make it.²⁹

The same course may be followed with a witness upon his direct examination in case he proves hostile to the party calling him. But in either case it is always absolutely essential in fair-

²⁷ State v. Sebastian, 215 Mo. 58, 114 S. W. 522.

²⁸ People v. Christensen, 85 Cal. 568, 24 Pac. 888; State v. Lucas, 24 Ore. 168, 33 Pac. 538; Smith v. United States, 161 U. S. 85, 40 Law Ed. 626, 16 Sup. Ct. 483.

²⁹ State v. Lewis, 44 La. Ann. 958, 11 So. 572; Lanasa v. State, 109 Md. 602, 71 Atl. 1058; People v. Row, 135 Mich. 505, 98 N. W. 13, 10 Detroit Leg. N. 841; People v. Tice, 115 Mich. 219, 73 N. W. 108, 69 Am. St. 560; Pitts v. State, 140 Ala. 70, 37 So. 101; State v. Darling, 202 Mo. 150, 100 S. W. 631; Scott v. State, 52 Tex.

Cr. 164, 105 S. W. 796; State v. Burns, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. 588; Wilson v. United States, 5 Ind. Ter. 610, 82 S. W. 924; Sherrod v. State, 90 Miss. 856, 44 So. 813; Ridgell v. State, 156 Ala. 10, 47 So. 71; Jones v. State, 141 Ala. 55, 37 So. 390; State v. Lockhart, 188 Mo. 427, 87 S. W. 457; Brown v. State, 142 Ala. 287, 38 So. 268; Burton v. State, 115 Ala. 1, 22 So. 585; Richards v. Commonwealth, 107 Va. 881, 59 S. E. 1104; Smith v. State, 52 Tex. Cr. 27, 105 S. W. 182; People v. Yee Foo, 4 Cal. App. 730, 89 Pac. 450; People v. Feinberg, 237 Ill. 348, 86 N. E. 584.

ness to the witness to lay a foundation for contradicting him by bringing to his attention in the question put to him, clearly and distinctly, all the circumstances of time, place and person under which the contradictory statements were made.³⁰ By having his attention called directly to the exact circumstances under which it is alleged the contradictory or inconsistent statement was uttered, the witness is protected from an unfair surprise. He has the right to explain the contradiction. When his memory is

³⁰ *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *Hester v. State*, 103 Ala. 83, 15 So. 857; *People v. Bosquet*, 116 Cal. 75, 47 Pac. 879; *Commonwealth v. Mosier*, 135 Pa. St. 221, 19 Atl. 943; *Hoge v. People*, 117 Ill. 35, 6 N. E. 796; *Aneals v. People*, 134 Ill. 401, 25 N. E. 1022; *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *Klug v. State*, 77 Ga. 734; *Bruce v. State*, 31 Tex. Cr. 590, 21 S. W. 681; *Montgomery v. Knox*, 23 Fla. 595, 3 So. 211; *State v. Turner*, 36 S. Car. 534, 15 S. E. 602; *State v. Goodbier*, 48 La. Ann. 770, 19 So. 755; *State v. Delaneuville*, 48 La. Ann. 502, 19 So. 550; *State v. Jones*, 44 La. Ann. 960, 962, 11 So. 596; *Jones v. State*, 65 Miss. 179, 3 So. 379; *State v. McLaughlin*, 44 Iowa 82; *Kent v. State*, 42 Ohio St. 426; *State v. Glynn*, 51 Vt. 577; *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *State v. Hunsaker*, 16 Ore. 497, 19 Pac. 605; *Cotton v. State*, 87 Ala. 75, 6 So. 396; *State v. Freeman*, 43 S. Car. 105, 20 S. E. 974; *Crossland v. State*, 77 Ark. 537, 92 S. W. 776; *State v. Anderson*, 120 La. 331, 45 So. 267; *Coker v. State*, 144 Ala. 28, 40 So. 516; *Alford v. State*, 47 Fla. 1, 36 So. 436; *State v. McGowan*, 36 Mont. 422, 93 Pac. 552; *Waller v. People*, 209 Ill. 284, 70 N. E. 681; *People v. Mallon*, 116 App. Div. 425, 101 N. Y. Supp. 814, 20 N. Y. Cr. 427; affirmed in 189 N. Y. 520, 81 N. E. 1171; *Burton v. State*, 115 Ala. 1, 22 So. 585; *Brown v. State*, 46 Fla. 159, 35 So. 82; *State v. Meyers*, 120 La. 127, 44 So. 1008; *Lanasa v. State*, 109 Md. 602, 7 Atl. 1058; *Commonwealth v. Smith*, 163 Mass. 411, 40 N. E. 189. Cf. *contra*, *People v. Shaw*, 111 Cal. 171, 43 Pac. 593. See, also, cases in *Underhill on Evidence*, p. 508, note 1. The witness may be contradicted by his testimony given on a prior trial of the same indictment if he asserts that his present testimony is the same as that previously given. *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Brown v. State*, 76 Ga. 623; or by his testimony at the coroner's inquest. *State v. Merriman*, 34 S. Car. 576, 13 S. E. 328; *Moran v. People*, 163 Ill. 372, 45 N. E. 230; *State v. Taylor*, 136 Mo. 66, 37 S. W. 907; *Williford v. State*, 36 Tex. Cr. 414, 37 S. W. 761; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, or by his deposition taken before the examining magistrate. *People v. Butler*, 55 Mich. 408, 409, 21 N. W. 385; *Falkner v. State*, 151 Ala. 77, 44 So. 409, or the grand jury. *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *Dean v. Commonwealth*, 25 Ky. L. 1876, 78 S. W. 1112, where a member of the grand jury was allowed to testify to contradict a witness.

aroused and refreshed by these details he may be able to show that he was honestly mistaken on the former occasion, or that the persons then present misunderstood or misquoted him. The impeached witness ought to be permitted, in giving his evidence, to state any facts which will explain or reconcile the seemingly inconsistent utterances or show their relation to one another and the meaning and purpose of each.⁸¹

If the witness declares he does not remember making the contradictory statements, he may be contradicted at once, without further foundation for their introduction.⁸²

If the witness admits that he made the contradictory statements it is not then competent to prove the statements by witnesses to whom they were made or who overheard them.⁸³

Both the admissions and the confessions of the accused are admissible against him as a part of the evidence for the prosecution and as direct evidence of guilt, and not merely to contradict him when he testifies as a witness. Hence, the fact that he testifies as a witness and denies that he confessed or affirms his innocence does not render it necessary to lay a foundation before introducing any of his contradictory statements, which are in form or substance confessions and admissions, as in the case of other witnesses who are to be impeached by contradiction.⁸⁴ On the other hand, if the accused is a witness, his confession is not admissible as a contradictory statement to impeach him if it would not be admissible as a confession.⁸⁵

But if the accused, being a witness, expressly denies on cross-examination that on a prior occasion he had made an incriminating statement not already proven by the prosecution he may be

⁸¹ *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *Henson v. State*, 120 Ala. 316, 25 So. 23; *Brown v. State*, 46 Fla. 159, 35 So. 82.

⁸² *Payne v. State*, 60 Ala. 80; *Wagner v. State*, 116 Ind. 181, 184, 18 N. E. 833; *Billings v. State*, 52 Ark. 303, 12 S. W. 574; *Levy v. State*, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. 826; *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108; *Smith v. State* (Tex.), 20 S. W. 554; *Jones v. State*,

145 Ala. 51, 40 So. 947; *Campos v. State*, 50 Tex. Cr. 289, 97 S. W. 100.

⁸³ *Bice v. State*, 51 Tex. Cr. 133, 100 S. W. 949.

⁸⁴ *Klug v. State*, 77 Ga. 734; *Lewis v. State*, 91 Ga. 168, 16 S. E. 986; *State v. Forsythe*, 99 Iowa 1, 68 N. W. 446. In *State v. Callahan*, 100 Minn. 63, 110 N. W. 342, a foundation was required to be laid.

⁸⁵ *State v. Barrett*, 40 Minn. 65, 74, 41 N. W. 459. See *Underhill on Evidence*, p. 509, note 4.

contradicted by the testimony of one who heard him. His incriminating statement being in form either a confession or an admission is properly a part of the case for the prosecution. He has a right to contradict it, of which he cannot be deprived by the fact that it is offered out of its regular order. It is error to refuse to permit him to attempt to show by other witnesses that he never made such an incriminating statement.³⁶

And in conclusion we may say that the jury have a right to determine what effect upon the credibility of the witness they shall give to the statement.³⁷ The mere fact of contradiction is not in law sufficient to justify a reasonable doubt of the truth of all the testimony of the witness in the minds of the jury.³⁸

§ 239. Impeachment by contradictory affidavits, depositions and other writings.—The rules governing impeachment, by contradictory statements, as above set forth, are equally applicable whether the inconsistent declarations are oral or are contained in affidavits and depositions,³⁹ or in publications by the witness on the subject to which his testimony relates.⁴⁰

Thus the accused, when testifying, or any witness called in his behalf, may be contradicted by the evidence as stated by him in the affidavits which were made and used by the accused upon a motion for a continuance or postponement.⁴¹

Contradictory statements contained in affidavits, depositions

³⁶ *State v. Constantine*, 48 Wash. 218, 93 Pac. 317.

³⁷ *Jones v. State*, 145 Ala. 51, 40 So. 947.

³⁸ *Snyder v. State*, 145 Ala. 33, 40 So. 978.

³⁹ *Gilyard v. State*, 98 Ala. 59, 13 So. 391; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091; *United States v. Taylor*, 35 Fed. 484. See also, *Sullivan v. Jefferson, etc., Co.* 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; *Fein v. Covenant &c. Assn.*, 60 Ill. App. 274; *State v. Cater*, 100 Iowa 501, 69 N. W. 880; *People v. Smith*, 114 App. Div. 513, 100 N. Y. Supp. 259; *State v. Jennings*, 48 Ore. 483, 87 Pac. 524.

⁴⁰ *Hartford v. State*, 96 Ind. 461, 468, 49 Am. 185.

⁴¹ *Commonwealth v. Starr*, 4 Allen (Mass.) 301, 302; *Pledger v. State*, 77 Ga. 242, 3 S. E. 320; *State v. Hayes*, 78 Mo. 307; *People v. Sweeney*, 55 Mich. 586, 590, 22 N. W. 50; *Weaver v. State*, 83 Ark. 119, 102 S. W. 713. In *Behler v. State*, 112 Ind. 140, 13 N. E. 272, the court says: "There is nothing giving to the statements in an affidavit for a continuance of a privilege; nor is there anything which impresses upon them any compulsory or confidential feature. The affidavit is a paper belonging to the files, public in its character and freely executed."

and other formal judicial documents are obviously to be considered from a different point of view, so far as their impeaching character is concerned, than oral statements.

In the case of contradictory writings, it is manifestly unfair to the witness to confront him with an affidavit or other paper couched in formal and technical phraseology. The language of the document is usually not his. In a criminal trial the affidavit or other legal instrument is usually prepared by the clerk of the court, as, for example, in the case of a complaint or affidavit on a preliminary examination, and, though the affidavit or deposition may have been read over to the affiant before he signed it, by the person whom the witness trusted, or whose duty it was to frame his ideas in proper words, he may have most likely wholly misunderstood the true meaning of a writing couched in such technical, and to him novel and unusual, language.⁴²

These considerations ought to be kept in view when the affidavit or deposition of the complaining witness, taken down by the clerk of the court, as a basis for issuing a warrant for the arrest of the accused, is employed to contradict the witness at the examination before the magistrate or at the trial.⁴³

⁴² *Johnston v. Todd*, 5 Beav. 597, 600.

⁴³ *Commonwealth v. Snee*, 145 Mass. 351, 14 N. E. 157. A proceeding against an alleged criminal may be begun by four methods. The party aggrieved may give information to the public prosecuting officer, who prepares an indictment and brings the evidence orally before the grand jury. The accuser may file a written complaint on oath before a magistrate who issues a warrant, followed by the preliminary examination and the possible holding of the accused for the action of the grand jury. The grand jury may act upon the knowledge of any of its members that a crime has been committed and make a presentment against the accused. The prosecuting attorney may file an information with the grand jury.

The most common mode is that of filing a written complaint with the examining magistrate followed by a preliminary examination. It is usually necessary that the complaint shall be sworn to before the examining magistrate, but not necessarily written out by him. The clerk, if any, of the justice of the peace or other examining magistrate usually prepares the complaint and affidavit. If there be no clerk the complaint is prepared by the magistrate himself. Except perhaps in the cities, the magistrate is rarely an attorney and even in the cities the clerk is usually a layman. It follows that complaints are often carelessly and unskillfully drawn, omitting material facts and including much that is immaterial; and by reason of lack of intelligence or for other causes, the statements of the

§ 240. Contradictory writings must be shown to the witness who is to be impeached.—The writing by which it is proposed to contradict the witness must be shown him on his examination so that he may read it, or it may be read to him. He must be asked if he wrote it or signed it, and if he admits this his attention must then be called to the inconsistencies.⁴⁴ If he admits that he wrote or signed it, the whole ought to be read to the jury as the best evidence of what the writing contains. If he denies that he is the author, the fact that he wrote it may be proved by proper evidence.⁴⁵ The stenographer who took down the testimony of a witness at a former trial to impeach the witness may read from his notes if he will swear that they are accurate, the witness having first been asked if he has testified on the former trial.⁴⁶

§ 241. Contradiction of irrelevant matters not permissible—Proof of confirmatory statements.—The rules above discussed, regulating the introduction of inconsistent declarations for the purpose of contradicting a witness, permit him to be contradicted only as regards matters relevant to the guilt or innocence of the prisoner. Where the witness is confronted with contradictory or inconsistent declarations made out of court and pertaining solely to irrelevant matters, and denies that he is their author.

accuser may be incorrectly understood and transcribed by the clerk. So, also, in haste the clerk may omit to read the complaint and procure the signature of the accuser to statements of which he had no knowledge. These facts should be taken into consideration on a criminal trial where the prosecuting witness is confronted with contradictory statements in or omissions from his complaint before the examining magistrate.

"Gemmill v. State, 16 Ind. App. 154, 43 N. E. 909; Floyd v. State, 82 Ala. 16, 2 So. 683; People v. Ching, 74 Cal. 389, 16 Pac. 201; Cooper v. State, 90 Ala. 641, 8 So. 821; State v. Crow, 107 Mo. 341, 17 S. W. 745; State v. Steeves, 29 Ore. 85, 43 Pac. 947; State v. Callegari, 41 La. Ann.

578, 581, 7 So. 130; Cole v. State, 59 Ark. 50, 26 S. W. 377; Gunter v. State, 83 Ala. 96, 3 So. 600; State v. Leeper, 70 Iowa 748, 751, 30 N. W. 501; State v. Baker, 136 Mo. 74, 37 S. W. Rep. 810. The testimony of a witness, taken before a magistrate, or at a coroner's inquest reduced to writing and signed by the witness, is not admissible unless it is first shown to him and his attention called to the inconsistencies. Simmons v. State, 32 Fla. 387, 13 So. 896; State v. O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.

⁴⁴ For numerous civil cases illustrating this rule see Underhill on Ev., pp. 510-512.

⁴⁵ Casey v. State, 50 Tex. Cr. 392, 97 S. W. 496.

his replies are conclusive. He cannot be contradicted on that point by the party seeking to impeach him.⁴⁷ The cases are not harmonious upon the question whether, after it has been shown that a witness has made contradictory statements out of court, it is permissible to prove upon his re-direct examination that he has made other statements which are consistent with and confirmatory of his testimony. The majority of the cases maintain the negative.⁴⁸ When, however, it appears that the witness is probably biased in favor of the party calling him because of his relation to him, or on account of his relation to the crime which is under investigation, it may be shown that, before such relation existed, the witness made statements confirmatory of his testimony now given in open court.⁴⁹

§ 242. Previous silence as impeachment.—A witness may be impeached, not only by his contradictory or inconsistent state-

⁴⁷ *Crawford v. State*, 112 Ala. 1, 21 So. 214; *State v. Conerly*, 48 La. Ann. 1561, 21 So. 192; *Wilson v. State*, 37 Tex. Cr. 64, 38 S. W. 610; *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31; *State v. Brown*, 100 Iowa 50, 69 N. W. 277; *Carter v. State*, 36 Neb. 481, 54 N. W. 853; *Hill v. State*, 91 Tenn. 521, 19 S. W. 674; *State v. Morris*, 109 N. Car. 820, 2 Am. St. 415, 13 S. E. 877; *Commonwealth v. Jones*, 155 Mass. 170, 171, 29 N. E. 467; *Commonwealth v. Fitzpatrick*, 140 Mass. 455, 5 N. E. 272; *Welch v. State*, 104 Ind. 347, 351, 3 N. E. 850; *Ford v. State*, 112 Ind. 373, 384, 14 N. E. 241; *Huber v. State*, 126 Ind. 185, 189, 25 N. E. 904; *People v. Greenwall*, 108 N. Y. 296, 15 N. E. 404; *State v. Dunn* (Oreg. 1909), 99 Pac. 278; *Henson v. State*, 120 Ala. 316, 25 So. 23; *State v. Teachey*, 134 N. Car. 656, 46 S. E. 733; *Dillard v. United States*, 72 C. C. A. 451, 141 Fed. 303; *Justice v. Commonwealth*, 20 Ky. L. 386, 46 S. W. 499; *McKnight v. State*, 50 Tex. Cr. 252, 95 S. W. 1056; *People v. Turner*, 1 Cal.

App. 420, 82 Pac. 397. A witness cannot be impeached by showing that out of court he had expressed suspicions of the prisoner, or an opinion of his guilt, which he denies on cross-examination. *Welch v. State*, 104 Ind. 347, 351, 3 N. E. 850; *People v. Stackhouse*, 49 Mich. 76, 77, 13 N. W. 364; *Commonwealth v. Snow*, 111 Mass. 411.

⁴⁸ *Sentell v. State*, 34 Tex. Cr. 260, 30 S. W. 226; *Goode v. State*, 32 Tex. Cr. 505, 24 S. W. 102; *Williams v. State*, 24 Tex. App. 637, 7 S. W. 333; *People v. Doyell*, 48 Cal. 85; *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 36 Am. St. 295; *Fallin v. State*, 83 Ala. 5, 3 So. 525; *State v. Flint*, 60 Vt. 304, 14 Atl. 178; *Lowe v. State*, 97 Ga. 792, 25 S. E. 676; *Holmes v. State*, 52 Tex. Cr. 352, 106 S. W. 1160; *Burks v. State*, 78 Ark. 271, 93 S. W. 983; *State v. McDaniel*, 68 S. Car. 304, 47 S. E. 384, 102 Am. St. 661; *State v. Houghton*, 45 Oreg. 110, 75 Pac. 887; *Rice v. State*, 50 Tex. Cr. 648, 100 S. W. 771; *Louder v. State*, 46 Tex. Cr.

ments, but also by proof that on a former occasion, under circumstances where it was his duty to state the whole truth, he omitted to state material and relevant facts which he now states.⁵⁰ Thus, it may be proved that a witness omitted to state facts at the preliminary examination which he testifies to on the trial.⁵⁰ But for his silence to be admissible, it must appear from all the circumstances that it was his duty to tell the whole truth. The witness must be permitted to explain his previous ignorance or silence, and to show that his present forgetfulness or past ignorance was real and not assumed.

He may testify that the occasion of his silence was a proceeding in a court of justice during which he was not questioned upon the matter at all.⁵¹ The denial by the witness that he omitted any fact on a previous examination may be dispensed with. If he says he does not remember, the party seeking to impeach may prove the omission to testify.⁵²

The witness may himself testify that he actually forgot the facts upon the earlier occasion,⁵³ or suppressed them through fear,⁵⁴ and, in a word, to any fact showing that his silence or concealment was in good faith and prompted by right motives.⁵⁵

§ 243. Relevancy of evidence to show the general reputation for truthfulness of a witness who has been impeached.—The party

121, 79 S. W. 552; State v. Gilliam, 66 S. Car. 419, 45 S. E. 6; State v. Sharp, 183 Mo. 715, 82 S. W. 134; State v. Thomason, 1 Jones (N. Car.) 274; Thompson v. State, 38 Ind. 39; State v. Flint, 60 Vt. 304, 14 Atl. 178. But see *contra*, Ball v. State, 31 Tex. Cr. 214, 20 S. W. 363; Hobbes v. State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; State v. McKinney, 111 N. Car. 683, 16 S. E. 235, and civil cases fully cited in Underhill on Ev., page 512.

⁵⁰ Brown v. State, 79 Ala. 61, 62; Commonwealth v. Harrington, 152 Mass. 488, 25 N. E. 835.

⁵¹ People v. Wirth, 108 Mich. 307, 66 N. W. 41; Cook v. State, 124 Ga. 653, 53 S. E. 104.

⁵² Babcock v. People, 13 Colo. 515, 22 Pac. 817; State v. Vickers, 47 La. Am. 1574, 18 So. 639; Territory v. Clayton, 8 Mont. 1, 19 Pac. 293; Hyden v. State, 31 Tex. Cr. 401, 404, 20 S. W. 764.

⁵³ Brown v. State, 79 Ala. 61, 63. It may be shown that his prior statement was omitted from the record of the former proceeding. United States v. Ford, 33 Fed. 861.

⁵⁴ State v. Turner, 36 S. Car. 534, 15 S. E. 602.

⁵⁵ People v. Chapleau, 121 N. Y. 266, 24 N. E. 469.

⁵⁶ Miller v. State, 97 Ga. 653, 25 S. E. 366.

whose witness has been directly impeached has the right to introduce evidence to overcome any presumption that may have arisen that he is not credible. Not only may he introduce cumulative evidence to corroborate him, but he may attempt to prove that his general reputation for truthfulness is good. It has been held that a party should not be permitted to prove that his witness was a man whose reputation for veracity was good, where the impeachment consisted wholly of evidence that the witness had made contradictory statements out of court.⁵⁶ But the majority of the cases repudiate this distinction. It is now held almost universally that evidence to show that the reputation of the witness for veracity is good may be introduced whenever the evidence of the witness has been impeached in any way, whether by his contradictory declarations or by a direct attack upon his character.⁵⁷

But evidence that a witness enjoys a reputation for truthfulness is not receivable to strengthen his testimony merely because he has been contradicted by an adverse witness,⁵⁸ or because he has been shaken or confused on cross-examination.⁵⁹

But it has been held in Texas that a witness for the prosecution, who had been subjected to a most searching cross-examination having a strong tendency to discredit him before the jury, might have his credibility sustained by the introduction on the part of the state of proof that his reputation for truth and veracity were good, though his character had not been directly attacked and no contradiction had been shown.⁶⁰ A witness who testifies that the accused has a bad reputation for truth and veracity may be contradicted by proving that on prior occasions he had made an inconsistent statement.⁶¹

⁵⁶ *Brown v. Mooers*, 6 Gray (Mass.) 451.

⁵⁷ *Clem v. State*, 33 Ind. 418; *Surles v. State*, 89 Ga. 167, 15 S. E. 38; *Griffin v. State*, 26 Tex. App. 157, 9 S. W. 459, 8 Am. St. 460; *Harris v. State*, 30 Ind. 131; *State v. Jones*, 29 S. Car. 201, 7 S. E. 296; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *State v. Fruge*, 44 La. Ann. 165, 167, 10 So. 621; *People v. Ah Fat*, 48 Cal. 61; *Tipton v. State*, 30 Tex. App. 539, 17 S. W. 1097; *Commonwealth v. Ingraham*, 7 Gray. (Mass.) 46; *Graham v. State*, 153 Ala. 38, 45 So. 580;

State v. Christopher, 134 Mo. App. 6, 114 S. W. 549. For civil cases see *Underhill on Evidence*, § 352.

⁵⁸ *Saussy v. South Florida R. Co.*, 22 Fla. 327; *Britt v. State*, 21 Tex. App. 215, 17 S. W. 255.

⁵⁹ *Stevenson v. Gunning*, 64 Vt. 601, 25 Atl. 697; *contra*, *State v. Rice* (S. Car., 1897), 37 S. E. 452.

⁶⁰ *Harris v. State*, 49 Tex. Cr. 338, 94 S. W. 227.

⁶¹ *Norris v. State*, 52 Tex. Cr. 166, 106 S. W. 136.

§ 244. **Limitations upon the right to ask questions which disgrace the witness.**—An important distinction must be noted as regards the competency of questions the answers to which involve facts which tend to disgrace the witness. The mere fact that a witness on his direct examination must, in order to answer a relevant question truthfully, make an admission which, while it may not tend to criminate him, may disgrace him or lower him in the estimation of his friends and acquaintances, is not sufficient to exclude the answer. Thus a woman or child may testify in rape that she had sexual intercourse with the accused over an objection that this was evidence that would degrade her.⁶² It would be not only unjust but absurd, particularly in a criminal prosecution, to close the mouth of a witness for that reason where the liberty and perhaps the life of an innocent person may depend upon his answer. His answer will not subject him to any criminal or civil liability. It may, on the other hand, be absolutely essential to a proper administration of justice. Hence a witness will be compelled to give relevant evidence, however greatly it may degrade, disgrace or humiliate him, provided his reply will tend to throw light upon the question at issue.⁶³

Other considerations may be invoked where the question which tends to disgrace the witness is asked while he is under cross-examination. The policy of the law does not permit, or at least does not encourage, cross-examination upon matters wholly irrelevant merely for the purpose of subsequent contradiction. Hence, if the witness, while being cross-examined, is asked, "Have you ever been convicted of burglary?" and replies that he has not, the interrogating party is bound by his answer.

But objections to evidence because of its irrelevancy are to be taken by a party, not by the witness. It is impossible to formulate any general rule by which can be determined the relevancy of questions upon cross-examination. The matter is largely in the judicial discretion. It may with safety be said that the court

⁶² State v. George, 214 Mo. 262, 113 Miller, 72 Mich. 265, 40 N. W. 429, 16 S. W. 1116. Am. St. 536; Coleman v. State, 53

⁶³ People v. Mather, 4 Wend. (N. Tex. Cr. 578, 111 S. W. 1011; Leach Y.) 229, 250, 254; 21 Am. Dec. 122n; v. Commonwealth, 33 Ky. 1016, 112 Ex parte, Boscowitz, 84 Ala. 463, 4 S. W. 595. So. 279, 5 Am. St. 384; Johnston v.

ought to interfere whenever necessary to protect the witness from needless insult and contumely, and to forbid impertinent questions which are altogether irrelevant, and have been asked merely to surprise, annoy and confuse the witness, and to cause him to lose his temper.⁶⁴

Subject to this limitation the law regards as relevant all facts which tend to illustrate the credibility of the witness or which may enable the jury to determine the weight of his testimony.

§ 245. Impeachment by showing social connections, occupation and manner of living.—The previous conduct of the witness, his life and associations, whether irreproachable or the reverse, are all relevant. Every person possesses, to a certain extent, the power of selecting his domicile and avocation. So the choice of his business and social connections, the circle of his friends and acquaintances, and his general mode and course of living are largely in his own control. If, therefore, he voluntarily associates with those who are engaged in disreputable pursuits; or if he is addicted to disgraceful or vicious practices, or follows an occupation which is loathsome and vile, though not perhaps criminal; no rule of law prevents such facts from being shown to determine his credibility, by questions put to him upon his cross-examination. And usually he may be questioned as to specific facts, in his past career, which may tend to his disgrace, provided they are not too remote in point of time.⁶⁵

But it is generally held that a female witness cannot be asked if she is a professional prostitute or a dissolute woman, or if she keeps a disorderly house.⁶⁶ And, as a rule, compelling a witness

⁶⁴ *Commonwealth v. Shaw*, 4 Cush. (Mass.) 593; *Commonwealth v. Sackett*, 22 Pick. (Mass.) 394; *State v. Rogers*, 31 Mont. 1; 77 Pac. 293.

⁶⁵ *Warren v. Commonwealth*, 99 Ky. 370, 35 S. W. 1028, 18 Ky. Law 141; *Clayton v. State*, 31 Tex. Cr. 489, 21 S. W. 255; *Carroll v. State*, 32 Tex. Cr. 431, 24 S. W. 100, 40 Am. St. 786; *Roberts v. Commonwealth*, 14 Ky. Law 219, 20 S. W. 267; *Ryan v. People*, 79 N. Y. 593; *State v. Philpot*, 97 Iowa 365, 66 N. W. 730; *State*

v. Miller, 100 Mo. 606, 13 S. W. 832, 1051; *State v. Taylor*, 117 Mo. 181, 22 S. W. 1103; *People v. Casey*, 72 N. Y. 393; *Reg. v. Burke*, 8 Cox C. C. 44; *People v. Gibling*, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757; *State v. Hilsabeck*, 132 Mo. 348, 34 S. W. 38; *State v. Moran*, 216 Mo. 550, 115 S. W. 1126; *Dyer v. State* (Tex. Cr. 1903), 77 S. W. 456.

⁶⁶ *Holtz v. State*, 76 Wis. 99, 44 N. W. 1107, 1110; *Stayton v. State*, 32 Tex. Cr. 33, 22 S. W. 38; *Ketching-*

to answer degrading or disgracing questions is largely a matter of judicial discretion.⁶⁷

Thus, for example, the witness may be compelled to answer the question, "How long since you lived with your wife?" The facts that a man had abandoned his family, has no permanent place of abode and has become a tramp, are very material upon his credibility.⁶⁸ So it may be shown by cross-examining a witness that he has sought to bribe another witness,⁶⁹ or otherwise to fabricate evidence,⁷⁰ or that he had been instructed what to say upon the witness stand,⁷¹ or had offered to leave the state if paid for doing so.⁷²

Now that an ex-convict or a person convicted of a felony is competent as a witness, it remains to inquire to what extent the conviction may be shown as impeachment. As a matter of ordinary observation it is clear to most persons that the mere fact that a witness has been convicted of an infamous crime, or, in fact, of any offense, will not prevent him from telling the truth or from being believed in a case where he has no motive to deceive. It is not usually the facts of a man's past which prompt him to give false testimony, except where the circumstances of the past create his present motives. Thus, it might be that a conviction or even a prosecution brought about by a person against whom the witness is testifying would create prejudice against that person, and the convict witness could not fairly and truthfully testify against him. Ordinarily this is not the case. The rule that a prior conviction may be shown to impeach a witness which is

man v. State, 6 Wis. 417; La Beau v. People, 34 N. Y. 223, 230. *Contra*, State v. Hack, 118 Mo. 92, 23 S. W. 1089; Tla-Koo-Yet-Lee v. United States, 167 U. S. 274, 42 Law ed. 166, 17 S. Ct. 855; State v. Romero, 117 La. 1003, 42 So. 482; Swint v. State, 154 Ala. 46, 45 So. 901. But see, State v. Boyd, 178 Mo. 2; 76 S. W. 979, in which case the witness was permitted to be asked about her child being born out of wedlock.

⁶⁷ Commonwealth v. McDonald, 110 Mass. 405; State v. Hobgood, 46 La. Ann. 855, 15 So. 406; People v. Carr,

64 Mich. 702, 31 N. W. 590; Browder v. State, 102 Ala. 164, 14 So. 895.

⁶⁸ Yanke v. State, 51 Wis. 464, 468, 8 N. W. 276; Roberts v. Commonwealth, 14 Ky. L. 219, 20 S. W. 267.

⁶⁹ State v. Hack, 118 Mo. 92, 23 S. W. 1089.

⁷⁰ England v. State, 89 Ala. 76, 8 So. 146.

⁷¹ State v. Tall, 43 Minn. 273, 276, 45 N. W. 449; Boulden v. State, 102 Ala. 78, 15 So. 341.

⁷² Jenkins v. State, 34 Tex. Cr. 201, 29 S. W. 1078.

imbedded in the statutes of the various states is a survival of the rule that a prior conviction was an insurmountable objection to the competency of the witness. The modern rule is that the conviction of an infamous crime, *i. e.*, a crime which at common law would have rendered the witness incompetent or of a crime involving great moral turpitude, may be proved to impeach the credibility of the witness.⁷³

After the witness has admitted or it is proved that he is a convict his credibility cannot be sustained by proving that he was unjustly convicted.⁷⁴ Nor is a conviction of an infamous crime inadmissible because the judgment of conviction has been appealed from and the appeal is still pending.⁷⁵ But a conviction of a misdemeanor cannot be shown,⁷⁶ nor should the court permit a question to the witness as to whether he has ever been arrested or indicted.⁷⁷ These facts are immaterial, for even innocent persons are arrested and are subject to indictment.

Under the statute, which permits a conviction of an infamous crime to be shown, a conviction of a statutory felony which was not a crime at common law has been received.⁷⁸

If it appears that one or more of the witnesses is a convict, the accused is entitled to an instruction on the effect of this fact on the credibility of these witnesses. It is proper to instruct the jury that they are not to disregard the evidence of a convict merely

⁷³ Fuller v. State, 147 Ala. 35, 41 So. 774; Wheeler v. State, 4 Ga. App. 325, 61 S. E. 409; Martin v. Commonwealth, 25 Ky. L. 1928, 78 S. W. 1104; State v. Powell, 5 Penn. (Del.) 24, 61 Atl. 966; Rollings v. State (Ala.), 49 So. 329; Wells v. Commonwealth, 30 Ky. L. 504, 99 S. W. 218; State v. Griggsby, 117 La. 1046, 42 So. 497. The proof of conviction in most cases is merely a convenient pretext on which counsel can abuse the witness by describing him as "an ex-convict," in his summing up; Caples v. State (Okla. Cr. App., 1909), 104 Pac. 493.

⁷⁴ Fuller v. State, 147 Ala. 35, 41 So. 774.

⁷⁵ Viberg v. State, 138 Ala. 100, 35 So. 53.

⁷⁶ Wells v. Commonwealth, 30 Ky. L. 504, 99 S. W. 218; Wheeler v. State, 4 Ga. App. 325, 61 S. E. 409.

⁷⁷ Mullins v. Commonwealth, 25 Ky. L. 2044, 79 S. W. 258; Ross v. State, 139 Ala. 144, 36 So. 718; State v. Barrett, 117 La. 1086, 42 So. 513; (arrest) Starling v. State, 89 Miss. 328, 42 So. 798; Hays v. State, 47 Tex. Cr. 149, 82 S. W. 511.

⁷⁸ Fuller v. State, 147 Ala. 35, 41 So. 774. See, *contra*, as to an act which, under a statute, may under some circumstances be a misdemeanor and under others, a felony. Gordon v. State, 140 Ala. 29, 36 So. 1009.

because he is a convict, but that they must weigh it, and consider it according to the rules of evidence; and that in so considering it, they may take into consideration the conviction of the witness as bearing upon his credibility, but that they should determine the credibility of convict witnesses upon the same consideration as that of any other witnesses.⁸⁰

§ 246. When and how previous imprisonment or conviction of crime may be shown.—To question the witness on cross-examination for the purpose of ascertaining from his own lips if he has ever been convicted of, or imprisoned for, crime, is not usually permitted, in the absence of statute.⁸¹ The fact of conviction or of incarceration is always of record. Hence, when either fact is directly in issue, it must be proved by the best evidence of which it is susceptible. A transcript of the prison register, or of the record of conviction, ought to be produced.⁸²

A witness cannot be asked if he has been convicted of a crime in a particular court where the statutes permit him to be examined only as to certain infamous crime.⁸³ The question is generally put to a witness in the following form, "Have you ever been convicted of a felony?" or "Have you ever been in state's prison?" or some other similar question of this character.⁸⁴ It is always proper to permit the witness who is asked whether he was convicted to state, in connection with the admission that he was

⁸⁰ *People v. Putman*, 129 Cal. 258, 61 Pac. 961; *People v. McLane*, 60 Cal. 412; *State v. Hubbard*, 201 Mo. 639, 100 S. W. 586.

⁸¹ *Fuller v. State*, 147 Ala. 35, 41 So. 774. Section 1796, Code 1896.

⁸² *Boyd v. State*, 94 Tenn. 505, 29 S. W. 901; *State v. Farmer*, 84 Me. 436, 24 Atl. 985; *Driscoll v. People*, 47 Mich. 413, 417, 11 N. W. 221; *State v. Minor*, 117 Mo. 302, 22 S. W. 1085; *Chambless v. State* (Tex., 1894), 24 S. W. 899; *State v. Alexis*, 45 La. Ann. 973, 13 So. 394; *Murphy v. State*, 108 Ala. 10, 18 So. 557; *Commonwealth v. Sullivan*, 150 Mass. 315, 23 N. E. 47; *Kirby v. People*, 123 Ill.

436, 15 N. E. 33; *Saxon v. State*, 96 Ga. 739, 23 S. E. 116; *Commonwealth v. Gorham*, 99 Mass. 420; *Green v. State*, 125 Ga. 742, 54 S. E. 724; *Gordon v. State*, 140 Ala. 29, 36 So. 1009; *O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639; *James v. United States*, 7 Ind. T. 250, 104 S. W. 607; *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287; *McKevitt v. People*, 208 Ill. 460, 70 N. E. 693; *Commonwealth v. Walsh*, 196 Mass. 369, 82 N. E. 19, 124 Am. St. 559.

⁸³ *Williams v. State*, 144 Ala. 14, 40 So. 405.

⁸⁴ *Dodds v. State* (Miss. 1908), 45 So. 863.

convicted, that he was granted a new trial and acquitted or was pardoned.⁸⁵ And finally, in Texas a conviction of crime is not admissible to impeach a witness unless of comparatively recent date.⁸⁶

But sometimes by statute it is permitted to ask the witness if he has ever been convicted of crime.⁸⁷ In case the conviction or imprisonment is denied by the witness, it must be proved by a copy of the record.⁸⁸

§ 247. **Incriminating questions.**—No witness can be required or compelled to answer a question, if, in the opinion of the court, it seems evident that to answer it truthfully would tend to criminate him, or even subject him to the danger of a criminal prosecution.⁸⁹

Whether the question is wholly unanswered, or partly answered

⁸⁵ *Thompson v. United States*, 30 App. D. C. 352; *O'Donnell v. People*, 110 Ill. App. 250.

⁸⁶ *Casey v. State*, 50 Tex. Cr. 392, 97 S. W. 496; *Busby v. State*, 48 Tex. Cr. 83, 86 S. W. 1032.

⁸⁷ *State v. O'Brien*, 81 Iowa 88, 93, 46 N. W. 752, 861; *People v. Hall*, 48 Mich. 482, 12 N. W. 665, 42 Am. 477; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481; *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406; *State v. Adamson*, 43 Minn. 196, 45 N. W. 152; *Marion v. State*, 16 Neb. 349, 20 N. W. 289; *State v. Miller*, 100 Mo. 606, 13 S. W. 832, 1051; *State v. McGuire*, 15 R. I. 23, 22 Atl. 1118; *State v. Merriman*, 34 S. Car. 16, 12 S. E. 619; *Commonwealth v. Morgan*, 107 Mass. 199, 205; *Helm v. State*, 67 Miss. 562, 7 So. 487; *State v. Martin*, 124 Mo. 514, 28 S. W. 12; *State v. Pratt*, 121 Mo. 566, 26 S. W. 556; *People v. Tubbs*, 147 Mich. 1, 110 N. W. 132; *State v. Barrington*, 198 Mo. 23, 95 S. W. 235; *Koch v. State*, 126 Wis. 470, 106 N. W. 531; *Fuller v. State*, 147 Ala. 35, 41 So. 774.

⁸⁸ *State v. Sauer*, 42 Minn. 258, 44

N. W. 115; *State v. McGuire*, 15 R. I. 23, 22 Atl. 1118; *People v. Carolan*, 71 Cal. 195, 12 Pac. 52; *State v. Wyse*, 33 S. Car. 582, 12 S. E. 556; *Titus v. State*, 117 Ala. 16, 23 So. 77; *Underhill on Ev.*, p. 517, note 3, § 354. These statutes are construed strictly. Where the statute permits proof of a conviction of *any* crime, a conviction of either felony or misdemeanor may be shown. *Helm v. State*, 67 Miss. 562, 7 So. 487; *State v. Sauer*, 42 Minn. 258, 44 N. W. 115; *Commonwealth v. Ford*, 146 Mass. 131, 15 N. E. 153; *State v. Brown*, 100 Iowa 50, 69 N. W. 277.

⁸⁹ *Commonwealth v. Trider*, 143 Mass. 180, 9 N. E. 510; *State v. Pancoast* (N. Dak., 1896), 67 N. W. 1052; *Temple v. Commonwealth*, 75 Va. 892; *Stevens v. State*, 50 Kan. 712, 32 Pac. 350; *Minters v. People*, 139 Ill. 363, 29 N. E. 45; *People v. Botkin* (Cal. App. 1908), 98 Pac. 861. *Underhill on Ev.*, p. 519, note 11. This rule is also applicable to the production of books and papers which will incriminate. *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781, aff'g, 57 Ill. App. 232.

and the witness objects to going any further, is immaterial. If the answer, though not embracing a full confession of criminal liability, merely forms "one link in the chain of testimony which would convict him," the witness may withhold it.⁹⁰

It is the duty of the court, without request, to instruct the witness that he need not answer. He may then answer, if he chooses to do so, and if, having been judicially informed of his legal prerogative of silence, he answers the question fully, he may be compelled to divulge every detail of the incriminating transaction.⁹¹

The witness cannot be compelled to explain in detail how the answer required would tend to incriminate him in order to enjoy the privilege of refusing to answer. It is sufficient if he swears that he believes that his answer will have that effect.⁹² Whether the question calls for an answer which will tend to incriminate the witness is for the court to determine.⁹³

The witness must answer, though he shall swear that he believes his answer will incriminate him, if, from all the circumstances, and from the character of the question and the answer required, it shall appear to the satisfaction of the court that any possible answer he may make will not have that effect. If there is no reasonable ground for supposing that he will incriminate himself he ought to answer.⁹⁴ When the danger to the witness is apparent he must be allowed a large discretion in remaining silent.⁹⁵ The accused who voluntarily becomes a witness in his

⁹⁰ Where evidence, sought from a witness in a criminal case, has a tendency to incriminate him or to establish a link in a chain of evidence which may lead to his conviction, or if the proposed evidence will disclose the names of persons upon whose testimony the witness might be convicted of a criminal offense, or will expose him to penalties or forfeitures, he cannot be compelled to answer. *People v. Argo*, 237 Ill. 173, 86 N. E. 679.

⁹¹ *Williams v. State*, 98 Ala. 52, 13 So. 333; *Commonwealth v. Pratt*, 126 Mass. 462; *State v. Van Winkle*, 80 Iowa 15, 45 N. W. 388; *State v. Denny* (N. D. 1908), 117 N. W. 869.

⁹² *People v. Mather*, 4 Wend. (N. Y.) 229, 252-254, 21 Am. Dec. 122n; *Bellinger v. People*, 8 Wend. (N. Y.) 595; *State v. Bond*, 12 Idaho 424, 86 Pac. 43.

⁹³ *Ex parte, Irvine*, 74 Fed. 954; *People v. Mather*, 4 Wend. (N. Y.) 229, 252-254, 21 Am. Dec. 122n; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *State v. Tall*, 43 Minn. 273, 45 N. W. 449; *Commonwealth v. Bell*, 145 Pa. St. 374, 22 Atl. 641-644.

⁹⁴ *Forbes v. Willard*, 37 How. Pr. (N. Y.) 193; *Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698.

⁹⁵ *Minter v. People*, 39 Ill. App. 438.

own behalf waives the privilege of refusing to answer incriminating questions, so far as the charge against him is concerned, by answering upon his direct examination questions relating to the crime with which he is charged, and in which he denies his guilt. He cannot, subsequently, on his cross-examination, refuse to answer other incriminating questions.⁹⁶

The right to refuse to answer incriminating questions is personal to the witness. To preserve his right he must himself object. If he wishes to answer, he may do so and neither the prosecution nor the accused has a right to object.⁹⁷

And a witness cannot refuse to answer incriminating questions because his answer will incriminate another person by whom he is employed, or will incriminate a corporation of which he is an officer.⁹⁸

It is error not to instruct the jury that no inference that the witness is a criminal should be drawn from his refusal to answer an incriminating question.⁹⁹

⁹⁶ *Shears v. State*, 147 Ind. 51, 46 N. E. 331; *McClain v. Commonwealth*, 110 Pa. St. 263, 1 Atl. 45; *Sullivan v. People*, 114 Ill. 24, 28 N. E. 381; *Commonwealth v. Mullen*, 97 Mass. 545; *Stover v. People*, 56 N. Y. 315; *Rains v. State*, 88 Ala. 91, 7 So. 315; *Commonwealth v. Nichols*, 114 Mass. 285, 19 Am. 346n; *State v. Ober*, 52 N. H. 459, 13 Am. 88; *People v. Tice*, 131 N. Y. 651, 30 N. E. 494; *State v. Allen*, 107 N. Car. 805, 11 S. E. 1016; *Spies v. People*, 122 Ill. 1, 235, 12 N. E. 865, 17 N. E. 898. See, also, *ante*, § 61, and *Underhill on Evidence*, page 521, note 4.

⁹⁷ *State v. Wentworth*, 65 Me. 234, 20 Am. 688; *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013; *State v. Butler*, 47 S. Car. 25, 24 S. E. 991; *State v. Mungeon*, 20 S. Dak. 612, 108 N. W. 552; *People v. Gosch*, 82 Mich. 22, 46 N. W. 101; *Commonwealth v. Shaw*, 4 Cush. (Mass.) 594, 50 Am. Dec. 813; *Samuel v. People*, 164 Ill. 379,

45 N. E. 728; *Brown v. State* (Tex. 1893), 20 S. W. 924; *Taylor v. State*, 83 Ga. 647, 10 S. E. 442; *Ham v. State*, 156 Ala. 645, 47 So. 126; *Taylor v. United States*, 81 C. C. A. 197, 152 Fed. 1; and see cases cited in *Underhill on Ev.*, p. 521.

⁹⁸ *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. 370, aff'g order *In re*, *Hale*, 139 Fed. 496; *McAlister v. Henkel*, 201 U. S. 90, 50 L. ed. 671, 26 S. Ct. 385.

⁹⁹ *State v. Bartlett*, 55 Me. 200; *Devries v. Phillips*, 63 N. Car. 53. The refusal must not be considered by the jury at all. It is gross injustice to the prisoner, and constitutes reversible error for the court, to charge that a refusal to answer an incriminating question may lead to the inference that the witness is endeavoring to shield the accused and not to protect himself. *Beach v. United States*, 46 Fed. 754.

The information which is elicited from a witness who, after he has claimed his privilege, is forced to answer an incriminating question, cannot be used against him subsequently.¹⁰⁰

If facts are shown from which the court is convinced that the incriminating evidence called for by the question cannot be used against the witness in a criminal prosecution, the witness must be compelled to answer.

Such is the case when the prosecution of the crime has been barred by the lapse of time,¹ or where a statutory enactment forbids the use of such testimony in a criminal prosecution of the witness.²

A statutory provision of this nature should be liberally construed for the purpose of affording the witness the fullest protection where he answers an incriminating question.³ A statute which provides that no person shall be prosecuted or be subjected to penalty or forfeiture on account of any transaction or matter concerning which he may testify in a proceeding or prosecution brought under certain statutes is constitutional and deprives a witness of his right to claim a privilege against answering incriminating questions. The protection of the federal statute affords the witness immunity only in the federal courts and this it has been held is sufficient.⁴

In other words, the Supreme Court of the United States has held that the fact that the statute passed by congress does not guarantee the witness against a prosecution in the state courts is

¹⁰⁰ United States v. Smith, 47 Fed. 501. *Ex parte* Buskett, 106 Mo. 602, 17 S. W. 753; Taylor v. United States, 152 Fed. 1, 81 C. C. A. 197.

¹ *Ex parte* Boscowitz, 84 Ala. 463, 4 So. 279, 5 Am. St. 384; People v. Kelly, 24 N. Y. 74; Southern Railway News Co. v. Russell, 91 Ga. 808, 18 S. E. 40. *Contra*, McFadden v. Reynolds (Pa., 1887), 11 Atl. 638.

² *Ex parte* Buskett, 106 Mo. 602, 17 S. W. 753, 27 Am. St. 378, 14 L. R. A. 407n; Willis v. State, 12 Ga. 444, 448; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n. The constitutional protection thrown

around a witness by the fifth amendment to the federal constitution, which provides that no person shall be compelled to be a witness against himself, was intended to shield the witness from actual prosecution, and not merely from the disgrace and infamy resulting from incriminating disclosures. Brown v. Walker, 161 U. S. 591, 40 Law ed. 819, 16 S. Ct. 644.

³ People v. Argo, 237 Ill. 173, 86 N. E. 679.

⁴ Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. 370; Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. 358.

not sufficient to invalidate it. This decision was made during a search for evidence in a prosecution under the federal anti-trust law and the same question has also arisen in Kansas under the state anti-trust law and a similar decision was arrived at—that is, the protection was sufficient although it did not protect in a prosecution under the federal anti-trust law.⁶ And the rule that a witness cannot refuse to answer incriminating questions where the statute gives him full immunity, is illustrated in a New York case, construing a statute which provides that no person shall be excused from testifying as to gambling on the ground that his evidence may tend to convict him of a crime, but that no such evidence shall be received against him upon any criminal investigation.⁶

Under a statute which provides that no witness shall be prosecuted on account of any testimony he may give in any proceeding, suit or prosecution, it has been held that the examination of witnesses before a grand jury is a proceeding.⁷ And where a state constitution provides that no person can be compelled in any "criminal case," to give evidence against himself, an inquisition before a grand jury has been held to be a criminal case.⁸

A statute which provides that no testimony given by a bankrupt under certain circumstances shall be used against him in a criminal proceeding is meant to protect him only against the use of his admissions against himself; and it does not permit him to close his mouth when he is called as a witness to testify against another person in a criminal proceeding. Its operation is confined strictly to his admissions in his own bankruptcy proceedings. It has been held under this statute that a bankrupt cannot be convicted of perjury or false swearing committed in his own bankruptcy proceedings in support of a claim filed by him against his estate.⁹

An inquiry by a justice in order to ascertain whether it will be necessary for him to hold an inquest is not a legal examination

⁶ *State v. Jack*, 69 Kan. 387, 76 Pac. 911.

⁷ *Hale v. Henkel*, 201 U. S. 43, 50 Law ed. 652, 26 Sup. Ct. 370.

⁸ *People v. Court of General Sessions &c.*, 96 App. Div. (N. Y.) 201, 89 N. Y. Supp. 364; *People v. O'Brien*, 176 N. Y. 253, 68 N. E. 353, aff'g, 80 N. Y. Supp. 816.

⁹ *People v. Argo*, 237 Ill. 173, 86 N. E. 679.

¹⁰ *United States v. Simon*, 146 Fed.

within a statute which provides that, in a criminal prosecution, no evidence shall be given against the accused of any statement made by him as a witness on a legal examination.¹⁰

§ 248. Interest and bias of the witness as impeachment.—The bias of the witness and his interest in the event of the prosecution are not collateral, and may always be proved to enable the jury to estimate his credibility. They may be proved by his own testimony upon cross-examination or by independent evidence.¹¹ Thus, for example, the prosecution may show that its witness has, on his direct examination, unexpectedly proved hostile, and may then show by other witnesses that the biased witness was at one time ready and willing to testify against the prisoner.¹²

On the other hand the defendant may show that he had a difficulty with one of the witnesses for the state.¹³ He may show that the witnesses for the prosecution hated him and from his evidence the jury may infer that this hatred colored the testimony.¹⁴ The bias of the witness may be shown, either by independent testimony or by questions put to him upon his examination. He may be interrogated as to his sympathy with the prisoner,¹⁵ or as to his hostility towards him.¹⁶ Thus one accused of illegal dealing in liquors may show that one of the prosecuting witnesses had been convicted of an illegal sale and that the accused was a witness against him.¹⁷

In proving bias or interest by questions put to the witness re-

¹⁰ *State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152n.

¹¹ *Sage v. State*, 127 Ind. 15, 28, 26 N. E. 667; *Bennett v. State*, 28 Tex. App. 539, 13 S. W. 1005; *Eldridge v. State*, 27 Fla. 162, 9 So. 448; *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *People v. Mallon*, 116 App. Div. 425, 101 N. Y. S. 814; *Wheeler v. State*, 79 Neb. 491, 113 N. W. 253; *State v. Darling*, 202 Mo. 150, 100 S. W. 631.

¹² See *Underhill on Ev.*, § 340.

¹³ *Jordan v. State*, 79 Ala. 9, 12; *Lyle v. State*, 21 Tex. App. 153, 17 S. W. 425; *Scott v. State*, 113 Ala. 64, 21 So. 425.

¹⁴ *State v. Barber*, 13 Idaho 65, 88 Pac. 418.

¹⁵ *State v. Turlington*, 102 Mo. 642, 15 S. W. 141; *Porch v. State*, 51 Tex. Cr. 7, 99 S. W. 1122.

¹⁶ A witness who testifies for the defendant may be asked if he did not leave the state to enable the accused to procure a continuance. *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Burnett v. State*, 53 Tex. Cr. 515, 112 S. W. 74.

¹⁷ *Vann v. State*, 140 Ala. 122, 37 So. 158.

garding his previous statements out of court indicating bias, it is necessary to state details of time, place and person attendant upon such declarations.¹⁸ If the witness denies having uttered the statement indicating bias, or if he refuses to answer or answers evasively, the fact of bias may be proved by other witnesses.¹⁹ Under modern rules the possession of an actual pecuniary interest in the outcome of an action is not a valid objection to the competency of a witness. But it may always be shown, even in a criminal proceeding, as a fact from which the jury may infer that the witness is biased. So a detective testifying against the accused may be asked if he had received any money, or if he expected to be paid for acting as a detective.²⁰

So, also, an attorney testifying against the accused may be asked if he had received a retainer in the case to assist in its prosecution and as to what capacity he was retained. If he denies these facts, they may be shown by other evidence.²¹

It may always be shown that a witness testifying for the accused is related to him, either by blood or marriage. And the jury may, with propriety, be warned that they should employ great caution in weighing the testimony of such a person,²² un-

¹⁸ *Queen's Case*, 2 Br. & Bing. 284, 311, 22 R. R. 662; *Crompton v. State*, 52 Ark. 273, 12 S. W. 563; *State v. Brown*, 28 Ore. 147, 41 Pac. 1042. It is otherwise when the bias is to be proved by independent testimony without interrogating the witness. *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189.

¹⁹ *State v. McFarlain*, 41 La. Ann. 686, 6 So. 728; *Eldridge v. State*, 27 Fla. 162, 9 So. 448; *Bennett v. State*, 28 Tex. App. 539, 13 S. W. 1005; *State v. Kelley*, 45 S. Car. 659, 668, 24 S. E. 45; *State v. Darling*, 202 Mo. 150, 100 S. W. 631.

²⁰ *State v. Tosney*, 26 Minn. 262, 263, 264, 3 N. W. 345; *Heldt v. State*, 20 Neb. 492, 30 N. W. 626, 57 Am. 835n; *Rivers v. State*, 97 Ala. 72, 12 So. 434. *Cf. State v. Barber*, 2 Kan. App. 679, 43 Pac. 800. But the mere fact that a

witness has frequently testified for the state in similar criminal prosecutions is not admissible as impeachment. *Mitchell v. State*, 94 Ala. 68, 10 So. 518; *Lea v. State*, 64 Miss. 294, 1 So. 244; *Union v. State* (Ga. App., 1909), 66 S. E. 24.

²¹ *Miller v. Territory*, 15 Okla. 422, 85 Pac. 239, reversed in 149 Fed. 330, 79 C. C. A. 268.

²² *Smith v. State*, 143 Ind. 685, 42 N. E. 913; *State v. Calkins*, 73 Iowa 128, 131, 34 N. W. 777; *United States v. Ford*, 33 Fed. 861; *State v. Hilsabeck*, 132 Mo. 348, 34 S. W. 38; *State v. Byers*, 100 N. Car. 512, 6 S. E. 420; *Simpson v. State*, 78 Ga. 91; *State v. Farrell*, 82 Iowa 553, 48 N. W. 940. *Contra, People v. Shattuck*, 109 Cal. 673, 42 Pac. 315. In *Myers v. State*, 97 Ga. 76, 25 S. E. 252, it was held that the bare fact of a reward having been offered for the apprehension of

less the inference of bias is overcome by evidence which shows to their satisfaction that the witness and the accused are on bad terms.

The relations of the witness and the decedent in a murder trial are always relevant. The witness may be compelled to disclose his or her relations with the decedent, though they were improper and they may be shown by other witnesses. If the witness is questioned and denies that he knew the decedent at all, he may be contradicted by other witnesses; the object of evidence to prove that there existed improper relations between decedent and the witness not being to blacken his or her character but to show bias and prejudice against the accused.

Evidence of relations which are entirely proper, for example, that the witness was the wife, sister or daughter of the decedent, is always competent.²³

On the other hand inasmuch as the friendly feeling of the prosecuting witness for the accused cannot be considered by the jury in arriving at their verdict it is not allowable for the accused to prove that the prosecuting witness did not have the accused arrested of his own free will or that he bore the accused no malice or ill will.²⁴

The bias of a witness in favor of the accused may have been created by means of threats made or bribes offered by him or by some one connected with him. The fact that a witness has been thus tampered with does not exclude his testimony. But the bribery or attempts to bribe a witness either to testify or to remain silent when upon the stand are always relevant,²⁵ though it is for the jury to determine what effect, if any, the threats or bribes have had upon the credibility of the witness.²⁶

Under the rule that the bias or interest of the witness may be shown, it is competent to prove, either by his cross-examination or by the evidence of another witness, that a witness for the state

the accused may be given in evidence as affecting the credibility of the witnesses for the prosecution.

²³ *Leach v. Commonwealth*, 33 Ky. L. 1016, 112 S. W. 595.

²⁴ *State v. De Hart*, 38 Mont. 211, 99 Pac. 438.

²⁵ *State v. Cook*, 13 Idaho 45, 88 Pac. 240.

²⁶ A witness may be impeached by showing his refusal to attend the funeral of a person murdered by conspirators under circumstances of unusual brutality. *Holtz v. State*, 76 Wis. 99, 44 N. W. 1107, 1110.

shows that he himself, is accused of the crime for which the accused is being tried. This often appears without the question being put where one accomplice testifies against another and, for that reason there exists the well-known rule that a conviction cannot be had upon accomplice's evidence, alone.

The inference may be very strong that the witness is endeavoring to fasten the crime upon the accused on trial in order to exculpate himself, and if this does not appear from the testimony of the witness, counsel for the accused may bring it out to effect his credibility.²⁷

The jury have no right, however, to determine the credibility of the witness upon his bias or prejudice alone. The bias or prejudice of the witness are only circumstances to be considered in connection with other circumstances as his intelligence, his manner of testifying and his conduct on the witness-stand. Though a witness may be friendly to the accused, closely related to him, or very intimate with him, it does not follow that he will perjure himself to secure his acquittal, for the conscience of the witness, or his regard for the binding obligation of his oath, or his fear of punishment in case he shall swear falsely, may overcome his prejudice in favor of the accused and prompt him to tell the truth.

Bias or prejudice is no more conclusive of the lack of veracity on the part of the witness than is his prior bad reputation and hence it is reversible error for the court to instruct the jury that they may disregard the testimony of a witness who is biased. The proper instruction is that they may, in determining the credibility of witnesses, consider among other circumstances of proof of bias or prejudice or interest in the outcome of the trial.²⁸

Where the impeachment of a witness is attempted, the accused is entitled to a charge by the court. If direct impeachment has not been attempted by some of the methods indicated in this chapter, the court may charge to that effect, expressly pointing out the methods of possible impeachment. A general charge that a wit-

²⁷ State v. Rosa, 71 N. J. L. 316, 58 Mo. 391, 61 S. W. 187; Van Buren v. Atl. 1010. State, 63 Neb. 453, 88 N. W. 671;

²⁸ People v. Amaya, 134 Cal. 531, 66 State v. Hoshor, 26 Wash. 643, 67 Pac. Pac. 794; State v. Carey, 23 Ind. App. 386; State v. Dickey, 48 W. Va. 325, 378, 55 N. E. 261; State v. Adair, 160 37 S. E. 695.

ness has not been impeached invades the province of the jury and may properly be refused.²⁹

The court may instruct the jury that they may disregard the evidence of a witness if they determine that he has been successfully impeached, unless upon the whole evidence, they find that he has been corroborated to their satisfaction.³⁰ The jury, however, are not at liberty to arbitrarily regard or disregard any evidence which is offered to impeach a witness and should be so instructed.³¹ They must consider the credibility of the evidence of the witness whose impeachment has been attempted and they may believe it, notwithstanding, that an attempt has been made to impeach him.³²

²⁹ *Rambo v. State*, 134 Ala. 71, 32 So. 650; *Prior v. State*, 99 Ala. 196, 13 So. 681; *State v. Breckenridge*, 33 La. Ann. 310.

³⁰ *Osborn v. State*, 125 Ala. 106, 27 So. 758; *Loerh v. People*, 132 Ill. 504, 24 N. E. 68; *State v. Goforth*, 136 Mo. 111, 37 S. W. 801.

³¹ *Hall v. State*, 130 Ala. 45, 30 So. 422; *Huff v. State*, 104 Ga. 521, 30 S. E. 808.

³² *Plummer v. State*, 111 Ga. 839, 36 S. E. 233; *State v. Johnagen*, 53 Iowa 250, 5 N. W. 176; *People v. Lyons*, 51 Mich. 215, 16 N. W. 380; *Owens v. State*, 80 Miss. 499, 32 So. 152; *Strong*

v. State, 61 Neb. 35, 84 N. W. 410. An instruction that, if the jury are satisfied from the evidence that a witness has been impeached, or they have a reasonable doubt on account of such evidence as to his credibility, his testimony should be disregarded except as far as it has been corroborated by credible witnesses, is properly refused, as it directs, instead of permits, the jury to disregard the testimony, and excludes corroboration by circumstances and documents. *Niezorawski v. State*, 131 Wis. 166, 111 N. W. 250.

CHAPTER XX.

THE ATTENDANCE OF WITNESSES.

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| § 249. The subpoena—Witness fees. | § 255. Obstructing the attendance of witnesses. |
| 250. Constitutional right of the accused to compulsory process to procure the attendance of witnesses. | 256. Change of venue for the convenience of witnesses. |
| 251. Subpoena <i>duces tecum</i> . | 257. The intentional absence of witnesses—When it constitutes a contempt of court. |
| 252. Validity of reasons for not producing writings. | 258. Privilege of witnesses from civil arrest and from service of civil process. |
| 253. Service of the subpoena and time allowed to witnesses. | 259. Attendance of witnesses in custody. |
| 254. Recognizance to secure the attendance of witnesses where the hearing is postponed. | |

§ 249. **The subpoena—Witness fees.**—The power of the court to hear testimony and to determine controversies confers by implication at common law the further power to require and to compel the production of evidence for or against the controverted facts. The judicial power to summon witnesses is commonly exercised by the employment of a subpoena, which has been defined as a “judicial writ, directed to the witness, commanding him to appear at the court, to testify what he knows in the cause therein described, pending in such court, under a certain penalty mentioned in the writ.”¹ In the absence of statute the state is under no obligations to pay the fees or expenses of its witnesses or of the witnesses for the accused.

It is conceived to be the duty of every citizen to assist gratuitously so far as lies in his power in procuring the punishment of

¹ Greenl. on Ev., § 309. The attendance of a witness before a commissioner, who has been appointed to take his deposition by a court which has received letters rogatory, may be secured by a subpoena, or order in the nature of one. *State v. Bourne*, 21 Ore. 218, 27 Pac. 1048; *Donnelly v. County*, 7 Iowa 419.

wrong-doers.² Hence, a statute providing that a witness in a criminal case is not entitled to fees does not conflict with a constitutional guarantee that no man's services shall be demanded or taken by the state without proper compensation.³

§ 250. Constitutional right of the accused to compulsory process to procure the attendance of witnesses.—The prisoner, even though on trial for his life, possessed, at common law, no absolute right to command the process of the court to secure the attendance of his witnesses, while if they voluntarily attended he was not permitted to examine them.⁴ By the provisions of the federal constitution and those of the several states, the right to compulsory process to obtain the attendance of witnesses is secured to the accused,⁵ and he is thus placed on an equality with the state.⁶ If he is unable to pay the expense of serving a subpoena, the court may direct a court officer to serve it.⁷ The courts construing these constitutional enactments hold that they merely confer a right to a subpoena or if this is not obeyed to further compulsory process such as a recognizance or bench warrant.⁸

² *Commissioners v. Ballinger*, 20 Kan. 590; *State v. Massey*, 104 N. Car. 877, 10 S. E. 608. In North Carolina by custom the prisoner if found guilty was taxed with the fees for the state's witnesses. Afterwards the matter was regulated by statute. For the statutes compelling the state to pay the fees of its witnesses, see *Barrett v. State*, 24 Ala. 74; *Briggs v. Coleman*, 51 Ala. 561; *Herrick, Ex parte*, 78 Ky. 23; *Sargent v. Cavis*, 36 Cal. 552; *Hall v. County Com'rs.*, 82 Md. 618, 34 Atl. 771, 51 Am. St. 484, 32 L. R. A. 449.

³ *Daly v. Multnomah Co.*, 14 Ore. 20, 12 Pac. 11; *United States v. Durling*, 4 Biss. 509, 25 Fed. Cas. 15010; *State v. Massey*, 104 N. Car. 877, 10 S. E. 608.

⁴ *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305; *United States*

v. Reid, 12 How. (U. S.) 361, 13 L. ed. 1023, 4 Bl. Com. 355, 358, 359.

⁵ *West v. State*, 1 Wis. 209; *United States v. Burr*, 25 Fed. Cas. 14692d; *United States v. Kenneally*, 26 Fed. Cas. 15522, 5 Biss. 122.

⁶ *State v. Massey*, 104 N. Car. 877, 10 S. E. 608.

⁷ *Commonwealth v. Lindsey*, 2 Ches. Co. (Pa.) 268; *Chamberlain, Ex parte*, 4 Cow. (N. Y.) 49. See *Commonwealth v. Williams*, 13 Mass. 501; *State v. Archer*, 54 N. H. 465, in which the rule is restricted to capital cases. And where one accused of a capital crime trusted to counsel to summon his witnesses, which the latter neglected to do, it was held that the trial must be postponed until the witnesses could be subpoenaed. *State v. Lewis*, 9 Mo. App. 321.

⁸ *State v. Pope*, 78 S. Car. 264, 58 S. E. 815.

The accused is not entitled to an allowance for his expenses in summoning witnesses or procuring depositions,⁹ unless it is expressly provided by statute that such expenses shall be paid by the county if he is acquitted.¹⁰

It is always for the trial judge to determine whether the accused, when he applies for compulsory process for the procurement of witnesses at the expense of the state, has properly complied with the requirements of the statute, and whether the accused is making the application in good faith.¹¹ The necessity and materiality of the evidence of the witness for whom compulsory process is asked must be made to appear.¹²

The prisoner must be granted the writ whenever he applies for it during the trial,¹³ though he should do so at the earliest reasonable opportunity.¹⁴ His constitutional right must be exercised in conformity with recognized legal rules. It does not apply to procure the personal attendance of a witness who resides out of the jurisdiction of the court,¹⁵ or to those within it whose deposition in favor of the prisoner can easily be procured if they are unable to attend in person.¹⁶ But any statute which prescribes

⁹ *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305.

¹⁰ *State v. Massey*, 104 N. Car. 877, 10 S. E. 608; *State v. Willis*, 79 Iowa 326, 44 N. W. 699; *Carpenter v. People*, 3 Gilm. (Ill.) 147; *Bennett v. Kroth*, 37 Kan. 235, 15 Pac. 221, 1 Am. St. 248; *Little v. Todd*, 3 Rich. (S. Car.) 91; *Howell v. Blackwell*, 7 Ga. 443; *Donnelly v. County*, 7 Iowa 419; *Commonwealth v. Williams*, 13 Mass. 501; *Chamberlain, Ex parte*, 4 Cow. (N. Y.) 49. In *Chamberlain, Ex parte*, 4 Cow. (N. Y.) 49, a distinction was made between witnesses for the accused in a case of felony and in a case of misdemeanor, the court holding that a witness in the former case must attend, when subpoenaed by the accused, without payment of fees, while in the latter he need not. But this distinction, if ever generally recognized, has long since been abolished

either by express statute or well recognized practice.

¹¹ *Jenkins v. State*, 31 Fla. 190, 12 So. 680; *State v. Godard*, 4 Idaho 750, 44 Pac. 643.

¹² *State v. Godard*, 4 Idaho 750, 44 Pac. 643.

¹³ *Edmondson v. State*, 43 Tex. 230; *Green v. State*, 17 Fla. 669. Cf. *State v. Thornton*, 49 La. Ann. 1007, 22 So. 315.

¹⁴ *Jenkins v. State*, 31 Fla. 190, 12 So. 680.

¹⁵ *State v. Pagels*, 92 Mo. 300, 4 S. W. 931; *State v. Butler*, 67 Mo. 59; *State v. Yetzer*, 97 Iowa 423, 66 N. W. 737; *State v. Wilcox*, 21 S. Dak. 532, 114 N. W. 687.

¹⁶ *Willard v. Superior Court*, 82 Cal. 456, 22 Pac. 1120. Cf. *State v. Berkley*, 92 Mo. 41, 4 S. W. 24. In such a case the accused has an absolute right to a commission to take testi-

that a criminal trial shall not be postponed if either party consents that the facts contained in affidavits for a continuance shall be regarded as the evidence of the absent witness, is unconstitutional, as it deprives the accused of his constitutional right to compulsory process.¹⁷

The court will grant the accused an attachment for a witness only when his evidence is material,¹⁸ and it affirmatively appears he will testify in favor of the accused,¹⁹ and when it also appears that he has been summoned, or that diligence has been used to secure his attendance, that he is in the state, and that his early presence can be secured.²⁰

A statute or rule of court limiting the number of subpoenas for witnesses to which one accused of felony is entitled is unconstitutional.²¹ But a rule which authorizes the court to refuse the accused compulsory process unless he shall show the witnesses are necessary for his defense and that their testimony is material is not unconstitutional.²²

§ 251. *Subpoena duces tecum*.—Where the production of documentary evidence in the possession of the witness is required, a subpoena *duces tecum* is employed, commanding him to search for and bring to court certain books or papers which are specifically described, with all documents and writing which may be evidence in the case. The papers are required to be stated with that degree of certainty which is practicable under the circum-

mony. *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305. And it is not error for the court to exercise its discretion in refusing to summon witnesses for the defendant at the public expense, where it appears that their evidence is cumulative or immaterial. *Goldsby v. United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. 216; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *State v. Graves*, 13 Wash. 485, 43 Pac. 376.

¹⁷ *State v. Berkley*, 92 Mo. 41, 4 S. W. 24; *Graham v. State*, 50 Ark. 161, 6 S. W. 721.

¹⁸ *People v. Marseiler*, 70 Cal. 98, 11 Pac. 503.

¹⁹ *State v. Pope*, 78 S. Car. 264, 58 S. E. 815.

²⁰ *State v. Johnson*, 41 La. Ann. 574, 7 So. 670. If the venue is changed on the motion of the prosecution, the court may make it a condition that the traveling expenses of the defendant's witnesses, who cannot pay their own expenses, shall be provided for. *People v. Baker*, 3 Abb. Pr. (N. Y.) 42.

²¹ *State v. Gideon*, 119 Mo. 94, 24 S. W. 748, 41 Am. St. 634n.

²² *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *State v. Graves*, 13 Wash. 485, 43 Pac. 376.

stances,²³ that the witness may know what is wanted of him, and the court may ascertain if the subpoena has been properly obeyed.²⁴ The sole object of this writ is the production of documentary evidence, and a piece of metal or other article, or a weapon with which a crime has been committed, cannot be brought into court by a subpoena *duces tecum*.²⁵ Nor can the writ be employed to compel the production of writings which are not to be used as evidence, but to refresh the memory of a witness.²⁶

§ 252. **Validity of reasons for not producing writings.**—Disobedience to a subpoena *duces tecum* by a post-office or internal revenue official is not excused by the fact that the rules of his department forbid him to disclose any information contained in its records.²⁷ A witness in whose possession are papers which it is sought to produce by a subpoena *duces tecum*, is not excusable for refusing or neglecting to obey it, because the papers do not belong to him. But the custodian of public records, and even of the records of a private corporation will be excused from bringing the originals into court because of the great inconvenience which would certainly result, and because the writings can generally be proved in a satisfactory manner by authenticated copies.²⁸

The mere fact that the witness brings the documents in court, in response to the subpoena, does not determine their admissibility as evidence.²⁹

Nor will the witness be compelled to produce the documents,

²³ *Starror, In re*, 63 Fed. 564; *Murray v. Louisiana*, 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. 990; *Ex parte*, Jaynes, 70 Cal. 638, 12 Pac. 117; *Ex parte*, Brown, 72 Mo. 83, 37 Am. 426.

²⁴ It is the duty of the person to whom the writ is directed to make a reasonable search for the documents required if they are in his possession. *United States v. Babcock*, 3 Dill. 566, 570, 571, 24 Fed. Cas. 14484; *Elting v. United States*, 27 Ct. Cl. 158; *United States v. Hunter*, 15 Fed. 712.

²⁵ *In re Shepard*, 18 Blatchf. 225; *Shepard, In re*, 3 Fed. 12; *Johnson*

Steel &c. Co. v. North Branch &c. Co., 48 Fed. 191.

²⁶ *United States v. Tilden*, 10 Ben. 566, 28 Fed. Cas. 16522. While a subpoena *duces tecum* is unreturned or unserved, no second subpoena will be valid for the same purpose. *Elting v. United States*, 27 Ct. Cl. 158.

²⁷ *Rice v. Rice*, 47 N. J. Eq. 559, 21 Atl. 286, 11 L. R. A. 591n. *Hirsch, In re* 74 Fed. 928.

²⁸ *Corbett v. Gibson*, 16 Blatchf. 334.

²⁹ *Rex v. Dixon*, 3 Burr. 1687; *Campbell v. Dalhousie*, L. R. 1 H. L. Sc. App. 462; *Mott v. Consumers' Ice Co.*, 52 How. (N. Y.) Fr. 244.

though he have them with him in court, if he can show a lawful or reasonable reason for withholding them.³⁰ The sufficiency and validity of the reason for not producing a writing are for the court.³¹ The mere assertion of the witness that writings are not in his possession does not excuse their non-production, if it appears they were recently in his hands and he fails to account for their disappearance.³²

§ 253. Service of the subpoena and time allowed to witnesses.—The subpoena should, in justice to the witness, be seasonably served. He should be given a reasonable opportunity so to arrange his business that it will not suffer during his absence.³³ It is now usually enacted by statute that a witness shall be allowed one day's time for each twenty miles he is compelled to travel from his residence to the court where his testimony is needed. At least one day's notice is necessary in every case. The witness must be served with the subpoena in person, so that being thus informed of its contents, he may be chargeable with contempt if he disobey it. To constitute a personal service, the subpoena should be shown to the witness, and a copy or a ticket containing a concise summary of its contents should be delivered to him, accompanied by his fees and an oral statement of what the paper is.³⁴ A subpoena is only valid to secure the attendance of a witness in the particular proceeding in which it issues. It is inoperative to secure his presence at a later term to which the trial has been adjourned.³⁵

§ 254. Recognizance to secure the attendance of witnesses where the hearing is postponed.—Where the accused on the preliminary examination has been committed for trial, or is held to await the action of the grand jury, or where the trial is continued, it is sometimes the practice to require a witness to give his recognizance or personal bond in order that his future attendance at

³⁰ *Lane v. Cole*, 12 Barb. (N. Y.) 680; *Central Nat. Bank v. Arthur*, 2 Sweeney (N. Y.) 194.

³¹ *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Lane v. Cole*, 12 Barb. (N. Y.) 680.

³² *Fenlon v. Dempsey*, 21 Abb. N. Cas. 291.

³³ *Hughbanks, In re*, 44 Kan. 105, 21 Pac. 75.

³⁴ See *Underhill on Evidence* § 281a.

³⁵ *Sapp v. King*, 66 Tex. 570, 1 S. W. 466.

the trial may be secured.³⁶ It is in the discretion of the court to accept sureties for the attendance of the witness, and if they are not procurable, or if the witness refuses to give his recognizance, the court may order that he shall be kept in custody until the trial.³⁷ This is doubtless a correct statement of the practice as it obtained at common law, but the modern tendency is to regard such a mode of procedure as extremely oppressive and unjust. It is certainly unfair to an innocent person, whose only offense is his accidental presence at the time and place of a crime, to incarcerate him because he is unable to give sureties for his appearance as a witness on the trial.³⁸ Hence it is sometimes provided by statute that a witness who is unable to give sureties for his appearance may be released from custody on giving his deposition.³⁹ And in any case it may be that there is an abuse of the judicial discretion if a witness is committed to jail solely because he cannot give bail for his appearance unless there is some proof of an intention on his part not to appear and testify.⁴⁰

§ 255. Obstructing the attendance of witnesses.—At the common law,⁴¹ and now frequently by statute, in many of the states, any attempt⁴² to retard or to prevent the attendance of witnesses called to testify in either civil or criminal proceedings,⁴³ or the act of

³⁶ *Bickley v. Commonwealth*, 2 J. J. Marsh. (Ky.) 572; *State v. Grace*, 18 Minn. 398; *Means v. State*, 10 Tex. App. 16, 38 Am. 640; *Shaw, Ex parte*, 61 Cal. 58; *United States v. Durling*, 4 Biss. 509, 25 Fed. Cas. 15010.

³⁷ 2 Hale P. C. 282; *Roscoe Cr. Ev.* p. 87; *Fawcett v. Linthecum*, 7 Ohio Cir. Ct. 141; *State v. Grace*, 18 Minn. 398; *Petrie, In re*, 1 Kan. App. 184, 40 Pac. 118.

³⁸ See remarks of court in *Hall v. Somerset County*, 82 Md. 618, on p. 623, 34 Atl. 771, 51 Am. St. 484, 32 L. R. A. 449.

³⁹ *State v. Grace*, 18 Minn. 398; *People v. Lee*, 49 Cal. 37; *Bickley v. Commonwealth*, 2 J. J. Marsh. (Ky.) 572. It is doubtful, however, if the

deposition is admissible as evidence against the accused unless he had a full opportunity to confront the witness and to cross-examine him at the previous hearing.

⁴⁰ *State v. Grace*, 18 Minn. 398.

⁴¹ *Commonwealth v. Reynolds*, 14 Gray (Mass.) 87; *State v. Carpenter*, 20 Vt. 9, 74 Am. Dec. 665.

⁴² *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450.

⁴³ 4 Bl. Com. 129; *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450 (even when the witness has not been served with a subpoena); *State v. Carpenter*, 20 Vt. 9; *United States v. Kee*, 39 Fed. 603; *State v. Ames*, 64 Me. 386; *State v. Baller*, 26 W. Va. 90, 53 Am. 66; (in which the character of an at-

a party in advising a witness not to answer any question put to him,⁴⁴ is a misdemeanor.

It is immaterial that the attempt was unsuccessful,⁴⁵ or that the obstructor refrained from the employment of violence or force and confined himself wholly to threats or scurrilous language,⁴⁶ got the witness intoxicated, so that he was unable to attend,⁴⁷ or employed the machinery of the criminal law to prevent his attendance by preferring an unfounded charge against him, and, in collusion with a magistrate, procured his imprisonment.⁴⁸ The witness may obtain a warrant for the arrest of the party who has obstructed him,⁴⁹ or the person who has thus illegally and maliciously hindered the attendance of the witness may be indicted by the grand jury.⁵⁰

Intimidating a witness from testifying against one accused of felony, though a misdemeanor, does not make the offender an accessory to the felony.⁵¹

The rules and principles laid down above are usually invoked in cases where private persons attempt to influence witnesses who were called to testify against the accused. They are, of course, equally applicable where police officials or public prosecuting officers practice similar methods of intimidation upon the witness for the accused. And in any event it is extremely improper to allow a public prosecutor to endeavor to dissuade witnesses for the accused from appearing and testifying, even though he may

tempt to obstruct a witness is discussed); *Rex v. Lawley*, 2 Str. 904. The fact that the witness was expected to testify, even though he has not been subpoenaed, and is not under recognizance to appear, is sufficient. *State v. Horner*, 1 Marv. (Del.) 504, 26 Atl. 73, 41 Atl. 139.

⁴⁴ *Gandy v. State*, 23 Neb. 436, 36 N. W. 817; *Perrow v. State*, 67 Miss. 365, 7 So. 349.

⁴⁵ *Russell on Cr.*, p. 182; *Gandy v. State*, 23 Neb. 436, 36 N. W. 817; *State v. Carpenter*, 20 Vt. 9.

⁴⁶ *Reg. v. Onslow*, 12 Cox C. C. 358; *Charlton's Case*, 2 Myl. & Cr. 316.

⁴⁷ *State v. Holt*, 84 Me. 509, 24 Atl. 951.

⁴⁸ *United States v. Kindred*, 4 Hughes (U. S.) 493.

⁴⁹ *Magnay v. Burt*, 5 Q. B. 381.

⁵⁰ It is not necessary that the record of the case in which the witness was to testify, *State v. Carpenter*, 20 Vt. 9, or the fact that the evidence of the witness was material, *Commonwealth v. Reynolds*, 14 Gray. (Mass.) 87, 74 Am. Dec. 665, or the particular method used to intimidate or obstruct him, *State v. Ames*, 64 Me. 386, shall be set forth in the indictment.

⁵¹ *Reg. v. Chapple*, 9 C & P. 355. A person is not guilty of intimidating or impeding a witness who beats him after he has testified. *United States v. Thomas*, 47 Fed. 807; *United States v. Kee*, 39 Fed. 603.

have the best of grounds to believe that they are unreliable and that they will perjure themselves.

§ 256. Change of venue for the convenience of witnesses.—In civil cases in order to avoid the expenditure of large sums of money as mileage, or for the taking of depositions, it is very frequently provided by statute that, where the convenience of the witnesses requires it, the venue or place of trial of the action may be changed. But as a general rule, in criminal cases no change of venue can be procured solely for the convenience of witnesses.⁵²

§ 257. The intentional absence of witnesses.—When it constitutes a contempt of court.—Every witness who has been properly summoned to attend and give testimony is guilty of a contempt of court if he intentionally fails, neglects or refuses to attend.⁵³ The court may, upon the application of the party by whom he has been summoned, grant an *ex parte* and immediate order for his arrest upon facts showing that his contempt is intentional and manifest.⁵⁴ But usually an attachment will issue only after the granting and the return of a preliminary order to show cause.⁵⁵ The subject is usually regulated by statute. Where this is not the case the power to grant an attachment is discretionary.⁵⁶ At common law a witness is not in contempt who fails to attend on his *subpoena* summoning him to appear before the grand jury. He must be summoned to appear in court to give evidence before the grand jury.⁵⁷

It is never essential that the trial should have been begun, or that the witness should have been called in open court before an attachment will issue to compel his presence. But it must be satisfactorily proved that he is wilfully disobedient in absenting

⁵² *People v. Harris*, 4 Denio. (N. Y.) 150.

⁵³ *Gunn, In re*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; *People v. Brown*, 46 Hun (N. Y.) 320; *Commonwealth v. Carter*, 11 Pick. (Mass.) 277; *Stephens v. People*, 19 N. Y. 549; *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820.

⁵⁴ *State v. Trumbull*, 4 N. J. L. 139;

Andrews v. Andrews, 2 John. Cas. (N. Y.) 109; *People v. Vermilyea*, 7 Cow. (N. Y.) 108.

⁵⁵ *Wilson v. State*, 57 Ind. 71; *Green v. State*, 17 Fla. 669; *State v. Hopper*, 71 Mo. 425.

⁵⁶ *State v. Hillstock*, 45 La. Ann. 298, 12 So. 352.

⁵⁷ *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820.

himself.⁵⁸ The party must move promptly for an attachment to bring the witness before the court. The application must be founded upon affidavits showing facts sufficient to constitute a prompt, seasonable and personal service of the subpoena⁵⁹ and the payment or tender of all proper and necessary fees. A writ of attachment for contempt is an extraordinary remedy which, in the absence of a statute, is wholly in the discretion of the court, and it should issue only upon evidence that is reasonably clear and convincing, that its issuance is needed and that the evidence of the witness is not cumulative, is material,⁶⁰ and that due diligence has been employed,⁶¹ though the immateriality of his evidence is no defense for a witness who distinctly refuses to obey a subpoena. So also it must appear that the witnesses would be physically able to attend if the attachment were to issue.⁶² Every person whatever his office or dignity, is bound to appear and testify when he is required to do so by proper judicial process, unless he has a lawful excuse. It has been held that the official engagements of the higher officers of the government may be a sufficient and legal excuse, though the dignity of the office is not.⁶³

A witness who has received early notice to attend court may be in contempt if, believing he has sufficient time, he postpones compliance with the subpoena until the case is on trial.⁶⁴

§ 258. Privilege of witnesses from civil arrest and from service of civil process.—A witness who is beyond the jurisdiction of the

⁵⁸ *Wilson v. State*, 57 Ind. 71. A member of congress is not exempt from subpoena by the accused in a criminal case. The constitution confers upon every man charged with crime the benefit of compulsory process to obtain the attendance of witnesses. *United States v. Cooper*, 4 Dall. 341, 25 Fed. Cas. 14861.

⁵⁹ *State v. Allemand*, 25 La. Ann. 525; *State v. Trumbull*, 4 N. J. L. 139.

⁶⁰ *Garden v. Creswell*, 2 M. & W. 319; *State v. Trounce*, 5 Wash. St. 804, 32 Pac. 750; *People v. Van Tassel*, 64 Hun (N. Y.) 444, 19 N. Y. S. 643; *Wyatt v. People*, 17 Colo. 252,

28 Pac. 961; *State v. Johnson*, 41 La. Ann. 574, 7 So. 670, and cases cited in *Underhill on Ev.*, on page 420.

⁶¹ *State v. Johnson*, 41 La. Ann. 574, 7 So. 670.

⁶² *State v. McCarthy*, 43 La. Ann. 541, 9 So. 493.

⁶³ *Thompson v. German Valley R. R. Co.*, 22 N. J. Eq. 111; 1 Burr's Trial 182. It is doubtful, however, if the executive official can be proceeded against for contempt. The party may have a remedy in damages. *Thompson v. German Valley R. R. Co. supra*.

⁶⁴ *Jackson v. Seager*, 2 D. & L. 13.

court is exempted from the service of a summons or other civil process under the same conditions, as regards time and place, and for the same reasons, as he is exempt from civil arrest while voluntarily within the jurisdictional limits of the court for the purpose of testifying.⁶⁵ Not only are witnesses privileged from service of civil process during their attendance, but they are also protected from arrest in civil actions during the time they are proceeding to, remaining at, or returning from court,⁶⁶ or any place where a congressional or legislative investigation is in progress.⁶⁷ Non-resident witnesses, in order to encourage their voluntary attendance, and because they cannot be summoned by a subpoena, will be privileged, although they may have come into the state voluntarily,⁶⁸ but the rule is otherwise in the case of a witness who resides within the jurisdiction and who attends voluntarily and without a subpoena.⁶⁹

The non-resident witness will be regarded as having waived his privilege if he shall voluntarily submit to arrest or fail to assert his exemption and claim his liberty at his earliest opportunity. He cannot then claim his privilege has been violated.⁷⁰

The trial in which he was to testify will be continued until his discharge from arrest.⁷¹ The witness is privileged not only during his journey to and from the place where the court is in session,

⁶⁵ *Hollander v. Hall*, 58 Hun (N. Y.) 604, 11 N. Y. S. 521; *Christian v. Williams*, 35 Mo. App. 297; *Larned v. Griffin*, 12 Fed. 590; *Compton v. Wilder*, 40 Ohio St. 130; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. 754; *Person v. Grier*, 66 N. Y. 124, 23 Am. 35.

⁶⁶ *Ballinger v. Elliott*, 72 N. Car. 596; *May v. Shumway*, 16 Gray. (Mass.) 86, 77 Am. Dec. 401n; *Norris v. Beach*, 2 Johns. (N. Y.) 294; and *Underhill on Evidence*, page 421, note 2.

⁶⁷ *Thompson's Case*, 122 Mass. 428, 23 Am. 370.

⁶⁸ *Christian v. Williams*, 35 Mo. App. 297; *Person v. Grier*, 66 N. Y. 124, 23 Am. 35; *Jones v. Knauss*, 31 N. J. Eq. 211.

⁶⁹ *Rogers v. Bullock*, 3 N. J. L. 109. ⁷⁰ *Smith v. Jones*, 76 Me. 138, 49 Am. 598; *Underhill on Evidence*, page 421, notes 5 and 6. The court in which the witness is called to testify will, in the case of his illegal arrest, order his immediate discharge upon the proper motion supported by affidavits. *Moore v. Green*, 73 N. Car. 394, 21 Am. 470. Though in the case of inferior courts the witness may be under necessity of employing the writ of *habeas corpus*. *Smith v. Jones*, 76 Me. 138, 49 Am. 598.

⁷¹ *Hurst's Cases*, 4 Dall. 387, 1 L. ed. 878; *Commonwealth v. Daniel*, 4 Pa. L. J. 49; *United States v. Edme*, 9 S. & R. (Pa.) 147.

but also during his detention in the place where the court is held, if the sole reason of his stay is his purpose to testify. The law allows a reasonable time for the journey to and from the place of trial, but does not countenance loitering,⁷² though a slight deviation to partake of food, to see one's friends or to obtain papers which are to be used as evidence at the trial, will not nullify the privilege from arrest. If the witness, after testifying, before returning home, proceeds to transact business which is wholly unconnected with his functions as a witness, his privilege ceases.⁷³

§ 259. **Attendance of witnesses in custody.**—The attendance of a witness who is incarcerated in prison,⁷⁴ or who is in the military or naval service, may be procured by the service of a writ of *habeas corpus ad testificandum* on the prison-keeper or officer in whose immediate charge he is.⁷⁵ The application for the writ should specify the nature of the suit in which his attendance is needed, that the evidence of the witness is material, and that the witness is restrained from attending court, together with the circumstances of the restraint so far as they are known to the applicant. It is not usually necessary in a criminal case that money to pay the expenses of a witness in a penitentiary should be tendered him.⁷⁶ As the general rules governing the granting and the service and return of this writ are those which obtain in connection with the ordinary writ of *habeas corpus*, no elaboration of them is necessary in the connection.

⁷² Chaffee v. Jones, 19 Pick. (Mass.) 260.

⁷³ See Underhill on Evidence, page 420, and notes.

⁷⁴ Harris, *Ex parte*, 73 N. Car. 65,

which was a case of a witness in jail convicted of a murder.

⁷⁵ People v. Sebring, 14 Misc. (N. Y.) 31, 35 N. Y. S. 237, 69 N. Y. St. 612.

⁷⁶ Roberts v. State, 72 Ga. 673.

CHAPTER XXI.

ABSENT WITNESSES AND CONTINUANCES.

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| <p>§ 260. Grounds for admitting the testimony of missing witnesses.</p> <p>261. Deceased or insane witnesses—How death of witness may be proved.</p> <p>262. Witnesses sick or out of the jurisdiction—Distinction between civil and criminal cases.</p> <p>263. Mode of proving absence of witness.</p> <p>264. Absence of witness procured by connivance—Relevancy and use of evidence of such witness.</p> <p>265. Cross-examining and confronting witnesses.</p> <p>266. Mode of proving the evidence of the absent witnesses—Substance only need be stated.</p> | <p>§ 267. Stenographer's notes, judge's minutes and bill of exceptions when used to prove the evidence of the absent witness.</p> <p>268. Continuance when granted because of absence of witness—Discretionary power of the court.</p> <p>269. Due diligence in summoning witness must be proved—The competency and materiality of his testimony must appear.</p> <p>270. What facts the affidavit for the continuance must contain.</p> <p>271. Admissions to avoid continuance—Constitutional right of the accused to enjoy the benefit of oral testimony.</p> <p>272. Admission of facts as true to avoid continuance.</p> |
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§ 280. Grounds for admitting the testimony of missing witnesses.

—The main reasons for the rejection of hearsay evidence are the absence of a judicial oath and of an opportunity for the cross-examination of the person who is the informant of the witness.

Where a witness who has given testimony in any judicial proceeding, civil or criminal, cannot be produced at a subsequent trial of the same matter between the same parties, there can be no objections on such grounds to receiving his sworn testimony at the former trial, if the absence of the witness is not caused by the party desiring to use his evidence.

The latter trial should be for the same offense, and the accused

person should be the same as in the former. It is not material that the later trial is under another indictment, if the offense charged and the parties are identical.¹

§ 261. Deceased or insane witnesses—How death of witness may be proved.—In criminal, as in civil procedure,² the evidence of a witness at a prior trial may be proved as evidence in a subsequent trial of the accused for the same offense if the witness is dead,³ or has become incompetent by reason of mental derangement.⁴ His testimony is admissible either for or against the party in whose favor he originally testified.

The same rule is applicable to evidence received at the preliminary examination, whether it was or was not committed to writing, where a witness is dead, but not where he is missing merely.⁵ The death of the witness must be shown by the best evidence which is obtainable, preferably a certified copy of the record of his death kept by the proper officer. In the absence of such proof of death, the oral testimony of a person who could swear, of his own knowledge, that he was dead would doubtless be received, as, for example, of a physician who had attended his death-bed, or of one who, being acquainted with the witness, had attended his funeral. Evidence that it is generally believed or reported that an absent witness is dead is not competent.⁶

¹ *Reynolds v. United States*, 98 U. S. 145, 158-161, 25 L. ed. 244; *Putnal v. State* (Fla.), 47 So. 864.

² See *Underhill on Ev.*, § 120.

³ *State v. Taylor*, Phil. (N. Car.) 508, 513; *Hair v. State*, 16 Neb. 601, 605, 21 N. W. 464; *State v. McNeil*, 33 La. Ann. 1332; *O'Brian v. Commonwealth*, 6 Bush (Ky.) 563, 571; *State v. Johnson*, 12 Nev. 121, 123; *State v. Able*, 65 Mo. 357; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. 580; *Nixon v. State*, 53 Tex. Cr. 325, 109 S. W. 931; *State v. Simmons* (Kan. 1908), 98 Pac. 277; *Lipscomb v. State*, 76 Miss. 223, 25 So. 158; *Weatherford v. State*, 78 Ark. 36, 93 S. W. 61; *Maloney v. State* (Ark., 1904), 121 S. W. 728.

⁴ *State v. King*, 86 N. Car. 603; *Marler v. State*, 67 Ala. 55, 42 Am. 95; *State v. Laque*, 41 La. Ann. 1070, 6 So. 787; *State v. Wheat*, 111 La. 860, 35 So. 955.

⁵ *Davis v. State*, 17 Ala. 354, 357; *State v. Hooker*, 17 Vt. 658; *Cox v. State* (Tex. Crim., 1896), 36 S. W. 435; *United States v. Macomb*, 5 McLean C. C. (U. S.) 286; *State v. McO'Brien*, 24 Mo. 402, 69 Am. Dec. 435; *State v. Byers*, 16 Mont. 565, 41 Pac. 708; *State v. Bollero*, 112 La. 850, 36 So. 754; *Wilson v. State*, 140 Ala. 43, 37 So. 93.

⁶ *State v. Wright*, 70 Iowa 152, 153, 30 N. W. 388; *McGrew v. State*, 13 Tex. App. 340.

§ 262. **Witnesses sick or out of the jurisdiction—Distinction between civil and criminal cases.**—It was formerly doubted, even in civil cases, whether the testimony of a living witness who was absent merely would be received in trial. Though the authorities sustain the rule by which in civil suits the testimony of an absent witness is received not only in case of death, but where he is incompetent by insanity or illness, or mere absence, the criminal courts always hesitate, in the absence of a permissive or mandatory statute, to admit such evidence unless the death or insanity of the witness is shown.

The mere fact that the witness is sick or out of the jurisdiction, or that his whereabouts are unknown so that he cannot be reached by a subpoena, is not enough.⁷ The authorities are not wholly harmonious, though usually now, by statute, such evidence is admissible.⁸

§ 263. **Mode of proving absence of witness.**—The absence of a witness from the state may be proved by circumstantial evidence, as by letters and telegrams alleged to have been written by him while he was absent.⁹ The dates and places named therein are

⁷ Reg. v. Scaife, 5 Cox. C. C. 243, 245, 246, 2 Den. C. C. 281, 17 Q. B. 238; McLain v. Commonwealth, 99 Pa. St. 86, 97; State v. Oliver, 43 La. Ann. 1003, 10 So. 201; State v. Staples, 47 N. H. 113, 90 Am. Dec. 565; Finn v. Commonwealth, 5 Rand. (Va.) 701; People v. Newman, 5 Hill (N. Y.) 295; Brogy v. Commonwealth, 10 Gratt. (Va.) 722; Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672n; United States v. Angell, 11 Fed. 34, 42; Hall v. State, 6 Baxt. (Tenn.) 522, 525; People v. Murphy, 45 Cal. 137; State v. King, 86 N. Car. 603, 605; Collins v. Commonwealth, 12 Bush (Ky.) 271; Bardin v. State, 143 Ala. 74, 38 So. 833; Kirkland v. State, 141 Ala. 45, 37 So. 352; Taylor v. State, 126 Ga. 557, 55 S. E. 474.

⁸ Shackelford v. State, 33 Ark. 539, 542; Dolan v. State, 40 Ark. 454, 461;

Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; Minneapolis Mill Co. v. Minneapolis & C. R. Co., 51 Minn. 304, 53 N. W. 639; Perrin v. Wells, 155 Pa. St. 299, 26 Atl. 543; Matthews v. State, 96 Ala. 62, 11 So. 203; Pruitt v. State, 92 Ala. 41, 43, 9 So. 406; State v. Nelson, 68 Kan. 566, 75 Pac. 505; Bell v. State, 156 Ala. 76, 47 So. 242; Morris v. State, 146 Ala. 66, 41 So. 274; State v. Wheat, 111 La. 860, 35 So. 955; Pate v. State (Ala. 1909), 48 So. 388; Shirley v. State, 144 Ala. 35, 40 So. 269; Hobbs v. State, 53 Tex. Cr. 71, 112 S. W. 308; People v. Gilhooley, 187 N. Y. 551, 80 N. E. 1116; Ozark v. State, 51 Tex. Cr. 106, 100 S. W. 927; State v. Timberlake, 50 La. Ann. 308, 23 So. 276.

⁹ Conner v. State, 23 Tex. App. 378, 5 S. W. 189; Carman v. Kelly, 5 Hun (N. Y.) 283; People v. Barker, 144

always relevant, though never conclusive. And all the facts proved should be such as will justify a fair-minded and reasonable man in believing that the witness is really out of the state.¹⁰ If the residence of the absentee is known his deposition ought to be procured.¹¹

If, by statute or otherwise, the testimony of an absent witness is receivable merely because his whereabouts cannot be ascertained, it must appear that diligent search for him was made, and that neither his attendance nor his deposition can be procured.¹² The absence of a witness being shown, it will be presumed to continue to the date of the trial.¹³

§ 264. Absence of witness procured by connivance—Relevancy and use of evidence of such witness.—Where a living witness is absent by the procurement or connivance of the accused, his evidence at a former trial or before a coroner's jury, is not admissible for the accused though it may be against him.¹⁴ It must be shown that the absence was procured,¹⁵ though not necessarily by corrupt means. If it is shown that the witness was sought diligently and

Cal. 705, 78 Pac. 266; *Somers v. State*, 54 Tex. Cr. 475, 113 S. W. 533.

¹⁰ *Wheat v. State*, 110 Ala. 68, 20 So. 449; *Harwood v. State*, 63 Ark. 130, 37 S. W. 304; *McCullum v. State*, 29 Tex. App. 162, 14 S. W. 1020, 1021; *People v. Barker*, 144 Cal. 705, 78 Pac. 266; *Kirkland v. State*, 141 Ala. 45, 37 So. 352; *Robinson v. State*, 128 Ga. 254, 57 S. E. 315. The answers to inquiries made at the residence of the missing witness, or in the neighborhood, are admissible. *McCullum v. State*, *supra*; *People v. Rowland*, 5 Barb. (N. Y.) 449, 452.

¹¹ *Sullivan v. State*, 6 Tex. App. 319, 32 Am. 580; *Brogy v. Commonwealth*, 10 Gratt. (Va.) 722.

¹² *State v. Stewart*, 34 La. Ann. 1037; *Summons v. State*, 5 Ohio St. 325; *Dolan v. State*, 40 Ark. 454; *Collins v. Commonwealth*, 12 Bush. (Ky.) 271; *McCullum v. State*, 29

Tex. App. 162, 14 S. W. 1020; *State v. King*, 86 N. Car. 603, 605; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *State v. Riley*, 42 La. Ann. 995, 8 So. 469; *Dorman v. State*, 48 Fla. 18, 37 So. 561; *State v. Riddle*, 179 Mo. 287, 78 S. W. 606; *State v. Sejours*, 113 La. 676, 37 So. 599; *State v. McClellan*, 79 Kan. 11, 98 Pac. 209; *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467.

¹³ *Rixford v. Miller*, 49 Vt. 319, 325; *State v. Bollero*, 112 La. 850, 36 So. 754.

¹⁴ *Reynolds v. United States*, 98 U. S. 145, 155, 158, 25 L. ed. 244; *State v. King*, 86 N. Car. 603; *Reg. v. Scaife*, 5 Cox C. C. 243, 2 Den. C. C. 281, 17 Q. B. 238, 242; *Lord Morley's Case*, 6 St. Trials 770; *State v. Coleman*, 199 Mo. 112, 97 S. W. 574.

¹⁵ *Williams v. State*, 19 Ga. 402, 403

the circumstances indicate that he kept out of the way purposely, the burden of proof is on the prisoner to prove good faith.

Where the evidence of an absent witness is admissible, if relevant, it should be excluded if it was irrelevant on the prior trial, though through inadvertence its incompetency was not recognized and it was not objected to at the earlier trial.¹⁶ And the testimony of one of defendant's witnesses, at a former trial, who is absent from the second trial, may, if he is deceased, be used by the state in its own favor,¹⁷ or, if the witness testifies at the later trial, to impeach his credibility.¹⁸

§ 265. **Cross-examining and confronting witnesses.**—Because of the universal constitutional right of the accused to confront the witnesses, it is absolutely necessary, in order that the testimony of a deceased or absent witness may be admissible at a subsequent trial against the accused, that the party against whom it is offered should have had an opportunity of cross-examining him at the earlier trial.¹⁹ Consequently on the trial of an indictment for homicide, the testimony taken at the coroner's inquest, held to investigate the death, is not admissible against the accused where the witness cannot be produced.²⁰

If the accused has *once* enjoyed his right to confront witnesses his constitutional right to meet the witnesses against him face to face is not violated by the admission of the testimony of such

¹⁶ *Petrie v. Columbia &c. R. Co.*, 29 S. Car. 303, 317, 7 S. E. 515.

¹⁷ *Hudson v. Roos*, 76 Mich. 173, 180, 42 N. W. 1099.

¹⁸ *Nuzum v. State*, 88 Ind. 599.

¹⁹ *O'Brian v. Commonwealth*, 6 Bush (Ky.) 563; *State v. Johnson*, 12 Nev. 121; *State v. O'Brien*, 81 Iowa 88, 46 N. W. 752; *Hair v. State*, 16 Neb. 601, 605, 21 N. W. 464; *Brown v. Commonwealth*, 73 Pa. St. 321, 13 Am. 740; *Wray v. State*, 154 Ala. 36, 45 So. 697, 15 L. R. A. (N. S.) 493n; *Butler v. State*, 83 Ark. 272, 103 S. W. 382; *Smith v. State*, 48 Tex. Cr. 65, 85 S. W. 1153; *State v. Herlihy*, 102 Me. 310, 66 Atl. 643;

Putnal v. State (Fla.), 47 So. 864; *Pratt v. State*, 53 Tex. Cr. 281, 109 S. W. 138; *Commonwealth v. Lenousky*, 206 Pa. 277, 55 Atl. 977.

²⁰ *Cline v. State*, 36 Tex. Cr. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. 850n; *State v. Campbell*, 1 Rich (S. Car.) 124; *Whitehurst v. Commonwealth*, 79 Va. 556; *State v. Cecil Co.*, 54 Md. 426; *McLain v. Commonwealth*, 99 Pa. St. 86, 97; *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422. In *State v. McNeil*, 33 La. Ann 1332, the accused was permitted to introduce testimony received at the coroner's inquest.

a witness, who is absent, at a subsequent trial.²¹ Hence, if the defendant was represented by counsel at the preliminary examination and has had an opportunity of cross-examining the witnesses, he has enjoyed his right to meet his accusers face to face, and no objection exists to receiving the testimony of deceased or insane witnesses.²² But an opportunity to cross-examine is not shown by evidence that the prisoner's counsel at the trial was also present at the preliminary examination.²³ The testimony will not be excluded merely because the former trial was conducted under an unconstitutional statute if the witness was amenable to the penalty for perjury if he testified falsely.²⁴

§ 266. Mode of proving the evidence of the absent witness—Substance only need be stated.—It was formerly considered essential that the person, *testifying* to the evidence of the absentee, should state his exact language.²⁵ This rule has been relaxed. The exact language need not now be given if the witness can state accurately the substance of what was said,²⁶ and his claiming to repeat *verbatim* what was said might be a suspicious circumstance.²⁷ It is safe to assume, however, that all the evidence of

²¹ *Commonwealth v. Richards*, 18 Pick. (Mass.) 434, 438, 29 Am. Dec. 608; *State v. McO'Brien*, 24 Mo. 402, 69 Am. Dec. 435; *People v. Penhollow*, 42 Hun (N. Y.) 103, 106; *State v. Walton* (Ore. 1909), 99 Pac. 431; *Arnwine v. State*, 54 Tex. Cr. 213, 114 S. W. 796, 802; *Putnal v. State* (Fla.), 47 So. 864. Depositions once legally taken may be used in a subsequent trial. *Johnson v. State*, 1 Tex. App. 333.

²² *Lucas v. State*, 96 Ala. 51, 11 So. 216; *Commonwealth v. Cleary*, 148 Pa. St. 26, 23 Atl. 1110, 1113; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. 580; *Commonwealth v. Keck*, 148 Pa. St. 639, 24 Atl. 161; *State v. McO'Brien*, 24 Mo. 402, 69 Am. Dec. 435; *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202; *People v. Newman*, 5 Hill (N. Y.) 295.

²³ *Jackson v. Crilly*, 16 Colo. 103, 109, 26 Pac. 331.

²⁴ *State v. Johnson*, 12 Nev. 121, 124.

²⁵ 1 Greenleaf on Ev., § 165; *Rex v. Jolliffe*, 4 T. R. 285; *Montgomery v. State*, 11 Ohio 424; *United States v. Wood*, 3 Wash. C. C. (U. S.) 440, 28 Fed. Cas. 16756; *Commonwealth v. Richards*, 18 Pick. (Mass.) 434, 438, 29 Am. Dec. 608.

²⁶ *State v. O'Brien*, 81 Iowa 88, 46 N. W. 752; *People v. Murphy*, 45 Cal. 137; *State v. Hooker*, 17 Vt. 658; *Brown v. Commonwealth*, 73 Pa. St. 321, 13 Am. 740; *State v. Able*, 65 Mo. 357, 369, 373; *Davis v. State*, 17 Ala. 354, 357; *Commonwealth v. Goddard*, 14 Gray. (Mass.) 402; *Jackson v. State*, 81 Wis. 127, 51 N. W. 89.

²⁷ *Cornell v. Green*, 10 S. & R. (Pa.) 14; *Ruch v. Rock Island*, 97 U. S. 693, 24 L. ed. 1101; *Putnal v. State* (Fla.), 47 So. 864.

the witness bearing upon any particular point, must be repeated in language as nearly identical with that originally used as possible, so that the effect which is produced may correspond with the impression made upon the jury by the testimony of the witness at the former trial. Hence the evidence, which was elicited upon the cross-examination of the witness, must be substantially repeated.²⁸ A witness who is relating the substance of the evidence of an absent witness, should be required to state all the material facts concerned in the issue in the later trial, so that his testimony may not present the evidence of the absent witness in a loose and fragmentary condition, or suggest that some important part has been forgotten. If, however, the memory of the witness is weak as to incidental or immaterial facts, the court should not therefore exclude the testimony; for, if it appears complete and substantially inclusive of what was said, it should go to the jurors. Slight inaccuracies, omissions or contradiction, are for them to consider in estimating its weight and credibility. But where, from the language or demeanor of the witness, it is obviously apparent that he has forgotten the substance of,²⁹ or has intentionally omitted a material part of what was said,³⁰ he is incompetent. Because of lack of facilities in early times for taking down testimony in writing with rapidity and correctness it was a universal custom, and in fact a rule for the common law, to receive only the oral narrative of a person who heard the testimony on the former trial as the best and perhaps the only evidence of it.

§ 267. Stenographer's notes, judge's minutes and bill of exceptions when used to prove the evidence of the absent witness.—The employment of a court stenographer whose duty it is to take the oral evidence is now nearly universal. He is a sworn officer, and his notes, or transcripts thereof, possess an official character which renders them of great value in case of the subsequent death or absence of a witness. If the statute provides for thus preserving

²⁸ *Wade v. State*, 7 Baxt. (Tenn.) 80, 81; and, see civil cases cited in *Underhill on Ev.*, p. 171, note 4. The objection that the witness fails to remember the cross-examination is waived if not made immediately. *State v. O'Brien*, 81 Iowa 88, 46 N. W. 752.

²⁹ *Puryear v. State*, 63 Ga. 692; *Bush v. Commonwealth*, 80 Ky. 244, 3 Cr. L. Mag. 505, 506, 507.

³⁰ *Tharp v. State*, 15 Ala. 749; *Commonwealth v. Richards*, 18 Pick. (Mass.) 434, 438, 439, 29 Am. Dec. 608.

evidence, the production of such records on a subsequent trial may be required as the best proof.⁸¹ If the stenographer's notes are not made evidence by statute, either expressly or by necessary implication, they are not admissible as such while he is alive;⁸² though, perhaps, after his death they might be received as the entries of a third person made in the course of his employment.⁸³ If the reporter is called as a witness they may be used to refresh his memory, and may even be read by him on the stand, if he can swear they were made when the testimony was taken, contain its substance and are accurate.⁸⁴

A stenographer's notes taken out of the jurisdiction,⁸⁵ or not made by or under the direction of a magistrate, or not signed by the witnesses, or taken from the lips of an interpreter where a witness testifies in a foreign tongue,⁸⁶ have been rejected. But the oral testimony of the stenographer after refreshing his memory by notes is always admissible, though his notes may not be evidence,⁸⁷ even though their correctness be not conclusively

⁸¹ *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Jackson v. State*, 81 Wis. 127, 51 N. W. 89; *Burnett v. State*, 87 Ga. 622, 13 S. E. 552; *Matthews v. State*, 96 Ala. 62, 11 So. 203; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. 580; *People v. Garnett*, 9 Cal. App. 194, 98 Pac. 247; *Morawitz v. State*, 49 Tex. Cr. 366, 91 S. W. 227; *State v. Heffernan* (S. Dak.), 118 N. W. 1027; *State v. Laird*, 79 Kan. 681, 100 Pac. 637; *Jones v. State*, 128 Ga. 23, 57 S. E. 313; *Sanford v. State*, 143 Ala. 78, 39 So. 370; *United States v. Greene*, 146 Fed. 796; *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *Fertig v. State*, 100 Wis. 301, 75 N. W. 960. Unless the statute in terms provides that the notes are evidence when certified by the reporter, they must be authenticated in the mode prescribed for the authentication of judicial records. *Rounds v. State*, 57 Wis. 45, 14 N. W. 865; *State v. Frederic*, 69 Me. 400. See *Underhill on Ev.*, § 146.

⁸² *State v. Frederic*, 69 Me. 400;

People v. McConnell, 146 Ill. 532, 34 N. E. 945; *Rounds v. State*, 57 Wis. 45, 47, 52, 14 N. W. 865; *Dowd v. State*, 52 Tex. Cr. 563, 108 S. W. 389.

⁸³ *Underhill on Ev.*, §§ 58, 146.

⁸⁴ *People v. Sligh*, 48 Mich. 54, 58, 11 N. W. 782; *Jackson v. State*, 81 Wis. 127, 51 N. W. 89; *Commonwealth v. Goddard*, 14 Gray. (Mass.) 402; *Hair v. State*, 16 Neb. 601, 606, 21 N. W. 464; *Horton v. State*, 53 Ala. 488; *State v. Kendig*, 133 Iowa 164, 110 N. W. 463; *Miller v. People*, 216 Ill. 309, 74 N. E. 743; *Flohr v. Territory*, 14 Okla. 477, 78 Pac. 565; *Austin v. Commonwealth*, 124 Ky. 55, 98 S. W. 295, 30 Ky. L. 295; *Burton v. State*, 115 Ala. 1, 22 So. 585; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *Hobbs v. State*, 53 Tex. Cr. 71, 112 S. W. 308; *Fuqua v. Commonwealth*, 118 Ky. 578, 81 S. W. 923, 26 Ky. L. 420.

⁸⁵ *Herrick v. Swomley*, 56 Md. 439.

⁸⁶ *People v. Ah Yute*, 56 Cal. 119.

⁸⁷ *State v. Freidrich*, 4 Wash. 204,

shown. But the notes must be shown to the opposite party, and he must have an opportunity to cross-examine to test their accuracy.³⁸ It is never permissible on the later trial to show contradictory statements to impeach the testimony of an absent witness. The law requires that the witness himself should be interrogated, giving the particulars of the time and place of the contradictory utterances.³⁹

The judge's notes are not evidence of what the witness said, and, as a rule, they can be used only to refresh the memory of a witness.⁴⁰ Their incompetency is due to the fact that they are not a part of the record, and are not made within the scope of official duty, or under the sanction of an official oath, which would guaranty that they are complete or correct. For the same reasons if it is sought to show, by the bill of exceptions or case on appeal, the testimony of an absent witness, a foundation must first be laid by proving (and for this purpose the certification and authentication by the court in accordance with the statute is usually sufficient) that the bill does actually contain all the evidence given by the witness.⁴¹ It is a preliminary question for the court, upon which it is error to refuse or neglect to rule, whether in any case it is proper to admit the testimony of the witness given at a prior proceeding.⁴²

§ 268. Continuance when granted because of absence of witness—Discretionary power of the court.—The rules governing continu-

29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; *People v. Chung Ah Chue*, 57 Cal. 567; *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *Shackelford v. State*, 33 Ark. 539. Cf. *Cravens v. State* (Tex. Cr. 1907), 103 S. W. 921; *Kimberly v. State*, 4 Ga. App. 852, 62 S. E. 571.

³⁸ *People v. Lem You*, 97 Cal. 224, 32 Pac. 11.

³⁹ *Pruitt v. State*, 92 Ala. 41, 43, 9 So. 406; *Matthews v. State*, 96 Ala. 62, 11 So. 203; *State v. Hunter*, 79 S. Car. 84, 60 S. E. 241.

⁴⁰ *State v. Dewitt*, 2 Hill (S. Car.) 282, 27 Am. Dec. 371; *Reg. v. Child*,

5 Cox C. C. 197, 203; *State v. Herlihy*, 102 Me. 310, 66 Atl. 643; *Butler v. State*, 83 Ark. 272, 103 S. W. 382. See, also, civil cases in *Underhill on Ev.*, p. 172.

⁴¹ *Kean v. Commonwealth*, 10 Bush (Ky.) 190, 19 Am. 63; *State v. Able*, 65 Mo. 357; *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236; *Case v. Blood*, 71 Iowa 632, 33 N. W. 144; *Slingerland v. Slingerland*, 46 Minn. 100, 103, 48 N. W. 605; *Dwyer v. Rippe-toe*, 72 Tex. 520, 10 S. W. 668. And cases cited *Underhill on Ev.*, p. 172.

⁴² *People v. Willett*, 92 N. Y. 29.

ances are substantially the same in criminal and civil cases,⁴³ but generally in the former an application for a continuance, coming from the accused, may be scanned with some suspicion because of his natural desire for delay.⁴⁴

Neither the defendant nor the prosecution can claim to have unlimited continuances granted. A continuance is not always a matter of right. It lies in the sound discretion of the trial court to grant and its action will not be reviewed, or a new trial granted to the defendant, for a refusal to grant a continuance, unless there has been a palpable abuse of that discretion to his disadvantage.⁴⁵

⁴³ *People v. Vermilyea*, 7 Cow. (N. Y.) 369, 384; *Howard v. Commonwealth* (Ky), 80 S. W. 817, 26 Ky. L. 148, reversed on rehearing (Ky), 26 Ky. L. 465, 81 S. W. 689; *People v. Plyler*, 121 Cal. 160, 53 Pac. 553; *Ewert v. State*, 48 Fla. 36, 37 So. 334.

⁴⁴ *Ballard v. State*, 31 Fla. 266, 282, 12 So. 865; *Gardner v. United States*, 5 Ind. Ter. 150, 82 S. W. 704.

⁴⁵ *State v. Johnson*, 47 La. Ann. 1225, 17 So. 789; *State v. Dettmer*, 124 Mo. 426, 432, 27 S. W. 1117; *People v. Considine*, 105 Mich. 149, 63 N. W. 196; *State v. Lucker*, 40 S. Car. 549, 550, 18 S. E. 797; *Walker v. State*, 136 Ind. 663, 666, 36 N. E. 356; *Walker v. State*, 91 Ala. 76, 79, 9 So. 87; *Ballard v. State*, 31 Fla. 266, 281, 12 So. 865; *Brown v. State*, 85 Tenn. 439; *Hardesty v. Commonwealth*, 88 Ky. 537, 11 S. W. 589, 11 Ky. L. 43; *State v. Wyse*, 33 S. Car. 582, 12 S. E. 556; *Price v. People*, 131 Ill. 223, 23 N. E. 639; *Jackson v. State*, 54 Ark. 243, 15 S. W. 607; *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814; *Thompson v. Commonwealth*, 88 Va. 45, 13 S. E. 304; *Keffer v. State*, 12 Wyo. 49, 73 Pac. 556; *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036; *Commonwealth v. Delero*, 218 Pa. 487, 67 Atl. 764; *Stevens v. State*, 138 Ala. 71, 35 So. 122; *Kroell v.*

State, 139 Ala. 1, 36 So. 1025; *Gertenkorn v. State*, 38 Tex. Cr. 621, 4 S. W. 503; *Clements v. State*, 51 Fla. 6, 40 So. 432; *State v. Chitman*, 117 La. 950, 42 So. 437; *State v. Thompson*, 121 La. 1051, 46 So. 1013; *McFarland v. State*, 83 Ark. 98, 103 S. W. 169; *Sisk v. State* (Tex. Cr. 1897), 42 S. W. 985; *Early v. State*, 51 Tex. Cr. 382, 103 S. W. 868, 123 Am. St. 889; *Dallas v. State*, 129 Ga. 602, 59 S. E. 279; *Lewis v. State*, 129 Ga. 731, 59 S. E. 782; *People v. Grill*, 151 Cal. 592, 91 Pac. 515; *People v. Fong Chung*, 5 Cal. App. 587, 91 Pac. 105, *People v. Boyd*, 151 Mich. 577, 115 N. W. 687, 15 Detroit Leg. N. 36; *Gallaher v. State*, 78 Ark. 299, 95 S. W. 463; *Goddard v. State*, 78 Ark. 226, 95 S. W. 476; *State v. Johnson*, 136 Iowa 601, 111 N. W. 827; *State v. Kenny*, 77 S. Car. 236, 57 S. E. 859; *Shaw v. State* (Tex. Cr.), 105 S. W. 500; *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 62 Am. St. 334, 38 L. R. A. 7211; *Turner v. State* (Tex. Cr.) 46 S. W. 830; *Moss v. State*, 152 Ala. 30, 41 So. 598; *Isham v. State* (Tex. Cr.), 49 S. W. 581; *State v. Burns*, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. 588; *State v. Cochran*, 147 Mo. 504, 49 S. W. 558; *Clinton v. State*, 53 Fla. 98, 43 So. 312.

This general principle, however, must be taken with the qualification that the discretion of the court must be exercised in a reasonable and not in an arbitrary or capricious manner. The statutory and constitutional rights and privileges of the prisoner must be considered. His right to a fair and impartial jury trial, to procure and compel the attendance of witnesses, to be represented by counsel, and to have a reasonably full opportunity to consult with counsel and to prepare his defense; must be respected, and a refusal to grant a continuance, which results in depriving him of any of these rights, constitutes reversible error.⁴⁶ Often the matter is regulated by statute under which a continuance is granted as a matter of right. All defendants jointly tried are, under such a statute, entitled to the same privilege in this respect.

§ 269. Due diligence in summoning witness must be proved—The competency and materiality of his testimony must appear.—In order to obtain a continuance because of the absence of a witness, certain facts must appear from the affidavits presented in support of the motion.

First, it must be shown that due diligence was employed to ascertain his whereabouts and secure his attendance. The defendant should promptly, upon his arrest, ascertain who and where his witnesses are, and should procure subpoenas or, if neces-

⁴⁶ *Claxon v. Commonwealth* (Ky.), 30 S. W. 998, 17 Ky. L. 284; *State v. Newsum*, 129 Mo. 154, 31 S. W. 605; *Delk v. State*, 100 Ga. 61, 27 S. E. 152; *Johnson v. State*, 52 Tex. Cr. 201, 107 S. W. 52; *Magee v. State* (Miss.), 45 So. 360; *Johnson v. Commonwealth* (Ky.), 107 S. W. 768, 32 Ky. L. 1117; *Swan v. State* (Tex. Cr.), 76 S. W. 464; *White v. State* (Miss.), 45 So. 611; *Moore v. Commonwealth* (Ky.), 81 S. W. 669, 26 Ky. L. 356; *Mays v. Commonwealth* (Ky.), 76 S. W. 162, 25 Ky. L. 646; *Long v. State*, 39 Tex. Cr. 461, 537, 46 S. W. 821, 73 Am. St. 954; *Foster v. State*, 52 Tex. Cr. 137, 105 S. W. 498; *State v. Hesterly*, 182 Mo. 16, 81 S. W. 624, 103 Am. St. 634; *Wingo v. State*, 53 Tex. Cr. 16, 108 S. W. 372; *State v. VonKutzleben*, 136 Iowa 89, 113 N. W. 484; *Brown v. State*, 120 Ga. 145, 47 S. E. 543; *Brooks v. State*, 3 Ga. App. 458, 60 S. E. 211, 213; *State v. Morgan*, 27 Utah 103, 74 Pac. 526; *State v. Cummings*, 189 Mo. 626, 88 S. W. 706; *State v. Timberlake*, 50 La. Ann. 308, 23 So. 276. No constitutional objections can exist to a statute permitting a party to avoid a continuance by admitting an absent witness will testify, in a civil case, as alleged in the affidavit. But the action of the legislature, in making such a statute apply to criminal trials, is unconstitutional. *Grham v. State*, 50 Ark. 161, 167, 6 S. W. 721.

sary, attachments, for them as soon thereafter as practicable. He has no right to delay until a very few days before the trial, and then to demand a postponement because his witnesses do not attend.⁴⁷

The competency and materiality of the testimony which the absent witness is expected to give must also be shown. It must

"Chapman v. State (Tex. Cr., 1895), 30 S. W. 225; State v. Lange, 59 Mo. 418; Pullen v. State, 11 Tex. App. 89; Pettit v. State, 135 Ind. 393, 405, 406, 34 N. E. 1118; State v. Hagan, 22 Kan. 490; Mackey v. Commonwealth, 80 Ky. 345; Wray v. People, 78 Ill. 212; Trask v. People, 151 Ill. 523, 527, 38 N. E. 248; State v. Smith, 8 Rich (S. Car.) 460; State v. Dixon, 47 La. Ann. 1, 3, 16 So. 589; Blige v. State, 20 Fla. 742, 51 Am. 628; McDermott v. State, 89 Ind. 187; State v. Veillon (La., 1897), 21 So. 856; Robinson v. State (Tex. Cr., 1898), 48 S. W. 176; Carter v. State (Miss. 1898), 24 So. 307; Hull v. State, 50 Tex. Cr. 607, 100 S. W. 403; Shelton v. State, 50 Tex. Cr. 627, 100 S. W. 955; Isham v. State (Tex. Cr., 1899), 49 S. W. 594; State v. Kindred, 148 Mo. 270, 49 S. W. 845; State v. Crane, 202 Mo. 54, 100 S. W. 422; State v. Burns, 124 Iowa 207, 99 N. W. 721; State v. Brown, 62 W. Va. 546, 59 S. E. 508; State v. Rabens, 79 S. Car. 542, 60 S. E. 442, 1110; State v. Burns, 19 Wash. 52, 52 Pac. 316; State v. Mills, 79 S. Car. 187, 60 S. E. 664; Jackson v. State, 49 Tex. Cr. 215, 91 S. W. 788; Early v. State, 51 Tex. Cr. 382, 103 S. W. 868, 123 Am. St. 889; State v. Morgan, 27 Utah 103, 74 Pac. 526; State v. Thompson, 141 Mo. 408, 42 S. W. 949; McQueen v. Commonwealth (Ky.), 88 S. W. 1047, 28 Ky. L. 20; White v. State (Tex. Cr. 1906), 98 S. W. 264; Sizemore v. Commonwealth (Ky.), 108 S. W. 254, 32 Ky. L. 1154; Hughes v. Commonwealth (Ky.), 80 S. W. 197, 25 Ky. L. 2153; Mullins v. Commonwealth (Ky.), 79 S. W. 258, 25 Ky. L. 2044; O'Rear v. Commonwealth (Ky.), 78 S. W. 407, 25 Ky. L. 1537; Garza v. State, 39 Tex. Cr. 358, 46 S. W. 242, 73 Am. St. 927; Weaver v. State, 52 Tex. Cr. 11, 105 S. W. 189; State v. Tucker, 72 Kan. 481, 84 Pac. 126; Melbourne v. State, 51 Fla. 69, 40 So. 189; Williams v. State, 53 Fla. 89, 43 So. 428; Harter v. People, 204 Ill. 158, 68 N. E. 447; High v. State (Tex. Cr. 1906), 98 S. W. 849; Tanner v. State (Tex. Cr. 1898), 44 S. W. 489; Harmanson v. State (Tex. Cr. 1897), 42 S. W. 995; Davis v. State (Tex. Cr. 1907), 102 S. W. 1150; Gerstenkorn v. State, 38 Tex. Cr. 621, 44 S. W. 503; Kroell v. State, 139 Ala. 1, 36 So. 1025; Bynum v. State, 46 Fla. 142, 35 So. 65; Welty v. United States, 14 Okla. 7, 76 Pac. 121; Watts v. State, 90 Miss. 757, 44 So. 36; People v. Browne, 118 App. Div. (N. Y.) 793, 103 N. Y. S. 903, 21 N. Y. Cr. 91, aff'd in 189 N. Y. 528, 82 N. E. 1130; Stegar v. State (Tex. Cr.), 105 S. W. 789; People v. Melandrez, 4 Cal. App. 396, 88 Pac. 372; Kidd v. State, 101 Ga. 528, 28 S. E. 990. The burden of proof to show diligence is on the accused. Walker v. State, 13 Tex. App. 618.

reasonably appear that the testimony of such a witness will, if introduced, influence the verdict.⁴⁸

If from the evidence already received it is apparent that the absent witness has no knowledge of the matter in issue,⁴⁹ or if the evidence to be procured is merely cumulative,⁵⁰ or if the court has sufficient reason for believing that certain facts which the absent witness is expected to controvert are already so far sus-

⁴⁸ *Gilcrease v. State*, 33 Tex. Cr. 619, 28 S. W. 531; *Cannon v. State*, 60 Ark. 564, 576, 31 S. W. 150, 32 S. W. 128; *Land v. State*, 34 Tex. Cr. 330, 30 S. W. 788; *Crumpton v. United States*, 138 U. S. 361, 34 L. ed. 959, 11 Sup. Ct. 355; *Dow v. State*, 31 Tex. Cr. 278, 20 S. W. 583; *Knowles v. State*, 31 Tex. Cr. 383, 20 S. W. 829; *Polin v. State*, 14 Neb. 540, 16 N. W. 898; *State v. Bennett*, 52 Iowa 724, 2 N. W. 1103; *State v. Falconer*, 70 Iowa 416, 30 N. W. 655; *People v. Anderson*, 53 Mich. 60, 18 N. W. 561; *Moody v. People*, 20 Ill. 316; *Steele v. People*, 45 Ill. 152; *State v. Turlington*, 102 Mo. 642, 15 S. W. 141; *Strauss v. State*, 58 Miss. 53; *People v. Vermilyea*, 7 Cow. (N. Y.) 369; *State v. Spillman*, 43 La. Ann. 1001, 10 So. 198; *Isham v. State* (Tex. Cr. 1899), 49 S. W. 581; *State v. Cochran*, 147 Mo. 504, 49 S. W. 558; *State v. Kindred*, 148 Mo. 270, 49 S. W. 845; *Tanner v. State* (Tex. Cr., 1898), 44 S. W. 489; *Clements v. State*, 51 Fla. 6, 40 So. 432; *Williams v. State*, 51 Tex. Cr. 352, 102 S. W. 1147; *Morphew v. State*, 84 Ark. 487, 106 S. W. 480; *Holley v. State*, 49 Tex. Cr. 306, 92 S. W. 422, 122 Am. St. 810; *Harris v. State*, 52 Tex. Cr. 118, 105 S. W. 801. For example, a continuance will be refused in a murder trial where the absent witness was expected merely to prove that unknown persons had threatened the deceased. *Boyett v. State*, 26 Tex. App. 689, 9 S. W. 275; *Stapleton v. Commonwealth* (Ky.), 3 S. W. 793.

⁴⁹ *Griffin v. State* (Tex., 1892), 20 S. W. 552; *Jones v. State*, 31 Tex. Cr. 177, 20 S. W. 354; *Childs v. State* (Tex. Cr. 1893), 22 S. W. 1039; *State v. Crane*, 202 Mo. 54, 100 S. W. 422; *House v. State*, 139 Ala. 132, 36 So. 732; *State v. Kemp*, 120 La. 378, 45 So. 283; *State v. Horn*, 209 Mo. 452, 108 S. W. 3; *State v. Woodward*, 182 Mo. 391, 81 S. W. 857, 103 Am. St. 646n; *State v. Pope*, 78 S. Car. 264, 58 S. E. 815; *Kennedy v. State*, 101 Ga. 559, 28 S. E. 979.

⁵⁰ *Nelms v. State*, 58 Miss. 362; *Varnadoe v. State*, 67 Ga. 768; *Robinson v. State* (Tex. Cr. 1898), 48 S. W. 176; *State v. Crane*, 202 Mo. 54, 100 S. W. 422; *Dudley v. State*, 40 Tex. Cr. 31, 48 S. W. 179; *Vanata v. State*, 82 Ark. 203, 101 S. W. 169; *Richie v. State*, 85 Ark. 413, 108 S. W. 511; *State v. Horn*, 209 Mo. 452, 108 S. W. 3; *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115; *Mullins v. Commonwealth* (Ky.), 79 S. W. 258, 25 Ky. L. 2044; *Williams v. State*, 45 Tex. Cr. 218, 75 S. W. 859; *Washington v. State*, 51 Tex. Cr. 542, 103 S. W. 879; *Kelley v. United States*, 7 Ind. Ter. 241, 104 S. W. 604; *Cravens v. State* (Tex. Cr. 1907), 103 S. W. 921; *Dean v. Commonwealth* (Ky.), 78 S. W. 1112, 25 Ky. L. 1876.

threatened the deceased. *Boyett v.*

tained by a preponderance of the evidence that his testimony bearing thereon would be untrue,⁵¹ a continuance may be denied.⁵²

§ 270. What facts the affidavit for continuance must contain.—

The affidavit for the continuance must show the names of the absent witnesses and their residences, if known,⁵³ and the specific facts to which the witnesses will testify, their connection with and relevancy to the subject-matter.⁵⁴ Merely to allege in the affida-

⁵¹ *Brown v. State*, 32 Tex. Cr. 119, 22 S. W. 596; *Rollins v. State* (Tex. Cr. 1892), 20 S. W. 358; *Borroun v. State* (Miss., 1897), 22 So. 62; *Andrews v. State* (Tex. Cr.), 100 S. W. 922; *Cravens v. State* (Tex. Cr.), 103 S. W. 921; *Robinson v. State* (Tex. Cr. 1898), 48 S. W. 176.

⁵² *Benson v. State* (Tex. Cr.), 103 S. W. 911; *Blanks v. Commonwealth*, 105 Ky. 41, 48 S. W. 161, 20 Ky. L. 1037; *State v. Timberlake*, 50 La. An. 308, 23 So. 276; *Harris v. State*, 52 Tex. Cr. 118, 105 S. W. 801. It has been held not error to refuse the accused a continuance asked merely to enable him to procure witnesses to prove his good character. *Steele v. People*, 45 Ill. 152; *McNealy v. State*, 17 Fla. 198.

⁵³ *State v. Underwood*, 76 Mo. 630; *Colton v. State*, 7 Tex. App. 50; *State v. Horn*, 209 Mo. 452, 108 S. W. 3; *Nick v. State*, 128 Ga. 573, 58 S. E. 48; *State v. Jones*, 53 W. Va. 613, 45 S. E. 916; *State v. Morgan*, 27 Utah 103, 74 Pac. 526; *State v. Kindred*, 148 Mo. 270, 49 S. W. 845.

⁵⁴ *Long v. People*, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48; *State v. Manceaux*, 42 La. Ann. 1164, 8 So. 297; *Carthaus v. State*, 78 Wis. 560, 47 N. W. 629; *State v. Bengé*, 61 Iowa 658, 17 N. W. 100; *Holland v. State*, 31 Tex. Cr. 345, 20 S. W. 750; *Dallas v. State*,

129 Ga. 602, 59 S. E. 279; *Rush v. State* (Tex. Cr. 1903), 76 S. W. 927; *Wiggins v. State*, 101 Ga. 501, 29 S. E. 26; *Territory v. Dooley*, 3 Ariz. 60, 78 Pac. 138; *State v. Cummings*, 189 Mo. 626, 88 S. W. 706; *State v. Teachey*, 138 N. Car. 587, 50 S. E. 232; *Renfroe v. State*, 84 Ark. 16, 104 S. W. 542; *State v. Howard*, 120 La. 311, 45 So. 260; *State v. Leary*, 111 La. 301, 35 So. 559; *Vanata v. State*, 82 Ark. 203, 101 S. W. 169. That the witness has knowledge of such facts. *Long v. People*, 34 Ill. App. 481; *Benge v. Commonwealth*, 92 Ky. 1, 17 S. W. 146, 13 Ky. L. 308. That the affiant believes the evidence of the witness to be true. *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461; *North v. People*, 139 Ill. 81, 28 N. E. 966. That he also believes that his testimony can be procured in time, stating the grounds for such belief. *Shirwin v. People*, 69 Ill. 55; *Austine v. People*, 110 Ill. 248; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224n; *People v. McCrory*, 41 Cal. 458; *Skates v. State*, 64 Miss. 644, 1 So. 843, 60 Am. 70n; *State v. Moultrie*, 33 La. Ann. 1146; *State v. Burwell*, 34 Kan. 312, 8 Pac. 470; *Faulkner v. Territory*, 6 N. Mex. 464, 30 Pac. 905; *State v. Alfred*, 115 Mo. 471, 22 S. W. 363, and that proper diligence has been employed to procure the attendance of the witness.

vit that proper diligence has been employed to procure the attendance of the witness is not enough. Facts constituting diligence must appear. Thus where it appears that the witness was at one time in the jurisdiction of the court it must appear that a subpoena was seasonably and properly issued and duly served on him to procure his attendance.⁵⁵ But under some circumstances actual service of a subpoena is not required, if it be shown that one was issued and seasonably delivered to the proper officer for service, and that he has made a return thereon that the witness cannot be found.⁵⁶

If a witness is bound over to appear, the accused is not under the necessity of serving him with a subpoena. But the fact that the magistrate, at the preliminary examination, admonished a witness to attend at the trial does not excuse the defendant from serving him with process and then demanding a continuance because of his absence.⁵⁷

§ 271. Admissions to avoid continuance—Constitutional right of the accused to enjoy the benefit of oral testimony.—The authorities are divided on the question whether the state can defeat the defendant's motion for a continuance to procure the testimony of an absent witness by a mere admission that he will testify to the facts which the affidavit states the defendant expects to prove. Some of the cases, basing their reasoning upon the existing constitutional guaranty that the prisoner shall have the personal presence of witnesses in his own behalf, maintain the negative. Hence, it has been repeatedly held that a statute providing that the defendant shall not be entitled to a continuance if the state

Haverstick v. State, 6 Ind. App. 595, 32 N. E. 785; Vogt v. Commonwealth, 92 Ky. 68, 17 S. W. 213, 13 Ky. L. 376. That the witnesses are not absent through the procurement or consent of the applicant, and that the application is not made for delay. Crews v. People, 120 Ill. 317, 11 N. E. 404; State v. Bradley, 90 Mo. 160. See Underhill on Ev., §§ 355-358, as to the form and language of affidavits.

⁵⁵ Henderson v. State, 22 Tex. 593;

Dingman v. State, 48 Wis. 485, 4 N. W. 668; State v. Burns, 54 Mo. 274; Roussell v. Commonwealth, 28 Gratt. (Va.) 930.

⁵⁶ Murray v. State, 1 Tex. App. 417; Skipworth v. State, 8 Tex. App. 135; Thomas v. State, 61 Miss. 60; People v. Lampson, 70 Cal. 204, 11 Pac. 593; State v. Walker, 69 Mo. 274; Walton v. Commonwealth, 32 Gratt. (Va.) 855.

⁵⁷ State v. Hayden, 45 Iowa 11; People v. Brown, 46 Cal. 102.

shall consent that the affidavit stating the evidence which he is to give may be read as his testimony is unconstitutional, if the defendant has used due diligence in endeavoring to procure the attendance of the witnesses, and the affidavit shows facts sufficient for the purpose.⁵⁸

Others maintain a contrary view and sustain as constitutional similar statutes, conferring upon the court the power to overrule an application for a continuance, where the prosecution does not admit that the missing testimony is true.⁵⁹

⁵⁸ *State v. Berkley*, 92 Mo. 41, 46-53, 4 S. W. 24; *Adkins v. Commonwealth*, 98 Ky. 539, 33 S. W. 948, 17 Ky. L. 1091, 32 L. R. A. 108; *Graham v. State*, 50 Ark. 161, 167, 6 S. W. 721; *State v. Baker*, 13 Lea (Tenn.) 326, 329; *Pace v. Commonwealth*, 89 Ky. 204, 207, 12 S. W. 271, 11 Ky. L. 407. *Cf. State v. Loe*, 98 Mo. 609, 613, 12 S. W. 254; *Goodman v. State*, Meigs (Tenn.) 195; *Risner v. Commonwealth (Ky.)*, 117 S. W. 318; *Mise v. Commonwealth (Ky.)*, 80 S. W. 457, 25 Ky. L. 2207; *Foster v. State*, 79 Neb. 259, 112 N. W. 656; *Gaines v. State*, 146 Ala. 16, 41 So. 865; *People v. Fong Chung*, 5 Cal. App. 587, 91 Pac. 105. The constitutional right of the accused to have process to compel the attendance of witnesses in his own behalf is absolute, and cannot be bartered or cut down by statutory enactment. The right is only enjoyed with completeness if the personal attendance of a witness is secured, for it is only then that the accused can receive the full benefit of his testimony. The demeanor of the witness on the stand while giving his testimony *viva voce* is an important factor in enabling the jury to determine his credibility. The defendant has a right to claim that the influence upon the jury of the intelligence and candor of his witness,

his respectable and refined appearance, his promptness and frankness in answering questions, his unhesitating readiness in giving all details, his calmness and self-restraint under a searching and perhaps abusive cross-examination, shall not be lost to him by a statute which compels him to accept a piece of paper in place of a living human being. See *State v. Berkley*, 92 Mo. 41, 46-53, 4 S. W. 24; *Pace v. Commonwealth*, 89 Ky. 204, 207-210, 12 S. W. 271, 11 Ky. L. 407; a leading case and the dissenting opinion in *State v. Jennings*, 81 Mo. 185, 193, 195-208, 51 Am. 236. "The value of oral testimony, over all other, is too well understood to suppose, for a moment, that such declarations would have the same weight on the minds of the jury as the testimony of the witness, if he had been examined before them in open court." *People v. Diaz*, 6 Cal. 248. *Cf. Goodman v. State*, Meigs (Tenn.) 195.

⁵⁹ *Keating v. People*, 160 Ill. 480, 43 N. E. 724; *Adkins v. Commonwealth*, 98 Ky. 539, 33 S. W. 948, 17 Ky. L. 1091, 32 L. R. A. 108; *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *Fanton v. State*, 50 Neb. 351, 69 N. W. 953, 36 L. R. A. 158; *Territory v. Perkins*, 2 Mont. 467, 470; *Territory v. Harding*, 6 Mont. 323, 332, 333, 12 Pac. 750; *Bach, J.*, dissenting:

If the absent witness is beyond the jurisdiction, so that compulsory process will not reach him, a continuance, as it would only bring his written evidence, may be denied on the admission.⁶⁰

§ 272. **Admission of facts as true to avoid continuance.**—In the absence of statute it is the rule, according to the decided current of authority, that the state may avoid the granting of a continuance to defendant because of the absence of a material witness in his behalf by admitting the truth of the statement of the evidence he would give as it is set forth in the affidavit. The statements go to the jury as true, and it is their positive duty so to regard them. They are not open to contradiction, and though the accused is deprived of his witness he receives the benefit of his evidence free from impeachment.⁶¹ And a statute laying down such a rule has been held constitutional. But the state must admit the truth of the evidence absolutely. It cannot reserve the right to impeach its credibility in any way.⁶²

Territory v. Guthrie, 2 Idaho 398; Hoyt v. People, 140 Ill. 588, 593, 594, 30 N. E. 315, 16 L. R. A. 239n; Hickam v. People, 137 Ill. 75, 79, 27 N. E. 88; State v. Bartley, 48 Kan. 421, 425, 29 Pac. 701, citing cases; State v. Shannehan, 22 Iowa 435, 437; State v. McComb, 18 Iowa 43, 47. Cf. Pace v. Commonwealth, 89 Ky. 204, 207, 12 S. W. 271, 11 Ky. L. 407; State v. Lund, 49 Kan. 580, 584, 31 Pac. 146; State v. Daniels, 49 La. Ann. 954; 22 So. 415; State v. Hutto, 66 S. Car. 449, 45 S. E. 13; People v. Mylin, 139 Ill. App. 500, aff'd 236 Ill. 19, 86 N. E. 156.

* State v. Adams, 20 Kan. 311; Thompson v. State, 5 Kan. 159.

* Powers v. State, 80 Ind. 77, 11 Ky. L. 407; Pace v. Commonwealth, 89 Ky. 204, 207, 208, 12 S. W. 271; O'Brien v. Commonwealth, 89 Ky. 354, 361, 12 S. W. 471, 11 Ky. L. 534; Browning v. State, 33 Miss. 47; Van Meter v. People, 60 Ill. 168; Miller v. State, 9 Ind. 340; People v. Ver-

milyea, 7 Cow. (N. Y.) 369; Wassels v. State, 26 Ind. 30; People v. Diaz, 6 Cal. 248, 249; Trulock v. State, 1 Clarke (Iowa) 515; State v. Baker, 13 Lea (Tenn.) 326; People v. Brown, 54 Cal. 243; People v. Wilson, 3 Park. Cr. (N. Y.) 199, 202; Nichols v. Commonwealth, 11 Bush (Ky.) 575; Terry v. State, 120 Ala. 286, 25 So. 176; State v. Williams, 76 S. Car. 135, 56 S. E. 783; State v. High, 116 La. 79, 40 So. 538; State v. Wilcox, 21 S. Dak. 532, 114 N. W. 687.

* People v. Diaz, 6 Cal. 248, 249; Wassels v. State, 26 Ind. 30; Powers v. State, 80 Ind. 77. Cf. Burchfield v. State, 82 Ind. 580; Territory v. Emilio (N. Mex.), 89 Pac. 239; Miller v. State (Wis.), 119 N. W. 850; Howerton v. Commonwealth (Ky.), 112 S. W. 606, 33 Ky. L. 1008; Huf-faker v. Commonwealth, 124 Ky. 115, 98 S. W. 331, 30 Ky. L. 334; Davis v. State, 52 Tex. Cr. 332, 107 S. W. 855. "An unconditional admission of

the truth of the facts sought to be proved by the absent witnesses would necessarily have a different effect. They would go to the jury as admitted facts in the case, not open to controversy, and it would be a positive duty of the jury so to consider them in determining the question of

the defendant's guilt. Such an admission, we think, would give the accused all the benefit that he could derive from the testimony of the witness if present at the trial." *Wassells v. State*, 26 Ind. 30; *Mayfield v. State*, 110 Ind. 591, 593, 11 N. E. 618.

CHAPTER XXII.

THE PROVINCE OF JUDGE AND JURY.

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| § 273. The power and right of the jury to determine the law—
Criminal libel. | § 276. Charging on the evidence. |
| 274. Character and analysis of a general verdict. | 277. Assumption of facts in charge. |
| 275. Charging the jury on the law—
—Physical power of the jury to disregard the judge's charge. | 278. Necessity for evidence to sustain instructions. |
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§ 273. **The power and right of the jury to determine the law—Criminal libel.**—The main, if not the sole, purpose, of the introduction of evidence in criminal trials, is to determine disputed questions of fact. If the facts constituting the case for the plaintiff in a civil action are admitted by a demurrer, or if the matter in defense constitutes no defense in law, or if the jury find a special verdict, a pure question of law arises which is exclusively for the judge to determine. This is universally the rule in all civil proceedings. The jury are bound to take the law from the court's instruction, and a verdict rendered by them which is palpably against the law will be set aside. Whether a jury selected to try a criminal case are under any circumstances judges of the law, in the sense that they are judges of the issue of fact, is a question which has received much attention. The subject received much investigation and was debated with vast learning and a great expenditure of eloquence and ability in England at the end of the last century, in the numerous prosecutions for criminal libel which were brought by the crown. It was admitted by all parties that the question, Did the accused publish the libel? and its meaning, were exclusively questions of fact for the determination of the jury. The controversy turned upon the right to determine whether the tendency of the publication was or was not

mischievous, and the intent of the accused in publishing it. On the one hand, it was held that the court had the exclusive right to decide that the libel was or was not calculated to produce mischief, and that the accused intended that it should do so. On the other, it was maintained that the question of mischievous tendency and criminal intent were, as in all other crimes, mixed questions of law and fact to be tried by the jurors, under proper instructions from the bench.¹

So far as the question of the right of jurors to determine the law in prosecutions for criminal libel is concerned, it may be considered as set at rest by the various constitutional provisions that in such cases the jurors shall have the right to determine both the law and the facts. If the constitution provides that the jury shall be judges of the law, "as in other cases," or may determine questions both of law and fact "under the direction of the court," it is very clear that it was intended merely to place criminal libel on the same footing as other crimes, and that the jury, while having the right to determine the intention of the accused, as well as the facts of publication, must receive the law from the court.²

¹ See *Rex v. Woodfall*, 5 Burr. 2661; *Rex v. Dean of St. Asaph*, 3 T. R. 428; *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90; *Commonwealth v. Anthes*, 5 Gray (Mass.) 185, 212, 219. For other cases bearing upon this subject, see *United States v. Battiste*, 2 Sumn. (U. S.) 240, 243, 24 Fed. Cas. 14545; *United States v. Morris*, 1 Curt. (U. S.) 23, 26 Fed. Cas. 15815; *Pennsylvania v. Bell*, Add. (Pa.) 156, 1 Am. Dec. 298; *Pennsylvania v. M'Fail*, Add. (Pa.) 255; *Townsend v. State*, 2 Blackf. (Ind.) 151; *Hamilton v. People*, 29 Mich. 173; *Commonwealth v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; *Pierce v. State*, 13 N. H. 536; *People v. Crosswell*, 3 Johns. Cas. (N. Y.) 337, 394.

Province of judge and jury, see *Elliott Evidence*, § 2732, 68 L. R. A.

79. Proof of *corpus delicti* in criminal cases, 68 L. R. A. 33.

² *Cooley's Cons. Limit.*, 567. By constitutional enactment in some of the states, the right to determine the law as well as the facts is conferred upon the jury in a criminal case. *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077; *Goldman v. State*, 75 Md. 621, 23 Atl. 1097; *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, 27 Am. St. 361, 13 L. R. A. 419n. In *Pennsylvania* and *Tennessee* by constitutional provisions "in all indictments for libel the jury shall have the right to determine the law and the facts under the directions of the court as in other cases." There has been much conflict of authority as to the effect of these provisions but it is apparently settled that they do not alter the general rule that the court must determine the law and the jury

§ 274. **Character and analysis of general verdict.**—By the plea of not guilty both the law and the facts are put in issue. Two issues thus arise and both must be tried. An acquittal is equivalent to a finding that either the existence of the law or the existence of the facts has not been established, while a verdict of guilty shows that both the law and the facts have been found to be against the accused. In other words, a general verdict, as Chief Justice Shaw well points out, is an answer both to the question, "Is there a law such as is alleged by the state?" and to the question, "Has the defendant done the acts charged and violated that law?" Hence, it is very evident that a general verdict must and does embody and declare the result of an inquiry into a question of law as well as of fact. But no way of analyzing it exists to ascertain, as it stands upon the record, whether the jury determined the law as well as the weight of the evidence. Their verdict is conclusive and unquestionable, because the law conclusively presumes that they acted upon correct legal rules. But the fact that the question of fact and the question of law are thus intermingled in the verdict, and in the deliberations of the jury which led up to it, should not be permitted to obscure the principle that both are independent and distinct, and that each is to be determined by different and distinct but co-ordinate tribunals. If we recognize the line of demarkation between them and the exclusive province of judge and jury we must also admit that the minds of the jurors must act freely and fully within the scope of their authority and duty, and the mind of the judge must operate with equal freedom within the range of his right and authority. The law will presume that both judge and jury have done their duty, and, this being so, a general verdict is the proper answer to the double or mixed question of law and fact, "Is the defendant guilty as charged in the indictment?" Such are the proper considerations when a general verdict is rendered. But the jury may find a special verdict. They can determine the material facts in detail upon the evidence as submitted to them, and as the same are proved to their satisfaction, and the judge can then decide whether, in law, the facts as proved bring the accused within the penal statute which it is al-

accept it as laid down by the court. L. R. A. 89; Ford v. State, 101 Tenn. Commonwealth v. McManus, 143 Pa. 454, 47 S. W. 703. St. 64, 21 Atl. 1018, 22 Atl. 761, 14

leged he has broken, and he can then pronounce him guilty or the reverse. On the other hand, the court can inform the jury what the law is as applied to the case, if certain facts, stated hypothetically, are proved to their satisfaction, leaving the proof entirely to them. As the court cannot tell what facts the jury will find, it can only of necessity give its direction in a hypothetical form. In so far as the jury apply the rules of law thus stated to them by the court they may, with correctness, be said to pass upon the law by incorporating it in their verdict and placing it on record with their determination of the facts. They certainly have the physical power to refuse to apply the rules of law stated to them, and if their refusal results in an acquittal they may, to that extent, determine what the law is, or to decide the law, as stated, is not applicable. But in the majority of instances in which a general verdict is returned it is more correct and nearer the truth to say that the jurors merely affirm and declare the law than that they determine what it shall be. It is for the court to point out what facts are, according to law, necessary in the particular case to be proved and to inform the jury that the law characterizes certain facts, taken together, as criminal or the reverse. It is for the jury then, keeping these rules of law in mind, to find a verdict of guilty or not guilty, according as they find these facts proved or the reverse.

§ 275. Charging the jury on the law—Physical power of the jury to disregard the judge's charge.—The judge presiding at a criminal trial is performing one of his most delicate and important duties when he charges the jury and endeavors to instruct them in the rules of law which should regulate their deliberations. The impressiveness and dignity of the judicial office, the venerable and upright character of its occupant, and the learning, acumen and experience which he is assumed to possess, unite to impress the jury. They are unconsciously influenced to accept everything that comes from his lips as authoritative, and they permit his opinions upon the issues of fact involved, so far as he may announce them, to guide them in their deliberations. The frequency with which convictions are reversed by appellate courts, because of errors in judicial instructions, clearly demonstrates the truth of this statement, and illustrates how extremely difficult it is for the human mind to operate impartially in the presence of accusations

of wicked conduct, even when trained to the task by years of study and experience.

Under the qualifications and limitations above pointed out it is the duty of the judge to instruct the jury upon all questions of law involved, and it is their duty to be governed thereby.³ The jury are sworn to determine the issue according to the law and the evidence, and the language of the court is the only proper evidence of what the law is that is in their possession. In the absence of any express constitutional or statutory provision making them the judges of the law in criminal cases, they are bound by their oaths to accept the judge's charge as proving what the law is, and to act accordingly. It will be found, as a rule, that juries obey and follow the judicial instructions implicitly. It is evident, however, that they have the physical power, though not the legal right, to disregard them. But the exercise of the power does not involve the possession of a legal right to disregard the judicial instructions as to the law, and the distinction between the two is clear and vital.⁴ Hence, if the jury shall disregard the law, so far as it is stated favorably to the accused, and pronounce him guilty, the verdict may be set aside and a new trial ordered,

³ *Duffy v. People*, 26 N. Y. 588; *Wright*, 53 Me. 328, 330-344; *People v. Worden*, 113 Cal. 569, 45 Pac. 844; *Sparf v. United States*, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. 273, *et seq.* (a leading case and well reasoned. Decided in October, 1894); *Commonwealth v. McManus*, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89; *Commonwealth v. Abbott*, 13 Metc. (Mass.) 120, 123, 124; *Hannum v. State*, 90 Tenn. 647, 18 S. W. 269; *United States v. Battiste*, 2 Sumn. 240, 245, 24 Fed. Cas. 14545; *People v. Finnegan*, 1 Park. Cr. 147, 152; *Pierce v. State*, 13 N. H. 536; *Hamilton v. People*, 29 Mich. 173, 192; *Montee v. Commonwealth*, 3 J. J. Marsh. (Ky.) 132, 149, 151; *State v. Smith*, 6 R. I. 33; *State v. Pierson*, 12 Ala. 149, 153; *Hardy v. State*, 7 Mo. 607; *Commonwealth v. Anthes*, 5 Gray (Mass.) 185, 208, 218; *State v.*

Wright, 53 Me. 328, 330-344; *People v. Pine*, 2 Barb. (N. Y.) 566, 568; *State v. Jeandell*, 5 Harr. (Del.) 475; *Davenport v. Commonwealth*, 1 Leigh (Va.) 588; *Danforth v. State*, 75 Ga. 614, 58 Am. 480; *McGowan v. State*, 9 Yerg. (Tenn.) 184, 193-195; *Pleasant v. State*, 13 Ark. 360, 376; *Adams v. State*, 29 Ohio St. 412; *Parrish v. State*, 14 Neb. 60, 15 N. W. 357; *People v. Ivey*, 49 Cal. 56; *State v. Hannibal*, 37 La. Ann. 619; *State v. Miller*, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083; *State v. Main*, 69 Conn. 123, 37 Atl. 80, 61 Am. St. 30, 36 L. R. A. 623. Cautionary instructions, see *Elliott Evidence*, § 2733.

⁴ *Parrish v. State*, 14 Neb. 60, 15 N. W. 357; *State v. Reed* (Ore.), 97 Pac. 627; *Anderson v. State*, 122 Ga. 175, 50 S. E. 51; *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

for the same reason that a verdict which is against the weight of the evidence would be set aside. When, however, a verdict of acquittal is rendered in disregard of the law laid down by the court, the decision of the jury is final, by reason of the existence of the common-law rule that no man can twice be put in jeopardy for the same offense. Hence, to this extent the jury may be said, not indeed to settle the law, but to determine that the law is not applicable, or to refuse to apply it. So far they have the power (and perhaps the legal right) to disregard the instructions of the court.⁵

It may be noted, however, that not every proposition which is contained in a text-writer or reported case is the law.⁶ It is not a correct method of instructing the jury to read or to repeat to them the process of reasoning or the arguments of legal authors, or of judges relating to matters of fact or experience which do not contain express propositions of law, but are mere enunciations of opinions upon matters of fact or suggestions drawn from everyday experience. These have an appropriate place in the argument of counsel, but their weight and cogency in determining the issue of guilt are for the minds of the jury alone.⁷

⁵ Commonwealth v. McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89; Habersham v. State, 56 Ga. 61, 64-67; Pierce v. State, 13 N. H. 536; United States v. Wilson, 1 Baldw. 78, 108, 28 Fed. Cas. 16730; United States v. Taylor, 11 Fed. 470, 472, 3 McCrary 500, 505; Duffy v. People, 26 N. Y. 588; People v. Pine, 2 Barb. (N. Y.) 566, 568. "They are also, *ex necessitate*, the ultimate judges, in one respect, of the law. If they acquit, the judge cannot grant a new trial, how much soever they have misconceived or disregarded the law." Montee v. Commonwealth, 3 J. J. Marsh. (Ky.) 132, 149, 151; Commonwealth v. VanTuyl, 1 Metc. (Ky.) 1, 5, 71 Am. Dec. 455.

⁶ People v. Wayman, 128 N. Y. 585, 27 N. E. 1070.

⁷ In Garfield v. State, 74 Ind. 60, the

court says: "The teachings of experience on questions of fact are not, however, doctrines of law, which may be announced as such from the bench, nor yet are they matters of proof to be shown as other facts in the case. They may well enter into the arguments of attorneys, one side claiming that experience teaches one thing, and the other side asserting another conclusion; but the jury, not the judge, is the arbiter of such contentions, as of all questions of fact. The most that the judge may do, under our practice, which leaves questions of fact entirely to the jury, is to direct the attention of the jurors to such propositions and leave them, in the light of their experience, to say what credit should be given to any testimony on account of its alleged doubtful character."

§ 276. Charging on the evidence.—The judge may, and indeed should, charge the jury on the evidence. It is his duty to marshal all the evidence before the jury in such a way and with such comments as will enable them to see its relevancy and pertinency. He may state it, and a careful, logical and impartial repetition, or an intelligent analysis of it will invariably facilitate their labors in determining its credibility, appreciating its character and weight, and thus ascertaining the truth. These are for their consideration alone, but the court should aid them so that they may come to an intelligent and satisfactory conclusion, which shall be in accordance with the law and consistent with the proof. This must be done fairly and impartially, with a due regard to the preservation of the defendant's rights. Nor need the court refrain from a fair, just and accurate summary of the evidence because when thus presented it may be unfavorable to the accused.⁸ On the other hand the court must not select and give undue prominence to certain parts of the testimony to the exclusion of others of equal importance, but which do not seem as important to the judicial mind.⁹

The usual, and at the same time the safest, formula is, "if, from the evidence, the jury believe, etc., then it is their duty to convict." The court may proceed to lay down certain well recognized legal rules which should be their guide in weighing the evidence and in determining its weight, for the power of the jury to determine the weight and credibility of the evidence is not arbitrary. It must be exercised in subordination to the logical principles which underlie all evidence, and which, from long reiteration and experience, have acquired the effect and character of rules of law. Thus the jury may with propriety be told that the testimony of an accomplice, uncorroborated, is to be viewed with distrust; that the admission of the prisoner is to be carefully scrutinized; that a witness shown to have testified falsely in any material particular

⁸ *State v. Rose*, 47 Minn. 47, 49 N. W. 404; *People v. Fanning*, 131 N. Y. 659, 30 N. E. 569; *State v. Valentina*, 71 N. J. L. 552, 60 Atl. 177.

⁹ *Goley v. State*, 85 Ala. 333, 5 So. 167; *State v. Ward*, 19 Nev. 297, 10 Pac. 133; *Morgan v. State*, 48 Ohio St. 371, 27 N. E. 710; *Scott v. Peo-* ple, 141 Ill. 195, 30 N. E. 329; *People v. Hawes*, 98 Cal. 648, 33 Pac. 791; *Bell v. State*, 91 Ga. 15, 16 S. E. 207; *Grant v. State*, 97 Ala. 35, 11 So. 915; *Miller v. State*, 107 Ala. 40, 19 So. 37; *Prine v. State*, 73 Miss. 838, 19 So. 711; *People v. Caldwell*, 107 Mich. 374, 65 N. W. 213.

should be disbelieved, and that they may consider the interest of the accused when he testifies as a witness. So they may be instructed generally upon the rules of law which determine the relevancy and probative force of presumptions of law which are received in lieu of proof, and of evidence such as dying declarations and confessions, which constitute exceptions to general rules and are received *ex necessitate rei*. But the court cannot exceed these limits and point out the particular and common details which are within the knowledge and experience of men generally, and are to be regarded in determining whether any evidence is or is not to be believed. Thus, for example, the court should not discredit a witness by stating that he has been impeached on his cross-examination because of his ignorance and want of experience.¹⁰

The weight to be given to the evidence and the credibility of the witnesses in every case where, upon the whole testimony, an issue of fact arises, are for the exclusive consideration and determination of the jury.¹¹

¹⁰ Thomas v. State, 95 Ga. 484, 22 S. E. Rep. 315. Cf., also, Hauk v. State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

¹¹ State v. Jones, 44 La. Ann. 1120, 1121, 11 So. 827; State v. Plum, 49 Kan. 679, 31 Pac. 308; Baysinger v. People, 115 Ill. 419, 5 N. E. 375; State v. Jones, 86 Mo. 623, 628; State v. Wisdom, 84 Mo. 177, 190; Jones v. State, 59 Ark. 417, 27 S. W. 601; State v. Kibling, 63 Vt. 636, 22 Atl. 613; People v. Minnaugh, 131 N. Y. 563, 29 N. E. 750; People v. Cowgill, 93 Cal. 596, 29 Pac. 228; Dean v. State, 130 Ind. 237, 29 N. E. 911; Rawls v. State, 97 Ga. 186, 22 S. E. 529; Ware v. State, 96 Ga. 349, 23 S. E. 410; Williams v. State, 46 Neb. 704, 65 N. W. 783; People v. Brow, 90 Hun (N. Y.) 599, 35 N. Y. S. 1009; Bonner v. State, 107 Ala. 97, 18 So. 226; State v. Aughttry, 49 S. Car. 285, 26 S. E. 619, 27 S. E. 199; State v. Cannon, 49 S. Car. 550, 27 S. E.

526; State v. Walker, 149 N. Car. 527, 63 S. E. 76; Peak v. State, 5 Ga. App. 56, 62 S. E. 665; State v. Fishel (Iowa), 118 N. W. 763; Konda v. United States, C. C. A. 166 Fed. 91, 22 L. R. A. (N. S.) 304n; State v. Sassaman, 214 Mo. 695, 114 S. W. 590; State v. Pirkey (S. Dak.), 118 N. W. 1042; Dennis v. State (Ark), 114 S. W. 926; Post v. United States, 135 Fed. 1, 67 C. C. A. 569, 70 L. R. A. 989n; Shires v. State (Okla. Cr. App.). 99 Pac. 1100; State v. Wilcox, 132 N. Car. 1120, 44 S. E. 625; State v. Hall, 132 N. Car. 1094, 44 S. E. 553; Lyles v. United States, 20 App. Cas. D. C. 559; State v. Dunn (Wis), 102 N. W. 935; Carson v. State, 48 Tex. Cr. 157, 86 S. W. 1011; State v. Collins, 28 R. I. 439, 67 Atl. 796; State v. Thrailkill, 71 S. Car. 136, 50 S. E. 551; State v. Shuff, 9 Idaho 115, 72 Pac. 664; State v. Littooy, 52 Wash. 87, 100 Pac. 170.

§ 277. **Assumption of facts in charge.**—The duty and the right of the court to state the testimony does not, by implication, authorize it to declare what is proved by the testimony, or what is the result of the testimony. These are questions for the jury.¹² The credibility of any evidence which has been offered is for the jury alone. Hence, the court should not, in its charge, assume, as proved, any allegation unsupported by evidence, or on which the evidence is so contradictory that reasonable men may form opposite opinions.¹³ Whether a fact, upon which the evidence is conflicting, is proved, is for the jury to determine. But where a fact is conceded or is established clearly and satisfactorily by the evidence without conflict or contradiction, the court may assume it as proved, or instruct the jury that there is evidence tending to prove that fact.¹⁴

§ 278. **Necessity for evidence to sustain instruction.**—It is not proper for the court to give instructions which, though they embody a correct statement of the law of evidence, are merely legal

¹² *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Casey*, 65 Cal. 260, 3 Pac. 874; *State v. Stewart*, Del. Gen. Sess., 67 Atl. 786; *Commonwealth v. Thomas* (Ky.), 104 S. W. 326, 31 Ky. L. 899; *Hall v. State*, 134 Ala. 90, 32 So. 750; *People v. Matthai*, 135 Cal. 442, 67 Pac. 694; *Doyle v. State*, 39 Fla. 155, 22 So. 272, 63 Am. St. 159; *Suddeth v. State*, 112 Ga. 407, 37 S. E. 747; *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245; *State v. Bige*, 112 Iowa 433, 84 N. W. 518; *State v. Lewis*, 56 Kan. 374, 43 Pac. 265.

¹³ *Newton v. State* (Miss.), 12 So. 560; *State v. Hope*, 102 Mo. 410, 14 S. W. 985; *Horn v. State*, 98 Ala. 23, 13 So. 329; *Brown v. State*, 72 Miss. 997, 17 So. 278; *Commonwealth v. McMahon*, 145 Pa. St. 413, 22 Atl. 971; *People v. Lang*, 104 Cal. 363, 37 Pac. 1031; *Scott v. People*, 141 Ill. 195, 30 N. E. 329; *State v. Lewis*, 56 Kan. 374; 43 Pac. 265; *Fowler v.*

State, 100 Ala. 96, 14 So. 860; *Butler v. State*, 2 Ga. App. 397; 58 S. E. 685.

¹⁴ *Koerner v. State*, 98 Ind. 7, 13; *Spigner v. State*, 103 Ala. 30, 15 So. 892; *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419; *Morgan v. State*, 48 Ohio St. 371, 27 N. E. 710; *State v. Meshek*, 61 Iowa 316, 16 N. W. 143; *State v. Aughtry*, 49 S. Car. 285, 26 S. E. 619, 27 S. E. 199; *Wiborg v. United States*, 163 U. S. 632, 41 L. ed. 289, 16 S. Ct. 1127, 1197; *Jeffries v. State*, 61 Ark. 308, 32 S. W. 1080; *State v. Zinn*, 61 Mo. App. 476; *Holliday v. State*, 35 Tex. Cr. 133, 32 S. W. 538; *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198; *State v. Kinney*, 21 S. Dak. 390, 113 N. W. 77; *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247; *People v. Phillips*, 70 Cal. 61, 11 Pac. 493; *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419; *State v. McKnight*, 1119 Iowa 56, 93 N. W. 63; *Pisar v. State*, 56 Neb. 455, 76 N. W. 869; *State v. Nickels*, 65 S. Car. 169, 43 S. E. 521.

abstractions, because they are not sustained by any evidence in the case.¹⁵ Thus, it is not error for the court to refuse to charge upon evidence, which was excluded,¹⁶ and *a fortiori*, on evidence, which has not been offered, and which is absolutely irrelevant,¹⁷ because the issue upon which it would alone be relevant does not exist in the case.

§ 279. Directing a verdict.—In a civil case the court has the legal power to direct a verdict for plaintiff when his cause of action is admitted, or even when the evidence or matter of defense, if true, constitutes no defense in law.¹⁸ So if the plaintiff fails to substantiate his allegations by evidence showing at least a *prima facie* case, there is nothing to go to the jury, and the court may direct a nonsuit. In other words, where the case turns upon an issue of law, the court may, in a civil case, direct the jury to find a verdict according as it determines the law, for the reason that it has the power to set aside a verdict which is against the law. But the court cannot in a criminal trial set aside a verdict of acquittal. Hence, to permit it to direct a verdict of guilty would be to allow it to do indirectly that which it has no power to do directly.

For this reason the jury cannot be directed to render a verdict of guilty, no matter how convincing the evidence may be, even where the facts are admitted or settled beyond any possibility of dispute. The constitutional right of the accused to have his guilt or innocence determined by a jury of his peers cannot be denied by the arbitrary exercise of the judicial power.¹⁹ In a criminal

¹⁵ *State v. Robinson*, 35 S. Car. 340, 14 S. E. 766; *Bostic v. State*, 94 Ala. 45, 10 So. 602; *Hill v. Commonwealth*, 88 Va. 633, 14 S. E. 330, 29 Am. St. 744; *Crane v. State*, 111 Ala. 45, 20 So. 590; *Morearty v. State*, 46 Neb. 652, 65 N. W. 784; *Doyle v. State*, 39 Fla. 155, 22 So. 272, 63 Am. St. 159.

¹⁶ *Commonwealth v. Cosseboom*, 155 Mass. 298; 29 N. E. 463.

¹⁷ *Felker v. State*, 54 Ark. 489, 16 S. W. 663; *Morgan v. State*, 48 Ohio St. 371, 27 N. E. 710; *Massey v. State*,

29 Tex. App. 159, 15 S. W. 601; *Graff v. People*, 134 Ill. 380, 25 N. E. 563; *Doyle v. People*, 147 Ill. 394, 35 N. E. 372; *Jackson v. State*, 91 Ga. 271, 18 S. E. 298, 44 Am. St. 22.

¹⁸ *United States v. Taylor*, 3 McCrary 500, 505.

¹⁹ *State v. Wilson*, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 79; *United States v. Taylor*, 11 Fed. 470, 472, 3 McCrary 500; *United States v. Battiste*, 2 Sumn. 240, 243, 24 Fed. Cas. 14545; *Commonwealth v. Werntz*, 161 Pa. St. 591, 29 Atl. 272; *Tucker v. State*, 57

trial under a plea of not guilty, no admission of a cause of action by the state can be implied. This plea puts in issue the credibility of the state's evidence, even if it is otherwise uncontradicted, because of the presumption of innocence which compels a determination by the jury. If no question of intent is involved in the criminal transaction, and the facts are overwhelmingly proved or admitted, so that the only question is, has a statute been violated? the court may properly point out that the law as applied to the facts shows the defendant's guilt, and instruct the jury that it is their duty to convict.²⁰

The court cannot, during the progress of the trial, instruct the clerk to enter a verdict of not guilty and then discharge a prisoner. If there is no evidence tending to prove the offense charged, and the only issue is one of law, it is the duty of the court to direct an acquittal, and erroneous not to do so.²¹ And it has been held that

Ga. 503, 505; *State v. Picker*, 2 Mo. App. 1074; *Sims v. State*, 43 Ala. 33; *Nonemaker v. State*, 34 Ala. 211; *People v. Collison*, 85 Mich. 105, 48 N. W. 292; *State v. Winchester*, 113 N. Car. 641, 18 S. E. 657; *State v. Riley*, 113 N. Car. 648, 18 S. E. 168; *State v. Picker*, 2 Mo. App. 1074; *Townsend v. State*, 137 Ala. 91, 34 So. 382; *Territory v. West* (N. Mex.), 99 Pac. 343.

²⁰ *People v. Neumann*, 85 Mich. 98, 48 N. W. 290; *People v. Elmer*, 109 Mich. 493, 67 N. W. 550. But where intent is in question, an instruction that if the jury believe the evidence it is their duty to find the defendant guilty, is erroneous as withdrawing the question of intent from them. *Perkins v. State*, 50 Ala. 154, 159. "A charge to the jury, that upon the facts testified to, assuming them to be true, it would be their duty to convict the prisoner, if ever proper, would be so only in the very rare cases in which the force of the facts proved should be such, as to make the inference of criminal intent, an

inference of law and not of fact." *Duffy v. People*, 26 N. Y. 588.

²¹ *State v. Trove*, 1 Ind. App. 553, 27 N. E. 878; *Commonwealth v. Lowrey*, 158 Mass. 18, 32 N. E. 940; *Commonwealth v. Ruddle*, 142 Pa. St. 144, 21 Atl. 814; *People v. Bennett*, 49 N. Y. 137; *State v. Green*, 117 N. Car. 695, 23 S. E. 98; *State v. Warner*, 74 Mo. 83, 85; *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. Minney*, 155 Mich. 534, 119 N. W. 918; *Murphy v. State*, 124 Wis. 635, 102 N. W. 1087. *Cf. People v. Daniels*, 105 Cal. 262, 38 Pac. 720, where the court has power only to "advise" an acquittal. *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016. "In cases of weak and unsatisfactory evidence, the court can always impress a jury with the benign principles of the common law established for the protection of the innocent, that the prosecution are bound to establish a clear case; that the prisoner is entitled to the benefit of all reasonable doubts, and that it is better that many guilty prisoners should escape than that one innocent

even when the evidence is insufficient in the opinion of the court to support a conviction on a motion for a new trial, it becomes its duty, with or without²² a request, to direct an acquittal. A request to have the jury directed to acquit must state specifically the grounds on which it is based.²³

§ 280. Order and manner of introducing the proof.—Ordinarily in all judicial proceedings the party who has the burden of proof must, in the opening, introduce all the facts in evidence which constitutes his case. He is required then to make out a *prima facie* case only, and need not anticipate his adversary's case or attempt to meet his evidence until the proof of the latter is heard.

In the case of homicide and other serious similar criminal offenses, it is within the judicial discretion to require the state to prove the *corpus delicti* at least *prima facie*, before admitting evidence to connect the accused therewith.^{23a}

After the prosecution has exhausted its case and the accused has had a full opportunity to introduce all the evidence upon which he relies for an acquittal, the court may permit the introduction of rebutting evidence on the part of the state. By rebutting evidence is meant not merely evidence which contradicts the witnesses upon collateral and irrelevant points, or which is corroborative and confirmative of that which preceded it, but evidence which squarely meets and controverts some affirmative fact or facts which the adversary has attempted to prove.²⁴

person should be punished; and there may be cases so weak upon the facts as to justify the advice of the court that it is unsafe in the particular case to convict." *People v. Bennett*, 49 N. Y. 137.

²² *Commonwealth v. Merrill*, 14 Gray (Mass.) 415, 418, 77 Am. Dec. 336; *People v. Ledwon*, 153 N. Y. 10, 46 N. E. 1046; *Taylor v. Territory* (Okla. Cr. App.), 99 Pac. 628.

²³ *State v. Nulty*, 2 Eastern 347.

^{23a} *People v. Millard*, 53 Mich. 63, 18 N. W. 562; *People v. Hall*, 48 Mich. 482, 12 N. W. 665, 42 Am. 477. The order in which the prosecution shall

introduce its proof is usually a matter of judicial discretion. *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *State v. Pruett*, 49 La. Ann. 283, 21 So. 842; *Brooke v. People*, 23 Colo. 375, 48 Pac. 502; *State v. Remington*, 50 Ore. 99, 91 Pac. 473; *State v. DeHart*, 38 Mont. 211, 99 Pac. 438; *People v. Carson* (Cal.), 99 Pac. 970; *Caswell v. State*, 5 Ga. App. 483, 63 S. E. 566; *Crawford v. United States*, 30 App. Cas. D. C. 1; *Shires v. State* (Okla. Cr. App.), 99 Pac. 1100.

²⁴ *State v. Parish*, 22 Iowa 284; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *Thomas v. State*, 47 Fla.

§ 280a. **The credibility of detectives and experts.**—The evidence of private detectives is justly regarded with some suspicion by the courts, but there is no rule of law that their testimony is to be weighed by any other method than that employed in the case of other witnesses.²⁵ It is usually a custom, as matter of practice, to caution the jury to be very careful in estimating the evidence of private detectives. This matter, however, is largely in the discretion of the court.²⁶

It has been held improper for the court as invading the province of the jury to instruct that the testimony of private detectives or of public detectives or police officers should be received with caution or with distrust.²⁷

The jury may take into consideration the fact of the interest of the detective or policeman in securing a conviction. The jury in determining his credibility that it would be to his advantage to secure a conviction as tending to give him credit and reputation, but it would hardly be proper for the court to instruct that the interest which the detective has in the conviction would justify the jury in regarding his testimony with suspicion. His motive is relevant and may be considered. It is immaterial, as matter of law, that the detective acts in apparent connection with the accused in the commission of the crime and that he did so for the purpose of procuring the arrest of the accused.²⁸ And the fact that a private detective or police officer procures evidence that a crime has been committed by committing a trespass on the premises occupied by the accused and by watching the accused and others while they engaged in the commission of the crime, does not violate the constitutional prohibition against compelling the party to testify against himself.²⁹

99, 36 So. 161; *Smith v. State*, 126 Ga. 803, 55 S. E. 1024; *State v. Arnold*, 206 Mo. 589, 105 S. W. 641.

²⁵ *Myers v. State*, 97 Ga. 76, 25 S. E. 252; *Burns v. People*, 45 Ill. App. 70; *People v. Shoemaker*, 131 Mich. 107, 90 N. W. 1035; *Copeland v. State*, 36 Tex. Cr. 575, 38 S. W. 210.

²⁶ *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325.

²⁷ *Hroneck v. People*, 134 Ill. 139,

24 N. E. 861, 23 Am. St. 652, 8 L. R. A. 837; *State v. Hoxsie*, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. 838; *State v. Bennett*, 40 S. Car. 308, 18 S. E. 886. But the contrary has also been held. *People v. Loris*, 115 N. Y. S. 236.

²⁸ *Commonwealth v. Foran*, 110 Mass. 179.

²⁹ *Cohn v. State (Tenn.)*, 109 S. W. 1149.

There is no presumption in law against the testimony of an expert witness who testifies for pay. It is error for the court to charge in such a way that the jury will be prejudiced against expert testimony. For example, it would be error for the court to tell the jury that experts can be found to swear on both sides of any question.³⁰ And it is manifest and glaring error for the court to state to the jury that medical experts, employed by the accused, are by reason of the fact that they testify for the defense entitled to little or no credit, but that great weight should be given to the testimony of an expert appointed by the court or produced by the state.³¹ The court may properly charge that expert opinions are to be considered with all the evidence and that the jury are not bound to act upon them.³² But the jury may determine whether these opinions are reasonable on a consideration of all the facts in the case and that they should subject all evidence, both expert and non-expert, to a careful examination by the same test.³³ But it is proper for the court to tell the jury that the weight of expert testimony depends on the skill, knowledge and appearance of the witness and his acquaintance with the subject under investigation.³⁴

It is error for the court to go beyond this in charging the jury on the weight of expert testimony. Thus, it is error where an expert witness testifies that the accused was sane when he committed the crime to instruct that "great respect is due to the opinion of those skilled in such matters and with reference to the phenomena of the human mind."³⁵

³⁰ *People v. Webster*, 59 Hun 398, 13 N. Y. S. 414; *State v. Rathbun*, 74 Conn. 524, 51 Atl. 540. S. W. 312; *Epps v. State*, 102 Ind. 539, 1 N. E. 491.

³¹ *Persons v. State*, 90 Tenn. 291, 16 N. W. 742, distinguishing *State v. Townsend*, 66 Iowa 741, 24 N. W. 535.

³² *Wagner v. State*, 116 Ind. 181, 18 N. E. 833.

³³ *Wilcox v. State*, 94 Tenn. 106, 28 E. 116. ³⁴ *Smith v. State*, 127 Ga. 56, 56 S.

CHAPTER XXIII.

EMBEZZLEMENT AND LARCENY.

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| <p>§ 281. Embezzlement—Essential facts constituting the crime.</p> <p>282. Embezzlement—The intention to convert.</p> <p>283. Proving other acts of embezzlement.</p> <p>284. Evidence of demand and refusal.</p> <p>285. The existence of the trust relation.</p> <p>286. The ownership of the property.</p> <p>287. Evidence of efforts to conceal or dispose of property or money.</p> <p>288. Circumstantial evidence to prove the venue.</p> <p>289. Value of the property.</p> <p>290. Admissions by the defendant.</p> <p>291. Documentary evidence.</p> <p>291a. Definition of larceny.</p> <p>292. Larceny—The felonious intention.</p> <p>293. The carrying away.</p> <p>294. Ownership — Character and proof of.</p> <p>295. Competency of owner of stolen goods as witness—Proof of his non-consent.</p> | <p>§ 296. Identifying the stolen property.</p> <p>297. Brands on cattle.</p> <p>298. Evidence of venue and of the value of money or property.</p> <p>299. Inference from possession of the property stolen.</p> <p>300. Recent and exclusive character of possession.</p> <p>301. Burden of explaining possession—Character of explanatory evidence.</p> <p>302. Explanatory declarations.</p> <p>303. Evidence of footprints.</p> <p>304. Financial standing and expenditures of the defendant.</p> <p>305. Evidence of other crimes.</p> <p>306. Stolen goods found through inadmissible confession.</p> <p>307. Malicious mischief.</p> <p>• 308. Malicious intent.</p> <p>309. Ownership and value of property—Evidence that the accused acted in good faith.</p> <p>310. Maliciously injuring animals.</p> <p>311. Injuries to grain, trees, crops, etc.</p> |
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§ 281. Embezzlement—Essential facts constituting the crime.—Four distinct propositions of fact must be established beyond a reasonable doubt to sustain a prosecution for embezzlement by an agent of a private person or a corporation. First, that the accused was the agent of the person or corporation, and that he, by the terms of his employment, was charged with receiving the

money or property of his principal. Second, that he did, in fact, receive such money or property. Third, that he received it in the course of his employment. Fourth, that he, knowing it was not his own, converted it to his own use or to the use of some third person not the true owner.¹

A statute defining embezzlement which provides that a conversion to the use of the accused, or to that of any "other person" is embezzlement or larceny, means some other person or some third person other than the accused and not some person other than the owner of the property.² If the accused being a servant or an agent converts goods or money of which he has merely the custody without the actual possession, the offense is larceny, not embezzlement.³

§ 282. Embezzlement—The intention to convert.—The crime of embezzlement was unknown at common law. It is wholly the creature of statutory enactment.⁴ And in determining whether acts charged constitute embezzlement the terms of the statute are controlling.⁵ Under most of the statutes, an appropriation of the money or the property of another, entrusted to the care of the

¹ *Leonard v. State*, 7 Tex. App. 417. *Ex parte*, *Hedley*, 31 Cal. 108; *Webb v. State*, 8 Tex. App. 310, 311; *State v. Schingen*, 20 Wis. 74; *People v. Cobler*, 108 Cal. 538, 41 Pac. 401; *DeLeon v. Territory*, 9 Ariz. 161, 80 Pac. 348; *People v. Hemple*, 4 Cal. App. 120, 87 Pac. 227; *Fields v. United States*, 27 App. D. C. 433; *State v. Dudenhefer*, 122 La. 288, 47 So. 614; *State v. Shuman*, 101 Me. 158, 63 Atl. 665; *State v. Stevenson*, 91 Me. 107, 39 Atl. 471; *State v. Newman*, 74 N. H. 10, 64 Atl. 761; *Moore v. State*, 53 Neb. 831, 74 N. W. 319; *Flohr v. Territory*, 14 Okl. 477, 78 Pac. 565; *State v. Bogardus*, 36 Wash. 297, 78 Pac. 942; *Bailey v. Commonwealth* (Ky. 1908), 113 S. W. 140; *State v. Foster*, 1 Penn. (Del.) 289, 40 Atl. 939.

² *Fleener v. State*, 58 Ark. 98, 23 S.

W. 1; *Commonwealth v. Stearns*, 2 Met. (Mass.) 343.

³ *People v. Perini*, 94 Cal. 573, 20 Pac. 1027; *Brown v. People*, 20 Colo. 161, 36 Pac. 1040.

Evidence of embezzlement in general, see *Elliott Evidence*, § 2969. Presumptions in prosecutions for embezzlement, see *Elliott Evidence*, § 2964. Burden of proof in prosecutions for embezzlement, see *Elliott Evidence*, § 2965. Weight and sufficiency of the evidence, see *Elliott Evidence*, § 2972. Questions of law and fact, see *Elliott Evidence*, § 2966. Defenses in prosecutions for embezzlement, see *Elliott Evidence*, § 2971.

⁴ *Leonard v. State*, 7 Tex. App. 417; *State v. Pellerin*, 118 La. 547, 43 So. 159.

⁵ *State v. Pellerin*, 118 La. 547, 43 So. 159.

accused, to his own use or to the use of any other person with a fraudulent intent is embezzlement.⁶ Generally there must be some act on the part of the accused to separate the property or money from that held by him as an agent, to deprive the owner of it, or to convert it to his own use, and he must assume some personal dominion over the property.⁷

It consists of a fraudulent appropriation to one's own use of the goods or money of another, which were entrusted, with the owner's consent, to one's care as agent, servant, bailee,⁸ trustee, or in some other fiduciary capacity. It differs from larceny in that larceny involves an unlawful taking without the owner's consent, while the gist of embezzlement is the conversion or breach of trust.⁹

Larceny involves a trespass upon the possession of another, but the accused in embezzlement being the agent or trustee of the owner has the possession of the property converted and therefore cannot be guilty of a trespass by converting the property.¹⁰ It has been held that one who obtains possession of property with the intention of subsequently stealing, and carries out this intention is guilty of larceny. The prosecution must show that he had the intent to steal at the time he acquired possession in order that the crime shall be larceny;¹¹ for, if the intent to steal is conceived

⁶ *State v. Seeney*, 5 Penn. (Del.) 142, 59 Atl. 48; *State v. Foster*, 1 Penn. (Del.) 289, 40 Atl. 939.

⁷ *Knight v. State*, 152 Ala. 56, 44 So. 585.

⁸ Any exercise of dominion or control by a bailee over property inconsistent with the rights of the owner or with the nature and purpose of the bailment is evidence of a conversion if done with intent to defraud. *State v. Sienkiewicz*, 4 Penn. (Del.) 59, 55 Atl. 346.

⁹ *Ennis v. State*, 3 Green (Iowa) 67; *People v. Johnson*, 91 Cal. 265, 272, 273, 27 Pac. 663; *Commonwealth v. Clifford*, 96 Ky. 4, 27 S. W. 811,

16 Ky. L. 184; *Commonwealth v. Moore*, 166 Mass. 513, 44 N. E. 612; *Wilson v. State*, 47 Tex. Cr. App. 159, 82 S. W. 651; *State v. Dunn*, 138 N. Car. 672, 50 S. E. 772. The history of the distinction at common law between the crimes of larceny and embezzlement and of the English legislation upon the subject is discussed at considerable length in *Commonwealth v. Ryan*, 155 Mass. 523, 527-529, 30 N. E. 364, 31 Am. St. 560, 15 L. R. A. 317.

¹⁰ *Knight v. State*, 152 Ala. 56, 44 So. 585.

¹¹ *Johnson v. State*, 119 Ga. 563, 46 S. E. 839.

after the taking of possession the crime is embezzlement.¹² Evidence of motive is inadmissible in embezzlement.¹³

The intent to defraud the true owner of his property and to convert it to one's own use, or to the use of some third person, must always be proved.¹⁴

The intent to defraud is always a question for the jury,¹⁵ and a charge upon fraudulent or dishonest intent should be given.¹⁶

The intent to convert may always be inferred from the circumstances,¹⁷ if they are sufficient to prove a willful and unlawful conversion.¹⁸

The accused is entitled to a charge to the jury that the presumption of law was that the defendant would not steal or misappropriate the money if it got into his hands.¹⁹

¹² *Levy v. State*, 79 Ala. 259.

¹³ *State v. Allen*, 21 S. Dak. 121, 110 N. W. 92.

¹⁴ *People v. Hurst*, 62 Mich. 276, 277, 28 N. W. 838; *State v. Carkin*, 90 Me. 142, 37 Atl. 878; *People v. Galland*, 55 Mich. 628, 629, 22 N. W. 81; *Stallings v. State*, 29 Tex. App. 220, 15 S. W. 716; *State v. Reilly*, 4 Mo. App. 392, 396-400; *State v. Lyon*, 45 N. J. L. 272, 275; *State v. Adams*, 108 Mo. 208, 18 S. W. 1000; *State v. Kortgaard*, 62 Minn. 7, 64 N. W. 51; *Mulford v. People*, 139 Ill. 586, 28 N. E. 1096; *State v. Pratt*, 98 Mo. 482, 485, 11 S. W. 977; *State v. Trolson*, 21 Nev. 419, 427, 32 Pac. 930; *State v. Hopkins*, 56 Vt. 250; *Robson v. State*, 83 Ga. 166, 9 S. E. 610, 612; *Beaty v. State*, 82 Ind. 228, 232; *People v. Page*, 116 Cal. 386, 48 Pac. 326; *State v. Seeney*, 5 Penn. (Del.) 142, 59 Atl. 48; *O'Brien v. United States*, 27 App. D. C. 263; *Eatman v. State*, 48 Fla. 21, 37 So. 576; *Ehrhart v. Rork*, 114 Ill. App. 509; *State v. McDonald*, 133 N. Car. 680, 45 S. E. 582; *State v. Summers*, 141 N. Car. 841, 53 S. E. 856; *Busby v. State*, 51 Tex. Cr. App. 289, 103 S. W. 638; *State v. Mis-*

pagel, 207 Mo. 557, 106 S. W. 513; *State v. Newman*, 74 N. H. 10, 64 Atl. 761. See *Elliott Evidence*, §§ 2967, 2716, 2717, 21 Am. St. 314.

¹⁵ *Walker v. State*, 117 Ala. 42, 23 So. 149.

¹⁶ *State v. Dunn*, 138 N. Car. 672, 50 S. E. 772.

¹⁷ *State v. Kortgaard*, 62 Minn. 7, 64 N. W. 51, 55; *People v. Wadsworth*, 63 Mich. 500, 30 N. W. 99; *State v. Seeney*, 5 Penn. (Del.) 142, 59 Atl. 48; *State v. Lentz*, 184 Mo. 223, 83 S. W. 970.

¹⁸ *State v. Brame*, 61 Minn. 101, 63 N. W. 250; *State v. Noland*, 111 Mo. 473, 485, 19 S. W. 715, 722; *Commonwealth v. Moore*, 166 Mass. 513, 44 N. E. 612. In such a case the consent or permission of the owner to the taking is irrelevant. *United States v. Taintor*, 11 Blatch. C. C. 374, 28 Fed. Cas. 16428, 1 Thomp. Nat. Bank Cas. 256; *Faust v. United States*, 163 U. S. 452, 41 L. ed. 224, 16 S. Ct. 1112; *Stephens v. State*, 49 Tex. Cr. App. 489, 93 S. W. 545.

¹⁹ *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846, reversing 20 App. Div. (N. Y.) 139, 46 N. Y. Supp. 1020.

The accused may always introduce evidence to show he acted in good faith and that he had no intention to convert.²⁰ He may testify he believed he had authority to use the money as his own,²¹ as, for example, where his employer owed him a debt and he retained money to offset it.²² He may show that the money he is accused of embezzling was employed to pay the debt of the principal to another with the consent of the owner.²³ If the jury are convinced that the accused had appropriated, or applied the property openly, and with an honest belief that he owned it, they should usually, under the statutes, acquit, though the accused was mistaken in his claim of title,²⁴ and his good faith had nothing for its foundation.²⁵

The offense is complete as soon as the property or money is intentionally converted. The subsequent return of the property or the repayment of the money to the owner is not admissible in evidence and does not excuse or extenuate the offense.²⁶

§ 283. Proving other acts of embezzlement.—Other similar acts of embezzlement at about the same time are relevant to show the criminal intent.²⁷

²⁰ *Frink v. State* (Fla. 1908), 47 So. 514.

²¹ *Eatman v. State*, 48 Fla. 21, 37 So. 576.

²² *Eatman v. State*, 48 Fla. 21, 37 So. 576.

²³ *Walker v. State*, 117 Ala. 42, 23 So. 149.

²⁴ *People v. Lapique*, 120 Cal. 25, 52 Pac. 40.

²⁵ *Eatman v. State*, 48 Fla. 21, 37 So. 576. It has been held that the intent to convert may be inferred from the non-payment of money to the owner. *O'Brien v. United States*, 27 App. D. C. 263; *Zuckerman v. People*, 213 Ill. 114, 72 N. E. 741. The contrary has also been held. *State v. McDonald*, 133 N. Car. 680, 45 S. E. 582.

²⁶ *State v. Pellerin*, 118 La. 547, 43 So. 159; *State v. Lentz*, 184 Mo. 223,

83 S. W. 970; *Busby v. State*, 51 Tex. Cr. App. 289, 103 S. W. 638; *State v. Merkel*, 189 Mo. 315, 87 S. W. 1186; *State v. Summers*, 141 N. C. 841, 53 S. E. 856; *Guenther v. State*, 137 Wis. 183, 118 N. W. 640; *United States v. Gilbert*, 25 Fed. Cases 15205; *People v. DeLay*, 80 Cal. 52, 22 Pac. 90; *Shinn v. Commonwealth*, 32 Gratt. (Va.) 899; *State v. Leicham*, 41 Wis. 565; *People v. Britton*, 118 N. Y. S. 989.

²⁷ *People v. Neyce*, 86 Cal. 393, 395, 24 Pac. 1091; *People v. Bidleman*, 104 Cal. 608, 613, 38 Pac. 502; *People v. Connelly* (Cal.), 38 Pac. 42; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *State v. Kortgaard*, 62 Minn. 7, 64 N. W. 51; *Bulloch v. State*, 10 Ga. 47, 54, 54 Am. Dec. 369; *Commonwealth v. Tuckerman*, 10 Gray (Mass.) 173, 200; *Commonwealth v. Shepard*, 1 Allen (Mass.) 575, 581;

So it may be shown that the accused failed to pay over money belonging to other persons aside from the offense in question and also promises by the accused that he would pay money entrusted to him though such evidence tends to prove a distinct offense.²⁸

§ 284. Evidence of demand and refusal.—Whether proof of a demand is necessary to show the conversion depends wholly upon the language of the statute. Even if not absolutely essential it may be relevant and proper to prove a demand, and that compliance was refused to show the intention to convert.²⁹ Proof of a demand is certainly immaterial where the demand would be ineffectual, as when the accused admits he has sold the goods.³⁰

Proof of a demand is not necessary where it would be impossible to make it because the accused disappeared shortly after the embezzlement.³¹ The same rule applies where before any demand

Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 216, 48 Am. Dec. 596; *Brown v. State*, 18 Ohio St. 496; *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736; *Jackson v. State*, 76 Ga. 551, 568; *Stanley v. State*, 88 Ala. 154, 157, 7 So. 273; *Lang v. State*, 97 Ala. 41, 46, 12 So. 183; *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782; *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *Reg. v. Richardson*, 8 Cox C. C. 448, 2 F. & F. 343. But the court must, on request, instruct the jury that this evidence must be confined to this point. *State v. Holmes* (Mich., 1896), 68 N. W. 11; *Eatman v. State*, 48 Fla. 21, 37 So. 576; *United States v. Breese*, 131 Fed. 915; *State v. Dudenhefer*, 122 La. 288, 47 So. 614; *People v. Robertson*, 6 Cal. App. 514, 92 Pac. 498; *Kossakowski v. People*, 177 Ill. 563, 53 N. E. 115; *People v. Rowland* (Cal. App., 1909), 106 Pac. 428.

²⁸ *Schintz v. People*, 178 Ill. 320, 52 N. E. 903.

Evidence of other crimes in prosecution for embezzlement, see 62 L. R. A. 226, 264, 105 Am. St. 996, 1001.

²⁹ *State v. Bryan*, 40 Iowa 379; *Peo-*

ple v. Royce, 106 Cal. 173, 39 Pac. 524, 525; *Burnett v. State*, 60 N. J. L. 255, 37 Atl. 622; *State v. Blackley*, 138 N. Car. 620, 50 S. E. 310. See *Elliott Evidence*, § 2970. The felonious conversion of the property, when complete, constitutes the gist of the crime, and if this is otherwise proved a demand is superfluous. *Wallis v. State*, 54 Ark. 611, 620, 16 S. W. 821. *Cf. State v. Brooks*, 85 Iowa 366, 371, 52 N. W. 240; *State v. Ross* (Ore., 1909), 104 Pac. 596.

³⁰ *United States v. Adams*, 2 Dak. 305, 9 N. W. 718; *State v. Foley*, 81 Iowa 36, 37, 46 N. W. 746; *Dean v. State*, 147 Ind. 215, 46 N. E. 528; *State v. Fellerin*, 118 La. 547, 43 So. 159; *State v. Knowles*, 185 Mo. 141, 83 S. W. 1083. Evidence of demand may be admissible and proper to show a failure to pay over or account for money. *State v. Sarlls*, 135 Ind. 195, 199, 34 N. E. 1129; *State v. Adamson*, 114 Ind. 216, 219, 16 N. E. 187; *Hale v. Richards*, 80 Iowa 164, 45 N. W. 734. See, also, *People v. Page*, 116 Cal. 386, 48 Pac. 326.

³¹ *Kossakowski v. People*, 177 Ill. 563, 53 N. E. 115.

is made the accused tells a witness that the money is all gone and he supposes he is to be arrested.⁸²

§ 285. **The existence of the trust relation.**—There can be no embezzlement where the relation between the accused and the owner of the property is that of debtor and creditor.⁸³ According to this, there can be no embezzlement as between partners.⁸⁴ The evidence must show that a relation of trust existed between the defendant and the true owner of the money or property, and that the thing embezzled came into the defendant's possession by virtue of his employment as an agent or bailee.⁸⁵

An agent or servant *de facto* without an express or formal appointment, may be guilty of embezzlement. But one who is in no position of trust or confidence towards the owner cannot be guilty of embezzlement though he may commit larceny.

It is sufficient to prove the official character of an officer of a corporation *de facto*. It is not necessary to produce a written certificate of his appointment, or to show that he was sworn or had given an official bond.⁸⁶

⁸² State v. Blackley, 138 N. Car. 620, 50 S. E. 310. No demand required though it could have been made. App. 496, 502, 103 S. W. 924, 926, 123 Am. St. 903.

⁸³ Bartow v. People, 78 N. Y. 377, 381; Tipton v. State, 53 Fla. 69, 43 So. 684; McAleer v. State, 46 Neb. 116, 64 N. W. 358; State v. Mahan, 132 Mo. 112, 39 S. W. 465; State v. Cooper, 102 Iowa 146, 71 N. W. 187. Evidence of usage and custom is admissible to show that the money came into the custody of defendant by virtue of his employment. State v. Silva, 130 Mo. 440, 32 S. W. 1007.

⁸⁴ Mulford v. People, 139 Ill. 586, 28 N. E. 1096.

⁸⁵ McCrary v. State, 51 Tex. Cr. State, 101 Ga. 783, 29 S. E. 22; People

An entry in the book of the minutes of the board of directors of a corporation, showing the election of the accused as president is sufficient proof of official character with evidence that he acted as president.³⁷ Whether or not a public official who is accused of embezzlement of public funds was or was not lawfully appointed is immaterial.³⁸

But the crime is not proved merely by showing the agency and the conversion. To show the intent, it must appear beyond a reasonable doubt that the agent had no right to use the money or goods in the manner he did. It must be shown to be a conversion which the agent, under his contract, had no right to make.³⁹ Ordinarily, the contract of employment, when in writing, ought to be produced. But it seems the principal may testify orally to the fact of agency, and he is then open to cross-examination as to the facts upon which this conclusion is based.⁴⁰

§ 286. The ownership of the property.—The ownership of the goods must be proved to be in some other person than the accused. When it is laid in a corporation, proof of a corporation *de facto* is enough.⁴¹ The charter or certificate of incorporation need not be produced.⁴²

v. Cobler, 108 Cal. 538, 41 Pac. 401; State v. Mims, 26 Minn. 183, 2 N. W. 494; Fortenberry v. State, 56 Miss. 286.

³⁷ McKnight v. United States, 122 Fed. 926, 61 C. C. A. 112.

³⁸ People v. Sanders, 139 Mich. 442, 102 N. W. 959; State v. Ring, 29 Minn. 78, 11 N. W. 233.

³⁹ State v. Wallick, 87 Iowa 369, 373, 54 N. W. 246; State v. Hill, 47 Neb. 456, 66 N. W. 541; People v. Page, 116 Cal. 386, 48 Pac. 326; Busby v. State, 51 Tex. Cr. App. 289, 103 S. W. 638; McCrary v. State, 51 Tex. Cr. App. 502, 103 S. W. 924, 123 Am. St. 905. A tax collector withholding settlement raises a presumption of embezzlement. It may not be necessary to prove he has collected any

taxes. State v. Dudenhefer, 122 La. 288, 47 So. 617.

⁴⁰ State v. Brooks, 85 Iowa 366, 372, 52 N. W. 240. But compare, *contra*, People v. Bidleman, 104 Cal. 608, 613, 38 Pac. 502; Thalheim v. State, 38 Fla. 169, 20 So. 938.

⁴¹ Fleener v. State, 58 Ark. 98, 102, 23 S. W. 1; Burke v. State, 34 Ohio St. 79; Calkins v. State, 18 Ohio St. 366, 98 Am. Dec. 121; State v. Turner, 119 N. Car. 841, 25 S. E. 810; Kosakowski v. People, 177 Ill. 563, 53 N. E. 115.

⁴² An immaterial variance in proving the name of the owner may be disregarded. Jackson v. State, 76 Ga. 551, 567; Commonwealth v. Dedham, 16 Mass. 141, 147; Eatman v. State, 48 Fla. 21, 37 So. 576. *Contra*, Washington v. State, 72 Ala. 272, 276.

The ownership of money by a corporation is proved by evidence that the corporation owned certain real estate and that such real estate had been sold.⁴³ The conversion of the funds of the local lodge of an unincorporated benevolent association is embezzlement under a statute which punishes embezzlement by officials or members of benevolent organizations and a local lodge has such an ownership of the funds collected from its members to be forwarded to the grand lodge as will justify alleging it to be the owner.⁴⁴ The ownership of the money or property embezzled must be proved substantially as laid in the indictment. Proof of ownership in a corporation does not sustain an allegation of ownership by a partnership.⁴⁵ But an allegation of ownership by an express company is supported by proof that the money appropriated belonged to parties who had delivered it to the express company for transportation.⁴⁶ So proof that money was paid to a bank through checks drawn by the agent of the state and collected by the bank is sufficient to show that the money was the property of the state.⁴⁷

§ 287. Evidence of efforts to conceal or dispose of property or money.—It is always relevant, and, indeed, indispensable to prove some kind or degree of concealment by the accused, either of the property or of the facts regarding its disposal.⁴⁸ Fraudulent vouchers and false statements,⁴⁹ and false entries in books containing a record of the transaction in question are always relevant. It need not be shown that the false entries were made at the time of the embezzlement, or that they were made by the accused, if

⁴³ *Fields v. United States*, 27 App. D. C. 433.

⁴⁴ *State v. Knowles*, 185 Mo. 141, 83 S. W. 1083.

⁴⁵ *State v. Morgan*, 28 Oreg. 578, 42 Pac. 128.

⁴⁶ *Riley v. State*, 32 Tex. 763.

⁴⁷ *Busby v. State*, 51 Tex. Cr. App. 289, 103 S. W. 638.

⁴⁸ *Fleener v. State*, 58 Ark. 98, 104, 23 S. W. 1; *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 1211; *State v. Pierce*, 77 Iowa 245, 249, 42 N. W.

181; *State v. Tompkins*, 32 La. Ann. 620; *State v. Fain*, 106 N. Car. 760, 764, 11 S. E. 593; *Stallings v. State*, 29 Tex. App. 220, 15 S. W. 716, 717.

But facts showing a conversion are enough. It need not be shown how defendant finally disposed of the money. *State v. King*, 81 Iowa 587, 47 N. W. 775; *State v. Pierce*, 77 Iowa 245, 42 N. W. 181.

⁴⁹ *State v. Cowan*, 74 Iowa 53, 55, 36 N. W. 886; *Commonwealth v. Moore*, 166 Mass. 513, 44 N. E. 612.

it appears that they were made at his instance and with his knowledge.⁵⁰

§ 288. Circumstantial evidence to prove the venue.—Circumstantial evidence is usually all that can be obtained to prove the venue because of the customary secrecy of the act of conversion. If it appears that the accused received the property in the county alleged, and that, when it was last seen in his custody, he was in that county, the venue is proved.⁵¹ This *prima facie* proof of venue may be rebutted by showing that the money was taken to another county and fraudulently converted there.⁵²

§ 289. Value of the property.—The value of the property involved need not be shown unless to ascertain whether the crime is a felony or misdemeanor.⁵³ If the value of several articles is alleged in a lump sum, the value of each may be shown separately.⁵⁴ Proof of the embezzlement of any part of the sum alleged is sufficient.⁵⁵ But proof of the embezzlement of a draft or check does not sustain an allegation of the embezzlement of money.⁵⁶ The crime of embezzlement is peculiar in some respects.

It is usually impossible to prove it with much preciseness of detail, particularly in the case of superior executive, public or private officials, who have no one to watch their manner of doing business. The statute against embezzlement would be a dead letter if it were required in every case to show precisely when the accused received the funds or to prove their character, whether

⁵⁰ *Jackson v. State*, 76 Ga. 551, 568. Proof of demand, and neglect to return, is evidence of conversion; but mere neglect to return or to pay money over is not proof of a fraudulent conversion. *Fitzgerald v. State*, 50 N. J. L. 475, 477, 14 Atl. 746, 747; *People v. Wyman*, 102 Cal. 552, 36 Pac. 932, 934.

⁵¹ *Wallis v. State*, 54 Ark. 611, 620, 16 S. W. 821; *Robson v. State*, 83 Ga. 166, 9 S. E. 610, 611; *State v. Small*, 26 Kan. 209.

⁵² *State v. New*, 22 Minn. 76, 79.

⁵³ *Gerard v. State*, 10 Tex. App. 690, 692.

⁵⁴ *State v. Mook*, 40 Ohio St. 588, 590. Under a statute permitting the money embezzled to be described as gold, silver or paper in the indictment proof of the amount of money taken is enough and the jury may presume it was in gold, silver or paper from this proof. *Storms v. State*, 81 Ark. 25, 98 S. W. 678.

⁵⁵ *State v. Foster*, 1 Penn. (Del.) 389, 40 Atl. 939.

⁵⁶ *State v. Mispagel*, 207 Mo. 557, 106 S. W. Rep. 513.

drafts, bank-notes or coin. Embezzlement usually consists of a continuous series of acts of conversion, done at various times but with a common design, and resulting in the principal and important fact of a shortage. Proof of such a series of criminal acts is sufficient to sustain a verdict that the aggregate amount, as alleged, was embezzled.⁵⁷

§ 290. Admissions by the defendant.—A confession to be admissible must relate specifically to the matter charged in the indictment. A confession, in general terms, that accused had been taking money "all along, ever since he began to work for him, and could not say how much he had taken," should be rejected, as it does not refer to names, dates, amounts or any other specific details.⁵⁸ Admission by the accused, of relevant facts, are always competent,⁵⁹ though they may tend to prove him guilty of another act of embezzlement.⁶⁰

A draft paid to the defendant,⁶¹ or a receipt signed by him in his official capacity, is admissible against him.⁶² The check by which the accused drew the money he embezzled is competent.⁶³ But statements of accounts and letters passing between the principal and the agent are not generally received as independent evidence, unless they can be construed as constituting a part of the *res gestæ*.⁶⁴

§ 291. Documentary evidence.—The admissibility and effect of transcripts of public records are frequently under consideration

⁵⁷ Jackson v. State, 76 Ga. 551, 573; State v. Pratt, 98 Mo. 482, 489, 11 S. W. 977; State v. Ring, 29 Minn. 78, 84, 11 N. W. 233; Bolln v. State, 51 Neb. 581, 71 N. W. 444.

⁵⁸ Commonwealth v. Sawtelle, 141 Mass. 140, 144, 5 N. E. 312.

⁵⁹ Butler v. State, 91 Ala. 87, 9 So. 191; State v. Mims, 26 Minn. 183, 2 N. W. 494; Smith v. State, 34 Tex. Cr. 265, 30 S. W. 236, 237; State v. Davison (N. H., 1906), 64 Atl. 761.

⁶⁰ Bode v. State, 80 Neb. 74, 113 N. W. 996.

⁶¹ State v. Brooks, 85 Iowa 366, 371,

52 N. W. 246. Though not payable to him. People v. McBride, 120 Mich. 166, 78 N. W. 1076.

⁶² People v. Van Ewan, 111 Cal. 144, 43 Pac. 520; Denton v. State, 77 Md. 527, 529, 26 Atl. 1022.

⁶³ De Leon v. Territory, 9 Ariz. 161, 80 Pac. 348.

⁶⁴ State v. Adams, 108 Mo. 208, 18 S. W. 1000; Eatman v. State, 48 Fla. 21, 37 So. 576. The fact that the defendant does not reply to a letter requesting a settlement is evidence with the letter. State v. Adams, 108 Mo. 208, 213, 214, 18 S. W. 1000.

in the trial of public officials for embezzling public property or funds. The general rule is that public records are admissible as evidence of all facts which are contained therein, and which were required by statute to be recorded by the official who made the entry. So the failure of a public officer to pay over money which he has collected may be shown by a transcript of an official register in which the payment should have been entered.⁶⁶ Such records are not, however, conclusive against the defendant. He may endeavor to explain or to impeach them unless he had already examined them and appeared satisfied with the entries. Under these circumstances he may be regarded as estopped by them.⁶⁷ Entries made by the accused himself in his own hand in books kept by him are received against him as admissions to show the receipt of the money and a failure to pay over.⁶⁷ But entries in his books by others are not admissible unless there is preliminary proof that his attention was called to them.⁶⁸ An expert accountant may testify orally to the result of his examination of voluminous books and accounts containing the amount of money received and paid by the accused when it is not convenient to bring the books into court.⁶⁹

⁶⁶ *Shivers v. State*, 53 Ga. 149, 152; *State v. King*, 81 Iowa 587, 47 N. W. 775. See *Elliott Evidence*, § 2968.

⁶⁷ *People v. Flock*, 100 Mich. 512, 514, 59 N. W. 237; *Bork v. People*, 16 Hun (N. Y.) 476; *Hockenberger v. State*, 49 Neb. 706, 68 N. W. 1037. A check drawn by an official is admissible against him to show the manner in which he embezzled public funds, though it may not be formally correct, or a sufficient voucher as between the government and the bank upon which it is drawn. *State v. Noland*, 111 Mo. 473, 19 S. W. 715.

⁶⁸ *State v. Ring*, 29 Minn. 78, 83, 11 N. W. 233; *Commonwealth v. Pratt*, 137 Mass. 98, 105; *Hockenberger v. State*, 49 Neb. 706, 68 N. W. 1037.

⁶⁹ *Lang v. State*, 97 Ala. 41, 46, 12

So. 183; *People v. Burnham*, 106 N. Y. Sup. 57, 120 App. Div. 388.

⁶⁹ *Hollingsworth v. State*, 111 Ind. 289, 297, 12 N. E. 490; *State v. Findley*, 101 Mo. 217, 14 S. W. 185, 187; *Busby v. State*, 51 Tex. Cr. 289, 103 S. W. 638. Where the defendant was accused of embezzling the money of a bank of which he was cashier, and the point at issue was whether he had conspired with others to get the money of the bank into his possession that he might convert it to his own use, evidence is relevant to show that the bank became insolvent, its financial condition at that date, its stock and liabilities, that defendant and his brother were insolvent and owed the bank large sums, that defendant had drawn large sums on his own account, and that a person whose draft had

As against the claim of the accused that he accounted for the proceeds of a check which he is accused of embezzling, it is permitted to the state to give oral testimony showing the history of the check from the time it was made out and mailed to the accused to the date when it was returned by the bank paying it.⁷⁰ The true character of a check which the accused is charged to have used fraudulently may always be shown by parol evidence.⁷¹ Though a contract of hiring be in writing, parol evidence is received to show how the money to become due thereunder was to be used.⁷² To refresh the memory of the prosecuting witness a memorandum may be referred to if it was properly made from information within the recollection of the witness at the time it was made.⁷³

§ 291a. Definition of larceny.—Larceny may be defined as the unlawful or wrongful taking and carrying away of the personal property of another with the intent to convert it to the use of the accused or to the use of some third person without the owner's consent.⁷⁴ If the accused, intending to steal another's goods, persuades the owner to consent to give him the goods in any manner showing an intention to pass title to him, it is not larceny.⁷⁵ Larceny and robbery are distinct in that in the case of robbery the taking is by physical force and without the consent of the owner. So where the accused was discovered to have his hand in the pocket of the prosecuting witness, and a struggle ensued between them which ends in the taking of the money by force, a robbery is committed, though in the beginning the accused intended only to commit a larceny.⁷⁶ But the taking of a purse from the pocket

been discounted for the defendant was also insolvent. *Reeves v. State*, 95 Ala. 31, 11 So. Rep. 158. Evidence to show that the bondsmen of the accused had settled and paid the shortage is irrelevant. *Fleener v. State*, 58 Ark. 98, 105, 23 S. W. 1; *Morehouse v. State*, 35 Neb. 643, 646, 53 N. W. 571; *State v. Pratt*, 98 Mo. 482, 492, 11 S. W. 977; *State v. Leicham*, 41 Wis. 565.

⁷⁰ *People v. Peck*, 139 Mich. 680, 103 N. W. 178, 12 Detroit Leg. N. 28.

⁷¹ *People v. Messer*, 148 Mich. 168, 111 N. W. 854.

⁷² *Eatman v. State*, 48 Fla. 21, 37 So. 576.

⁷³ *Walker v. State*, 117 Ala. 42, 23 So. 149.

⁷⁴ *State v. Wolf* (Del.), 66 Atl. 739.

⁷⁵ *Welch v. State*, 126 Ga. 495, 55 S. E. 183; *State v. Court* (Mo., 1910), 125 S. W. 451.

⁷⁶ *Carter v. State*, 3 Ga. App. 477, 60 S. E. Rep. 216.

of the prosecuting witness secretly and without his knowledge and without force and violence is larceny only.⁷⁷

§ 292. **Larceny—The felonious intention.**—The felonious and larcenous intention which was present in taking the goods must be shown beyond a reasonable doubt.⁷⁸

It may, of course, be inferred from circumstances indicating motive. The intent is for the jury, and if it can fairly be inferred on all the evidence a conviction must be affirmed.⁷⁹

To rebut the inference of a felonious intent the accused must be permitted to testify that he had, or believed he had, and claimed in good faith a title to the property derived from its owner,⁸⁰ or that he took the property for any innocent purpose,⁸¹ or in an open manner, to satisfy a claim against the owner.⁸² or because he believed it to be his own.⁸³ The intoxication or

⁷⁷ *Morris v. State*, 125 Ga. 36, 53 S. E. 564. For further definitions of the crime, the reader is referred to the cases cited in § 292 and § 293.

⁷⁸ *Long v. State*, 11 Fla. 295, 297; *Phelps v. People*, 55 Ill. 334; *Britt v. State*, 2 Tex. App. 215, 222, 17 S. W. 255; *Waidley v. State*, 34 Neb. 250, 252, 51 N. W. 830; *Micheaux v. State*, 30 Tex. App. 660, 18 S. W. 550; *Pence v. State*, 110 Ind. 95, 99, 10 N. E. 919; *State v. Fitzpatrick*, 9 *Houst. (Del.)* 385, 32 *Atl.* 1072; *Green v. State (Tex., 1896)*, 33 S. W. 120; *Truslow v. State*, 95 *Tenn.* 189, 31 S. W. 987; *State v. Ravenscraft*, 62 *Mo. App.* 109; *People v. Hendrickson*, 18 *App. Div. (N. Y.)* 404, 46 *N. Y. S.* 402; *People v. Frankenberg*, 236 *Ill.* 408, 86 *N. E.* 128; *State v. Allen*, 34 *Mont.* 403, 87 *Pac.* 177; *Todd v. Commonwealth*, 29 *Ky. L.* 473, 93 *S. W.* 631; *Flagg v. State*, 51 *Tex. Cr.* 602, 103 *S. W.* 855; *Stoddard v. State*, 132 *Wis.* 520, 112 *N. W.* 453; *McMahan v. State*, 50 *Tex. Cr.* 244, 96 *S. W.* 17; *Malone v. State*, 169 *Ind.* 72, 81 *N. E.* 1099; *Ladeaux v. State*, 74 *Neb.* 19,

103 *N. W.* 1048. See *Elliott Evidence*, §§ 3055, 3056. Evidence of good character of defendant in prosecution for larceny, 103 *Am. St.* 901. Comprehensive note on proof of the *corpus delicti* in criminal cases, 68 *L. R. A.* 33.

⁷⁹ *Robinson v. State*, 113 *Ind.* 510, 512, 16 *N. E.* 184; *Malone v. State*, 169 *Ind.* 72, 81 *N. E.* 1099; *Jefferson v. State (Ark.)*, 115 *S. W.* 1140. See also, *Talbert v. State*, 121 *Ala.* 33, 25 *So.* 690.

⁸⁰ *State v. Williams*, 95 *Mo.* 247, 250, 8 *S. W.* 217, 6 *Am. St.* 46; *Commonwealth v. Stebbins*, 8 *Gray (Mass.)* 492, 495.

⁸¹ *Brooks v. State (Tex., 1894)*, 27 *S. W.* 141. The declaration of a deceased owner of property alleged to have been stolen that he gave it to the accused is admissible. *People v. Doyle*, 58 *Hun (N. Y.)* 535, 538, 12 *N. Y. S.* 836.

⁸² *People v. Husband*, 36 *Mich.* 306, 308; *State v. Bailey*, 63 *W. Va.* 668, 60 *S. E.* 785.

⁸³ *State v. Daley*, 53 *Vt.* 442, 444.

mental weakness of the accused before the taking may be shown, not in extenuation, but as a circumstance from which absence of specific intent may be inferred.⁸⁴

The state may always show circumstances from which it may be reasonably inferred that the accused made a claim to the property in bad faith or that he had no confidences in the claim under which he took it away. It may be shown that the accused, though claiming to own the property himself, endeavored to put it beyond the reach of the true owner, either by concealment, by selling it or by destroying it.⁸⁵

Evidence of the secret taking of the goods, or of their open taking with the owner's knowledge but without his consent, and with the intent to sell them or to prevent the owner from finding them is always relevant.⁸⁶

Facts or declarations prior or subsequent to the taking away may be proved if they are a part of the *res gestæ*. From these a larcenous intent may properly be inferred. The false representations of the accused employed to procure money subsequently stolen are relevant.⁸⁷ The testimony of an accomplice who aided the accused on an understanding with him that she was to induce men to drink intoxicating liquors in order that the accused, a saloon keeper, might steal their money is admissible.⁸⁸

Parol evidence of a conversation between the prosecuting witness and the accused has been received where, prior to the taking of the property they met and traveled some distance in company to the place where the money was taken.⁸⁹ So, generally any statement made by the accused to the owner or to any other person having possession of the property by which he obtains its possession that as, for example, where he states that he will keep it until the owner calls for it, is admissible on the intent.⁹⁰ All

38 Am. 694; Hunter v. State (Tex., 1897), 37 S. W. 323; State v. Ravenscraft, 62 Mo. App. 109; Johnson v. United States (Okla. Cr. App.), 99 Pac. 1022.

⁸⁴ Robinson v. State, 113 Ind. 510, 513, 16 N. E. 184; *ante*, § 166.

⁸⁵ State v. Bailey, 63 W. Va. 668, 60 S. E. 785.

⁸⁶ Long v. State, 11 Fla. 295, 297.

⁸⁷ Towns v. State, 167 Ind. 315, 78 N. E. 1012, 119 Am. St. 501.

⁸⁸ State v. McCarthy, 36 Mont. 226, 92 Pac. 521.

⁸⁹ Viberg v. State, 138 Ala. 100, 35 So. 53, 100 Am. St. 22.

⁹⁰ State v. Levine, 79 Conn. 714, 66 Atl. 529, 10 L. R. A. (N. S.) 286.

these facts to be admissible must show an intention to commit larceny and not some other crime.⁹¹

§ 293. The carrying away.—The felonious taking away of the stolen property out of the possession of the owner, though only for an instant, without the owner's consent, being a constituent element of the crime, must usually be proved.⁹² It must be shown, too, that the accused actually meant to deprive the owner of his property permanently⁹³ and not merely to use it temporarily in a mischievous or wanton manner, intending to return it.⁹⁴

One who accepting in good faith the custody of a lost article for the purpose of restoring it to its owner subsequently appropriates it to his own use is guilty of larceny.⁹⁵

It is always proper to permit the state to prove that the accused was in the house or in the room occupied by the prosecuting witness if the property stolen was there too. This evidence may be very strong if the accused was near the stolen property while the owner was absent and if on the return of the owner, the property

⁹¹ *Pence v. State*, 110 Ind. 95, 99, 10 N. E. 919; *People v. Burnham*, 119 App. Div. (N. Y.) 302, 104 N. Y. S. 725.

⁹² *Mizell v. State*, 38 Fla. 20, 20 So. 769; *Wright v. State*, 18 Tex. App. 358, 365; *Sharp v. State*, 29 Tex. App. 211, 213, 15 S. W. 176, 177; *State v. Wingo*, 89 Ind. 204, 207; *Starck v. State*, 63 Ind. 285, 30 Am. 214; *Eads v. State*, 17 Wyo. 490, 101 Pac. 946; *State v. Wolf* (Del.), 66 Atl. 739; *Hicks v. State*, 101 Ga. 581, 28 S. E. 917; *People v. Burnham*, 119 App. Div. (N. Y.) 302, 104 N. Y. S. 725. And this carrying away may be accomplished by any removal of the property from its original situation as would work a complete severance from the possession of the owner. *State v. Taylor*, 136 Mo. 66, 37 S. W. 907; *Edmonds v. State*, 70 Ala. 8, 9, 45 Am. 67; *State v. Seagler*, 1 Rich. (S. Car.) 30, 42 Am. Dec. 404; *State v. Gilbert*, 68 Vt. 188, 34 Atl.

697; *State v. Rozeboom* (Iowa, 1910), 124 N. W. 783.

⁹³ *State v. McKee*, 17 Utah 270, 53 Pac. 733.

⁹⁴ *Colwell v. State* (Tex., 1896), 34 S. W. 615; *Pence v. State*, 110 Ind. 95, 98, 10 N. E. 919; *Robinson v. State*, 113 Ind. 510, 512, 16 N. E. 184; *State v. Hayes*, 214 Mo. 230, 113 S. W. 1050; *State v. McGee*, 212 Mo. 95, 110 S. W. 699; *Daniels v. State*, 148 Ala. 663, 41 So. 525; *People v. Rogers*, 22 App. Div. (N. Y.) 147, 47 N. Y. S. 893; *State v. Morse*, 12 Idaho 492, 86 Pac. 53.

⁹⁵ *State v. Levine*, 79 Conn. 714, 66 Atl. 529, 10 L. R. A. (N. S.) 286.

The property, *Elliott Evidence*, § 3052; the trespass, *Elliott Evidence*, § 3050; the taking, *Elliott Evidence*, § 3049; the carrying away, *Elliott Evidence*, § 3051; nonconsent of owner, *Elliott Evidence*, § 3054; testimony of accomplice, 98 Am. St. 173; defenses, *Elliott Evidence*, § 3059.

is missing.⁹⁶ So evidence is admissible to show that persons who were in the company of the accused and who aided him in committing the larceny were acquainted with the accused prior thereto.⁹⁷

Evidence that he was present when the taking occurred may be sufficient, if his presence was an aid to an accomplice who did the carrying away.⁹⁸ Proof of the slightest carrying away for a very short time,⁹⁹ by which the property is not taken out of the presence of the owner,¹⁰⁰ and also when immediately thereafter it is restored to its former place.¹ is enough if the accused is shown to have obtained full custody of, and entire and absolute control over the property.² If the goods were lawfully taken by or delivered to the accused, the state must show an unlawful conversion or appropriation by the accused, as in embezzlement.³

§ 294. Ownership—Character and proof of.—The ownership of the property must be proved substantially as laid.⁴ Slight dis-

⁹⁶ *Bradford v. State*, 147 Ala. 95, 41 So. 462.

⁹⁷ *State v. McGee*, 188 Mo. 401, 87 S. W. 452.

⁹⁸ *Edmonds v. State*, 70 Ala. 8, 9, 45 Am. 68; *Kent v. State*, 64 Ark. 247, 41 S. W. 849.

⁹⁹ *Eckels v. State*, 20 Ohio St. 508, 513-517; *Commonwealth v. Luckis*, 99 Mass. 431, 433, 96 Am. Dec. 769; *Harrison v. People*, 50 N. Y. 518, 522, 10 Am. 517; *State v. Gebey*, 196 Mo. 104, 93 S. W. 402.

¹⁰⁰ *Madison v. State*, 16 Tex. App. 435, 441.

¹ *Harrison v. People*, 50 N. Y. 518, 520, 521, 10 Am. 517.

² *Rex v. Thompson*, 1 Mood. C. C. 78.

³ *Shinn v. Commonwealth*, 32 Gratt. (Va.) 899, 910; *Davis v. State*, 100 Ga. 69, 25 S. E. 921; *ante*, § 282.

⁴ *Glover v. State*, 40 So. 354, 146 Ala. 690; *Bryan v. State*, 49 Tex. Cr. 196, 91 S. W. 580; *Elliott Evidence*, § 3053. If it is laid in one person and

is proved to be in another a conviction should be reversed. *McDowell v. State*, 68 Miss. 348, 8 So. 508; *Clark v. State*, 29 Tex. App. 437, 438, 16 S. W. 171; *Thurmond v. State*, 37 Tex. Cr. 422, 35 S. W. 965; *Commonwealth v. Trimmer*, 1 Mass. 476; *State v. McCoy*, 14 N. H. 364; *State v. Burgess*, 74 N. Car. 272. If the owner is alleged to be unknown to the grand jury, he must be proved to have been so. *Sharp v. State*, 29 Tex. App. 211, 15 S. W. 176; *Logan v. State*, 36 Tex. Cr. 1, 34 S. W. 925, and if this is done, proof of ownership in a person known is not fatal. *People v. Fleming*, 60 Hun (N. Y.) 576, 14 N. Y. Supp. 200. If one person has a general and another a special ownership, the ownership may be alleged and proved in either. *Trafton v. State*, 5 Tex. App. 480, 484. So an allegation of ownership by A. is not sustained by proving a joint ownership in A. and B. *State v. Burgess*, 74 N. Car. 272, 273.

crepancies in proving the name of the owner may be disregarded.⁵ The best evidence of ownership is the instrument under which the title is claimed, and it should be produced,⁶ though under most circumstances, ownership of personal property may be proved by parol. Direct proof of ownership is not always necessary. Ownership may be inferred from circumstances.⁷ Possession of personal property is primary evidence of ownership,⁸ if it appears that the alleged owner exercised exclusive control, possession and management over it.⁹ An absolute ownership need not be proved. Evidence that the alleged owner held the property as bailee or trustee will suffice.¹⁰ If the ownership is laid in a corporation proof of its *de facto* existence is enough,¹¹ nor need it be shown that the corporation was legally doing business in the state.¹²

§ 295. Competency of owner of stolen goods as witness—Proof of his non-consent.—At common law the owner was not incompetent because of his interest to testify at the trial, even when he was entitled to restitution on conviction,¹³ or to a fine, the value of which exceeded that of the goods stolen.¹⁴ The non-consent of the owner must be proved, as it cannot be presumed from the taking.¹⁵ His testimony, where he had the exclusive custody and control of the property, and, where he has delegated his power of management to another, the testimony of this agent with his own evidence is primary evidence to prove non-consent.¹⁶

⁵ Underwood v. State, 72 Ala. 220, 222; State v. Brin, 30 Minn. 522, 524, 16 N. W. 406; Perry v. People, 38 Colo. 23, 87 Pac. 796.

⁶ Edwards v. State, 29 Tex. App. 452, 16 S. W. 98.

⁷ George v. United States, 1 Okla. Cr. 407, 97 Pac. 1052, 100 Pac. 46.

⁸ Morris v. State, 84 Ala. 446, 4 So. 912; Ledbetter v. State, 35 Tex. Cr. 195, *infra*.

⁹ State v. Robinson, 35 La. Ann. 964. The alleged owner is not the best witness of the fact of possession or ownership. Lowrance v. State, 4 Yerg. (Tenn.) 145, 146.

¹⁰ Ledbetter v. State, 35 Tex. Cr. 195, 32 S. W. 903; State v. Somerville, 21 Me. 14, 38 Am. Dec. 248;

United States v. Jackson, 29 Fed. 503 (mail matter); State v. Brown (Mont.), 99 Pac. 954.

¹¹ Commonwealth v. Whitman, 121 Mass. 361.

¹² State v. Hopkins, 56 Vt. 250.

¹³ State v. Casados, 1 N. & McC. (S. Car.) 91.

¹⁴ State v. Pray, 14 N. H. 464, 466; Commonwealth v. Moulton, 9 Mass. 29, 30.

¹⁵ State v. Storts, 138 Mo. 127, 39 S. W. 483; Garcia v. State, 26 Tex. 209, 210, 82 Am. Dec. 605; Wilson v. State, 12 Tex. App. 481, 487.

¹⁶ State v. Moon, 41 Wis. 684, 686; Bubster v. State, 33 Neb. 663, 664, 50

Other evidence is not admissible until the absence of the owner or of his agent has been satisfactorily accounted for.¹⁷ If this is done, non-consent may be proved by circumstantial evidence,¹⁸ provided the circumstances proved are such as exclude every reasonable presumption that the owner consented,¹⁹ as, for example, by showing that he was searching for his property soon after the theft,²⁰ or by the declarations of the accused to the effect that he had parted with possession and that the owner could not have his property.²¹

Evidence that the owner furnished an opportunity to a suspected person to commit a larceny, for the purpose of detecting and arresting him, is inadmissible to show he consented to part with his property.²²

§ 296. Identifying the stolen property.—The identity of the stolen property must be established substantially as laid in the indictment.²³ Where cattle are described by age, color, species or brand, these details become material and a variance is fatal.²⁴

N. W. 953; *Jackson v. State*, 7 Tex. App. 363, 364; *Wilson v. State*, 12 Tex. App. 481.

¹⁷ *State v. Osborne*, 28 Iowa 9; *State v. Morey*, 2 Wis. 494, 496.

¹⁸ *Carroll v. People*, 136 Ill. 456, 465, 466, 27 N. E. 18; *Rex v. Hazy*, 2 C. & P. 458; *State v. Skinner*, 29 Ore. 599, 46 Pac. 368; *Trafton v. State*, 5 Tex. App. 480; *Files v. State*, 36 Tex. Cr. 206, 36 S. W. 93; *State v. Porter*, 26 Mo. 201, 203, 2 Russ. on Crimes 737; *George v. United States*, 1 Okla. Cr. 307, 97 Pac. 1052; *Ray v. State*, 4 Ga. App. 67, 60 S. E. 816; *Van Syoc v. State*, 69 Neb. 520, 96 N. W. 266; *Jordan v. State*, 51 Tex. Cr. 646, 104 S. W. 900; *State v. Faulk* (S. Dak., 1908), 116 N. W. 72.

¹⁹ *Wilson v. States*, 45 Tex. 76, 78, 23 Am. 602; *Housh v. People*, 24 Colo. 262, 50 Pac. 1036.

²⁰ *Rains v. State*, 7 Tex. App. 588. Cf. *State v. Porter*, 26 Mo. 201, 207;

George v. United States, 1 Okla. Cr. 307, 97 Pac. 1052.

²¹ *People v. Dean*, 58 Hun (N. Y.) 610, 12 N. Y. S. 749.

²² *Varner v. State*, 72 Ga. 745, 746. See *State v. Hull*, 33 Ore. 56, 54 Pac. 159, 72 Am. St. 694n.

²³ *Hodnett v. State*, 117 Ga. 705, 45 S. E. 61.

²⁴ *State v. Jackson*, 30 Me. 29, 30; *Wiley v. State*, 74 Ga. 840; *Hooker v. State*, 4 Ohio 348, 351; *Banks v. State*, 28 Tex. 644, 647; *Bush v. State*, 18 Ala. 415, 416; *Whart. Cr. Ev.*, § 124; *Robertson v. State*, 97 Ga. 206, 22 S. E. 974; *Mizell v. State*, 38 Fla. 20, 20 So. 769; *State v. Dale*, 141 Mo. 284; 42 S. W. 722, 64 Am. St. 513. If a statutory distinction is made between the species of any animal, proof of one is a variance if another is alleged. *State v. Buckles*, 26 Kan. 237, 241. Otherwise, where no distinction is made. *People v. Pico*, 62 Cal. 50,

It is unnecessary that the stolen property, even though bank notes, should be produced as evidence in court,²⁵ though this may be done²⁶ in the discretion of the court if the articles are first identified as having been stolen.²⁷ The identity of money received in evidence with the stolen money is for the jury.²⁸ If the article is not produced the owner may testify to the marks thereon.²⁹

But a witness cannot be permitted to prove a previous description, not verified by oath, which he received from a person who went in search of the stolen property,³⁰ or to testify that such a description corresponds with his recollection. A witness to the identity of the property need not be positive but may give his opinion based in personal knowledge,³¹ though a witness will not be permitted to testify that on the previous date the owner identified it.³² An indictment for stealing chickens,³³ a cow,³⁴ a horse,³⁵ or a hog,³⁶ is sustained by proof of the larceny of any variety or sex of the animal.³⁷

52; State v. Hill, 65 Mo. 84, 85; Wiley v. State, 3 Coldw. (Tenn.) 362, 375; Turley v. State, 3 Humph. (Tenn.) 323, 324.

²⁵ Moore v. Commonwealth, 2 Leigh (Va.) 701, 706; Spittorff v. State, 108 Ind. 171, 172, 8 N. E. 911; State v. Clark, 27 Utah 55, 74 Pac. 119.

²⁶ Ledbetter v. State, 35 Tex. Cr. 195, 32 S. W. 903; Lue v. Commonwealth (Ky.), 15 S. W. 664; Bryant v. State, 116 Ala. 445, 23 So. 40; Hooten v. State, 53 Tex. Cr. 6, 108 S. W. 651.

²⁷ Buchanan v. State, 109 Ala. 7, 19 So. 410.

²⁸ Hooten v. State, 53 Tex. Cr. 6, 108 S. W. 651.

²⁹ State v. Ballard, 104 Mo. 634, 637, 16 S. W. 525.

³⁰ Whizenant v. State, 71 Ala. 383, 385.

³¹ Misseldine v. State, 21 Tex. App. 335, 17 S. W. 768; State v. Lockwood, 58 Vt. 378, 380, 3 Atl. 539; State v. Babb, 76 Mo. 501, 404; State v. Mur-

phy, 15 Wash. 98, 45 Pac. 729; Minor v. State, 55 Fla. 77, 46 So. 297. But compare, *contra*, Elliston v. State, 50 Tex. Cr. 575, 99 S. W. 999.

³² Anderson v. State, 14 Tex. App. 49, 52. Where the owner identified goods found in defendant's possession from their quality and color the defendant should be allowed to show, by a witness having experience in such matters, that a merchant cannot identify goods from color and quality alone. Buchanan v. State, 109 Ala. 7, 19 So. 410.

³³ State v. Bassett, 34 La. Ann. 1108.

³⁴ Parker v. State, 39 Ala. 365.

³⁵ Davis v. State, 23 Tex. App. 210, 211, 4 S. W. 590.

³⁶ State v. Godet, 7 Ired. (N. Car.) 210, 211.

³⁷ It will be presumed that the animals alleged to have been stolen were alive. If they were dead it should be so stated, for an indictment for stealing an animal is not sustained by proof of stealing a carcass. Rex v.

Money or valuable securities stolen must be properly identified, and the proof of the money missing, or which was found in the possession of the prisoner, must agree substantially with that alleged in the indictment. A witness may be permitted to see coins found in the possession of the accused for the purpose of identifying them as stolen.³⁸ Where it is alleged that bank notes,³⁹ promissory notes,⁴⁰ treasury notes,⁴¹ or money,⁴² were stolen the proof must correspond with the allegation, and any material variance will be fatal. But strict proof of the identity of money is not required. The identity of stolen money may be determined from circumstantial evidence.⁴³ So where several bills of high denomination were stolen, evidence was received to show that the accused had bills of that sort in his possession after the larceny, though before he had been destitute.⁴⁴

Evidence of the genuineness and value of stolen bank bills, or of the corporate existence of the bank, is proper, though usually the jury may infer these facts,⁴⁵ as from an admission by the accused that he had passed them for value.⁴⁶ Parol evidence may be given to prove the genuineness of stolen bank notes or checks, without producing them or accounting for their non-

Halloway, 1 C. & P. 127; Commonwealth v. Beaman, 8 Gray (Mass.) 497, 499.

³⁸ Russell v. State (Ala.), 38 So. 291.

³⁹ Pomeroy v. Commonwealth, 2 Va. Cas. 342.

⁴⁰ Stewart v. State, 62 Md. 412, 415.

⁴¹ State v. Collins, 72 N. Car. 144, 145; Keating v. People, 160 Ill. 480, 43 N. E. 724; State v. Clark, 27 Utah 55, 74 Pac. 119.

⁴² Lancaster v. State, 9 Tex. App. 393, 395; Braxton v. State, 50 Tex. Cr. 632, 99 S. W. 994; Hooten v. State, 53 Tex. Cr. 6, 108 S. W. 651.

⁴³ McDonald v. State (Fla.), 47 So. 485.

⁴⁴ People v. Wilkinson, 60 Hun (N. Y.) 582, 14 N. Y. S. 827; Keating v. People, 160 Ill. 480, 43 N. E. 724; Commonwealth v. Montgomery, 11

Metc. (Mass.) 534, 537, 45 Am. Dec. 227; Anglin v. State, 52 Tex. Cr. 475, 107 S. W. 835; State v. Johnson, 36 Wash. 294, 78 Pac. 903, where the prosecuting witness was allowed to state that within a half hour after the arrest he found a \$20 gold piece in the room of the accused though he could not identify that particular piece of money as his own. On trial for the larceny of a roll of bills, the identification of a roll of paper with a single bill wrapped around it to represent the roll taken is not error. Keating v. People, 160 Ill. 480, 43 N. E. 724.

⁴⁵ Clark v. State, 14 Ind. 26; Collins v. People, 39 Ill. 233, 241.

⁴⁶ Baldwin v. State, 1 Sneed (Tenn.) 411, 416. See, also, Hildreth v. People, 32 Ill. 36, 38.

production.⁴⁷ A failure to produce the bank notes, though a circumstance which the jury may consider as favoring the prisoner's innocence, does not render parol evidence of their value incompetent. If they are produced, it is not necessary to call the officers of the bank to prove them genuine.⁴⁸

§ 297. **Brands on cattle.**—That cattle are branded with the brand of the prosecuting witness is some evidence of his ownership.⁴⁹ The state may prove that an unrecorded brand was used for years by the party claiming ownership.⁵⁰ A diagram of a brand has been received, together with the hide of the stolen steer, where they were properly identified.⁵¹ Testimony that the prosecuting witness made mistakes in branding his cattle is irrelevant.⁵² Brands duly recorded according to law must usually be proved by a copy of the record to identify stolen animals. This is *prima facie* proof of the ownership of the animal bearing that brand.⁵³

The statutes do not make brands and marks evidence of identity for they are evidence aside from statute. The effect of the statutes is to render a certified copy of the record admissible in evidence.⁵⁴ In some cases, however, the statutes provide that no brand except recorded brands shall be evidence of the ownership of cattle.⁵⁵

A witness who has seen the animal alleged to have been stolen may describe any marks which he may have observed.⁵⁶ A witness

⁴⁷ *People v. Holbrook*, 13 Johns. (N. Y.) 90, 93; *Milne's Case*, 2 East C. L. 602; *State v. Mayberry*, 48 Me. 218, 238; *Commonwealth v. Messenger*, 1 Binn. (Pa.) 273, 275, 278, 2 Am. Dec. 441; *Williams v. State*, 34 Tex. Cr. 523, 31 S. W. 405, 406; *McGinnis v. State*, 24 Ind. 500, 506, 507.
⁴⁸ *Moore v. Commonwealth*, 2 Leigh (Va.) 701, 706.

⁴⁹ *State v. Wolfley*, 75 Kan. 406, 89 Pac. 1046, 93 Pac. 337; *People v. Romero* (Cal. App., 1910), 107 Pac. 709.

⁵⁰ *Territory v. Meredith* (N. Mex.), 91 Pac. 731.

⁵¹ *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325.

⁵² *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325.

⁵³ *Dickson v. Territory*, 6 Ariz. 199, 56 Pac. 971.

⁵⁴ *Thompson v. State*, 26 Tex. App. 466, 476, 9 S. W. 760; *Brooke v. People*, 23 Colo. 375, 48 Pac. 502; *Areola v. State*, 40 Tex. Cr. 51, 48 S. W. 195.

⁵⁵ *Territory v. Smith*, 12 N. Mex. 229, 78 Pac. 42.

⁵⁶ *Lockwood v. State* (Tex. Cr.), 26 S. W. 200; *Elsner v. State*, 22 Tex. App. 687, 688, 3 S. W. 474; *Tittle v. State*, 30 Tex. App. 597, 599, 17 S. W. 1118; *Sapp v. State* (Tex. Cr. App. 1903), 77 S. W. 456. But proof of the brand to show ownership is not indispensable unless it is the only evidence. *Wolf v. State*, 4 Tex. App. 332.

may always be permitted to state that it is difficult to identify cattle, because of the similarity of marks on them.⁵⁷

§ 298. Evidence of venue and of the value of money or property.—

The burden of proving the venue as laid, and beyond a reasonable doubt,⁵⁸ is upon the state, though, if the state shall omit to prove the venue specifically, the jury may infer it from all the evidence on both sides.⁵⁹ An allegation of larceny in one county is supported by evidence of a taking in another, and a transportation into the county where the venue is laid.⁶⁰ The property taken must be proved to have some value,⁶¹ though the value alleged, not being usually a part of the *corpus delicti*, need not be proved unless proof of value is necessary to fix the grade of the offense.⁶²

Direct evidence of the precise value of the property stolen is not required. The value of the stolen property is always largely a matter of opinion. The opinion of a witness as to the value, where value is material, is not of necessity conclusive on the jury. They may disregard the opinion of the witness if they think he has not testified honestly and fairly. The jury may infer that the stolen property has value from evidence of its character and use,⁶³

⁵⁷ *Lue v. Commonwealth* (Ky. 1889), 15 S. W. 664. The ears and dewlaps of a cow have been allowed to be exhibited, to identify the animal and to show that the brand had been mutilated. *State v. Crow*, 107 Mo. 341, 350, 17 S. W. 745. And compare *Mizell v. State*, 38 Fla. 20, 20 So. 769. In some instances, it is provided by the statutes that in a prosecution for stealing a horse the ownership of which is uncertain or unknown, the property shall be held to be owned by the state. Contradictory evidence as to whether the horse is or is not branded leaves the ownership uncertain within the statute. *State v. Eddy*, 46 Wash. 494, 90 Pac. 641.

⁵⁸ *Harsdorf v. State* (Tex. App.), 18 S. W. 415; *Moye v. State*, 65 Ga. 754, 755; *Thockmorton v. Common-*

wealth (Ky.), 29 S. W. 16, 16 Ky. L. 530.

⁵⁹ *Scott v. State*, 42 Ark. 73, 77; *State v. Shour*, 196 Mo. 202, 95 S. W. 405.

⁶⁰ *Commonwealth v. Dewitt*, 10 Mass. 154, 155; *People v. Burke*, 11 Wend. (N. Y.) 129, 4 Bl. Com. 305. Cf. *State v. Bartlett*, 11 Vt. 650.

⁶¹ *Powell v. State*, 88 Ga. 32, 33, 13 S. E. 829; *Parker v. State*, 111 Ala. 72, 20 So. 641; *Commonwealth v. McKenney*, 9 Gray (Mass.) 114; *Benjamin v. State*, 105 Ga. 830, 31 S. E. 739.

⁶² *Commonwealth v. Riggs*, 14 Gray (Mass.) 376, 77 Am. Dec. 333; *Vandegrift v. State*, 151 Ala. 105, 43 So. 852; *Herd v. United States*, 13 Okla. 512, 75 Pac. 291.

⁶³ *Commonwealth v. McKenney*, 9 Gray (Mass.) 114, 116; *Whalen v.*

and a non-expert witness may always testify to the value of the property.⁶⁴

The courts will notice judicially the meaning of words used to designate the circulating medium, its value, and that of all moneys, foreign or domestic, whose value is established by law.⁶⁵

Evidence, therefore, that the property consisted of bank notes or any description of money will always sustain an inference that it was of some value.⁶⁶ Securities, as stock certificates, whose real value is not proved, will be presumed to have a nominal value.⁶⁷

Expert evidence will be received to prove the value of stocks, bonds and other securities, if the expert has bought or sold the securities in question, and for that reason is competent.⁶⁸ It will be presumed that gold coin alleged to have been stolen was of its face value.⁶⁹ Where evidence of value is relevant to determine the grade of the offense, the accused may show that the value of the property was such that he should not be convicted of grand larceny. Usually the market value⁷⁰ at the time and place of the theft is the only proper evidence.⁷¹ Evidence of value at the time of the trial is competent unless it appears that the value at the time of the trial differed from that at the time of the theft.⁷²

Commonwealth, 90 Va. 544, 19 S. E. 182; State v. Faulk (S. Dak. 1908), 116 N. W. 72.

⁶⁴ State v. Finch, 70 Iowa 316, 317, 30 N. W. 578, 59 Am. 443; Moss v. State, 40 So. 340, 146 Ala. 686, not reported in full; Echols v. State, 41 So. 298, 147 Ala. 700, not reported in full; State v. Montgomery, 17 S. Dak. 500, 97 N. W. 716; Vandegrift v. State, 43 So. 852, 151 Ala. 105; Lewis v. State (Ala., 1909), 51 So. 308.

⁶⁵ Underhill on Ev., § 237; McDonald v. State, 2 Ga. App. 633, 58 S. E. 1067.

⁶⁶ Nelson v. State, 35 Tex. Cr. 205, 32 S. W. 900; McDowell v. State, 74 Miss. 373, 20 So. 864; Vincent v. State, 3 Heisk. (Tenn.) 120, 126; Bagley v. State, 3 Tex. App. 163, 169; Duvall v. State, 63 Ala. 12, 15; Mc-

Donald v. State, 2 Ga. App. 633, 58 S. E. 1067.

⁶⁷ People v. Griffin, 38 How. Pr. (N. Y.) 475, 480; Whalen v. Commonwealth, 90 Va. 544, 549, 19 S. E. 182; Rooney v. State, 51 Neb. 576, 71 N. W. 309.

⁶⁸ People v. Turpin, 233 Ill. 452, 84 N. E. 679, 17 L. R. A. (N. S.) 276n.

⁶⁹ State v. Faulk (S. Dak.), 116 N. W. 72.

⁷⁰ State v. Brown, 55 Kan. 611, 40 Pac. 1001; Cannon v. State, 18 Tex. App. 172, 173; Glover v. State, 40 So. 354, 146 Ala. 690, not reported in full.

⁷¹ People v. Cole, 54 Mich. 238, 239, 19 N. W. 968; Glover v. State, 40 So. 354, 146 Ala. 690; Keipp v. State, 51 Tex. Cr. 417, 103 S. W. 392.

⁷² Cummings v. State (Tex. Cr. 1907), 106 S. W. 363.

If the property has no market value at the time of the trial, it is competent to prove the purchase price.⁷³ The owner's opinion of the value of the property has been received.⁷⁴

The jury may fix the value of the property according to the highest estimate of any witness.⁷⁵

§ 299. Inference from possession of the property stolen.—The rules which are elsewhere explained,⁷⁶ in connection with the question of a presumption of guilt arising where property stolen from a house in which a burglary has been committed is found in the possession of the accused, are applicable on an indictment for larceny.

According to the most approved modern view, the possession of stolen property, however recent and unexplained, creates no presumption of law that the possessor committed the larceny, and consequently a conviction of larceny based upon an instruction to that effect, and casting the burden of proving the innocent character of the possession upon the accused, must be set aside. The fact of the possession of stolen goods may always be shown. From proof of this fact, in connection with other evidence, the jury may infer as a matter of probability and reasoning, but not as a rule of law, that is, they may, under the judicious guidance of the court, draw the inference of fact that the possessor is guilty of stealing them.⁷⁷

⁷³ *State v. McDermet*, 138 Iowa 86, 115 N. W. 884; *McCoy v. State* (Tex. Cr. App., 1909), 120 S. W. 858.

⁷⁴ *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492, 495; *People v. Kehoe*, 19 N. Y. S. 763, 64 Hun. (N. Y.) 636, without opinion.

⁷⁵ *Lane v. State* (Tex. Cr., 1894), 28 S. W. 202, 203. Circumstantial evidence of value may be sufficient. *Collins v. State* (Tex. Cr., 1909), 118 S. W. 1038.

⁷⁶ See *post*, § 378.

⁷⁷ *People v. Wong Chong Suey*, 110 Cal. 117, 42 Pac. 420; *People v. St. Clair* (Cal. 1896), 44 Pac. 234; *Phillips v. State* (Tex. Cr., 1896), 34 S.

W. 119; *Orr v. State*, 107 Ala. 35, 18 So. 142; *Hix v. People*, 157 Ill. 382, 41 N. E. 862; *State v. Wilson*, 95 Iowa 341, 64 N. W. 266; *Dobson v. State*, 46 Neb. 250, 64 N. W. 956; *State v. Velarde*, 59 Cal. 457, 563; *Smith v. People*, 103 Ill. 82, 85; *State v. Raymond*, 46 Conn. 345; *Underwood v. State*, 72 Ala. 220, 222; *Boyskin v. State*, 34 Ark. 443, 445, 446; *State v. Hoffman*, 53 Kan. 700, 708, 709, 37 Pac. 138; *State v. Hodge*, 50 N. H. 510; *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *Conkwright v. People*, 35 Ill. 204; *State v. Pennyman*, 68 Iowa 216, 217, 26 N. W. 82; *Harper v. State*, 71 Miss. 202, 203; *State v. Jennett*, 88 N. Car. 665, 667; *Com-*

§ 300. **Recent and exclusive character of possession.**—The possession must not be too remote in time from the theft, or it will not have much value as evidence.⁷⁸ The lapse of time between the taking and the date of the possession is a very important circumstance. If it is so great that no connection between them can reasonably be imagined, evidence of possession is of little weight, and, in an extreme case, it may be excluded as irrelevant.

But possession of the property so soon after the theft that the possessor could not have obtained it unless he had just stolen it, may, in the absence of a credible explanation, sustain a conviction.⁷⁹ As the intervening time lengthens the cogency of this evidence diminishes.⁸⁰ But the period intervening which ought

monwealth v. Montgomery, 11 Met. (Mass.) 534, 45 Am. Dec. 227; Blaker v. State, 130 Ind. 203, 29 N. E. 1077; Sahlinger v. People, 102 Ill. 241; Shepperd v. State, 94 Ala. 102, 10 So. 663; Gravely v. Commonwealth, 86 Va. 396, 400, 10 S. E. 431; Pace v. State (Tex. Cr., 1894), 31 S. W. 173; Perry v. State (Ala., 1908), 46 So. 470; Perry v. People, 38 Colo. 23, 87 Pac. 796; McDonald v. State (Fla. 1908), 47 So. 485; State v. Toohey, 203 Mo. 674, 102 S. W. 530; State v. Sprague, 149 Mo. 409, 50 S. W. 901; State v. Drew, 179 Mo. 315, 78 S. W. 594; 101 Am. St. 474n; Territory v. Livingston, 13 N. Mex. 318, 84 Pac. 1021; State v. Lax, 71 N. J. L. 386, 59 Atl. 18; Randolph v. State (Tex. Cr., 1899), 49 S. W. 591; Kennon v. State, 46 Tex. Cr. 359, 82 S. W. 518; Pool v. State, 51 Tex. Cr. 596, 103 S. W. 892; Bryant v. State, 116 Ala. 445, 23 So. 40; State v. Burns, 19 Wash. 52, 52 Pac. 316; State v. McClain, 130 Iowa 73, 106 N. W. 376. Evidence of possession of stolen goods is admissible. 101 Am. St. 485. Evidence of possession of stolen goods does not warrant conviction if the jury have a reasonable doubt of guilt. 101 Am. St. 503. The possession of a box in which stolen

goods were packed may be equivalent in force and effect, to the possession of the goods. People v. Block, 15 N. Y. S. 229, 60 Hun (N. Y.) 583, without opinion; State v. Record (N. Car., 1909), 65 S. E. 1010.

⁷⁸ Goldstein v. People, 82 N. Y. 231; Davis v. State, 50 Miss. 86, 94, 95; Commonwealth v. Montgomery, 11 Met. (Mass.) 534, 45 Am. Dec. 227; Beck v. State, 44 Tex. 430, 432; Sloan v. People, 47 Ill. 76, 2 Russ. on Crimes (9th Am. Ed.) 337; Graves v. State, 12 Wis. 591; Williams v. State, 40 Fla. 480, 25 So. 143, 74 Am. St. 154; Bryant v. State, 4 Ga. App. 851, 62 S. E. 540; Wiley v. State (Ark., 1909), 124 S. W. 249.

⁷⁹ Blaker v. State, 130 Ind. 203, 29 N. E. 1077, 1078; Branson v. Commonwealth, 92 Ky. 330, 17 S. W. 1019, 13 Ky. L. 614; Brown v. State, 59 Ga. 456, 458; Madden v. State, 148 Ind. 183, 47 N. E. 220; State v. Eubank, 33 Wash. 293, 74 Pac. 378; Ingraham v. State, 82 Neb. 553, 118 N. W. 320; Elliott Evidence, § 3058; Scott v. State, 119 Ga. 425; 46 S. E. 637; State v. Broxton, 118 La. 126, 42 So. 721; Miller v. People, 229 Ill. 376, 82 N. E. 391.

⁸⁰ State v. Jennett, 88 N. Car. 665,

to nullify any presumption from possession cannot be fixed, depending not so much on mere lapse of time as on other circumstances and the defendant's declarations explanatory of the possession.⁸¹

Though the element of time is important, other facts are to be considered; among them is the character of the goods, for if they are light and portable, such as coin, bank notes or jewelry, which pass easily and quickly from hand to hand, possession a few days after the theft might not, as matter of law, be recent.⁸² The reverse is true when the goods are bulky and cumbersome. But generally the recency of possession is a question for the jury on all the evidence.

Not only must the possession be recent, but it must be personal, exclusive, and with a distinct, implied or express assertion of ownership. If these essentials are not proved, a conviction based on the fact of possession must be set aside.⁸³ The possession of the stolen property is personal and exclusive if it is exclusive as to all persons not *particeps criminis*. As to accomplices the possession of one is the possession of all.⁸⁴ A mere constructive possession is not enough. The accused will not be presumed to have stolen articles which he does not know he possesses. If other persons have equal right and facility of access with him to a room, trunk or closet where stolen goods are discovered, possession, not being exclusive or personal, is of no value as evidence.⁸⁵

66; *Martin v. State*, 104 Ala. 71, 16 So. 82, 84; *People v. Deluce*, 237 Ill. 541, 86 N. E. 1080.

⁸¹ *State v. Miller*, 45 Minn. 521, 522, 48 N. W. 401; *Davis v. State*, 50 Miss. 86, 94, 95; *State v. Jennett*, 88 N. Car. 665, 667; *State v. Lange*, 59 Mo. 418, 422.

⁸² *State v. Castor*, 93 Mo. 242, 250, 5 S. W. 906; *Davis v. State*, 50 Miss. 86, 95; *Rex v. Partridge*, 7 Car. & P. 551.

⁸³ *State v. Castor*, 93 Mo. 242, 250, 5 S. W. 906; *Clark v. State*, 30 Tex. App. 402, 17 S. W. 942; *People v. Hurley*, 60 Cal. 74, 75, 44 Am. 55; *Blaker v. State*, 130 Ind. 203, 205, 29

N. E. 1077; *People v. Wilson*, 7 App. Div. (N. Y.) 326, 40 N. Y. S. 107; *State v. Lackland*, 136 Mo. 26, 37 S. W. 812; *State v. Deyoe*, 97 Iowa 744, 66 N. W. 733; *Funderburg v. State* (Tex. Cr., 1896), 34 S. W. 613; *People v. Wilson*, 151 N. Y. 403, 45 N. E. 862; *Van Straaten v. People*, 26 Colo. 184, 56 Pac. 905; *Bryant v. State*, 4 Ga. App. 851, 62 S. E. 540.

⁸⁴ *People v. Horton*, 7 Cal. App. 34, 93 Pac. 382; *Wiley v. State* (Ark., 1909), 124 S. W. 249.

⁸⁵ 3 Greenl. on Ev., § 33; *State v. Wilks*, 58 Mo. App. 159, 162. "If the article be small, and such as is easily and quickly transmissible from one person to another, and when it is

§ 301. **Burden of explaining possession—Character of explanatory evidence.**—Though hardly accurate to say that the burden of explaining the possession of stolen property is upon the accused,⁸⁴ yet he must offer some reasonable and probable explanation.⁸⁵ It is reversible error not to permit him to do so, or to reject any relevant evidence tending to produce that result.⁸⁶ If, having the power and opportunity he offers no explanation,⁸⁷ or one which is unsatisfactory in that it does not show that the character of his possession is consistent with innocence, a conviction will be justified.⁸⁸ He may prove that he bought the goods,⁸⁹ that he offered to pay the owner for them,⁹⁰ or that he became possessed of them, believing he was the owner's agent.⁹¹ The accused may show that he received money and checks from the prosecuting witness, prior to the alleged larceny of a check which is found

found in the possession of the accused, it is openly exposed where the owner may readily find it, and will probably discover it, and he makes no effort to conceal it, but gives an account of his possession, which is probable from the nature of the article, these circumstances would be sufficient to destroy the presumption arising from mere possession." *Jones v. State*, 30 Miss. 653, 655.

⁸⁴ *Baker v. State*, 80 Wis. 416, 421, 50 N. W. 518; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378. *Cf.* *Waters v. People*, 104 Ill. 544, 548. An instruction which requires the accused to satisfy the jury of the good faith of his claim of title is error. *Johnson v. United States (Okla. App.)*, 99 Pac. 1022.

⁸⁵ *State v. Vinton (Mo., 1909)*, 119 S. W. 370.

⁸⁶ *Crossland v. State*, 77 Ark. 537, 92 S. W. 776; *State v. Winter*, 83 S. Car. 153, 65 S. E. 209.

⁸⁷ *Adams v. State*, 52 Ala. 379, 381; *Tilly v. State*, 21 Fla. 242, 249.

⁸⁸ *State v. Garvin*, 48 S. Car. 258, 26 S. E. 570; *Franklin v. State*, 37 Tex. Cr. 312, 39 S. W. 680; *State v. Hogard*, 12 Minn. 293; *Mondragon v.*

State, 33 Tex. 480; *State v. Miller*, 45 Minn. 521, 522, 48 N. W. 401; *Tilly v. State*, 21 Fla. 242, 249; *State v. Jennings*, 81 Mo. 185, 209, 51 Am. 236; *Waters v. People*, 104 Ill. 544, 548; *Commonwealth v. McGorty*, 114 Mass. 299; *Miller v. People*, 229 Ill. 376, 82 N. E. 391; *State v. McKinney*, 76 Kan. 419, 91 Pac. 1068; *State v. Vinton (Mo., 1909)*, 119 S. W. 370. The denial by the accused of his identity when discovered in the possession of the property, and his absurd explanations of his whereabouts which are inconsistent with the testimony of other witnesses, are corroborative of possession sufficient to warrant submission to the jury. *People v. Vidal*, 121 Cal. 221, 53 Pac. 558.

⁸⁹ Though he has forgotten the name of the vendor. *Merriwether v. State (Tex. Cr.)*, 115 S. W. 44; *Jones v. People*, 12 Ill. 259, including all pertinent declarations made by himself or the vendors. *People v. Dowling*, 84 N. Y. 478, 485.

⁹⁰ *Hall v. State*, 34 Ga. 208, 210.

⁹¹ *Lewis v. State*, 29 Tex. App. 105, 14 S. W. 1008; *Chambers v. State*, 62 Miss. 108.

in his possession to prove the lawfulness of his possession of the check.⁹⁴ These and other explanatory facts may be shown even where the defendant has failed or refused to give a satisfactory explanation of the possession of the property when it was first found in his possession.⁹⁵ If the explanatory evidence creates a reasonable doubt in the minds of the jurors that he stole the property, he should be acquitted.⁹⁶ It is not absolutely requisite that the accused should prove that his possession was honest. It is sufficient to acquit him if he gives a natural, reasonable and probable explanation of how he acquired possession which the prosecution does not show to be false.⁹⁷ Such an explanation may be taken as true if the state, relying for a conviction and proof of the *corpus delicti* upon recent possession alone, does not prove its falsity or attempt to do so.⁹⁸ If the explanation is absurd, unreasonable or unsatisfactory it is the right of the jury, and often their duty, to disregard it though no evidence in rebuttal on that point is offered.⁹⁹ But when the explanation offered is reasonable and probable it must be overcome, and its falsity shown by positive and definite evidence. Thus if the accused states to a witness that he purchased the prop-

⁹⁴ *Crossland v. State*, 77 Ark. 537, 92 S. W. 776.

⁹⁵ *Harris v. State*, 15 Tex. App. 411; *Echols v. State*, 41 So. 298, 147 Ala. 700, not reported in full; *People v. Farrington*, 140 Cal. 656, 74 Pac. 288.

⁹⁶ *State v. Peterson*, 67 Iowa 564, 567, 25 N. W. 780; *Grentzinger v. State*, 31 Neb. 460, 462, 48 N. W. 148; *Clark v. State*, 30 Tex. App. 402, 17 S. W. 942; *Baker v. State*, 80 Wis. 416, 421, 50 N. W. 518; *Blaker v. State*, 130 Ind. 203, 207, 29 N. E. 1077; *State v. Wilson*, 95 Iowa 341, 64 N. W. 266; *State v. Cross*, 95 Iowa 629, 64 N. W. 614; *Gilmore v. State* (Tex. Cr., 1895), 33 S. W. 120; *Crawford v. State*, 113 Ala. 661, 21 So. 64; *State v. Dillon*, 48 La. Ann. 1365, 20 So. 913; *State v. Lax*, 71 N. J. L. 386, 59 Atl. 18; *Johnson v. United States* (Okla.), 99 Pac. 1022;

Newton v. State (Tex. Cr.), 48 S. W. 507; *Isham v. State* (Tex.), 49 S. W. 581; *McDonald v. State* (Fla., 1908), 47 So. 485; *Douglas v. State* (Ark., 1909), 121 S. W. 923.

⁹⁷ *Hart v. State*, 22 Tex. App. 563, 3 S. W. 741; *Garcia v. State*, 26 Tex. 209, 210; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *Jones v. State*, 30 Miss. 653, 655, 64 Am. Dec. 175; *State v. Castor*, 93 Mo. 242, 250, 5 S. W. 906; *Yarbrough v. State*, 115 Ala. 92, 22 So. 534. As to changing brands on cattle, *Williams v. State*, 40 Fla. 480, 25 So. 143, 74 Am. St. 154.

⁹⁸ *People v. Hurley*, 60 Cal. 74, 77, 44 Am. 55; *Powell v. State*, 11 Tex. App. 401, 402; *Johnson v. State*, 12 Tex. App. 385, 391; *State v. Kimble*, 34 La. Ann. 392, 395, 3 Greenl. on Evidence, § 32; *Franklin v. State*, 3 Ga. App. 342, 59 S. E. 835.

⁹⁹ *Tilly v. State*, 21 Fla. 242, 249.

erty of a third person the latter is a competent witness to testify that he did not sell the accused the property.¹⁰⁰ Direct evidence is not always essential. Circumstantial evidence will answer if upon all the evidence the prosecutor shall succeed in convincing the jury of the guilt of the prisoner beyond a reasonable doubt.¹

§ 302. **Explanatory declarations.**—Any declaration made by the accused explaining the reason or character of his possession, if made while it lasts, is admissible as a part of the *res gestæ* for or against him.² Under the older authorities, the defendant's declarations were not admissible in his favor, if made after his possession had terminated. This rule is now somewhat relaxed, but not to the extent of permitting proof of his self-serving declarations made at all times and under all circumstances. Where no previous opportunity for explanation arose, he may now prove his statements made when arrested, or when charged with theft, or informed he is suspected, though he has parted with posses-

¹⁰⁰ State v. Grubb, 201 Mo. 585, 99 S. W. 585.

¹ Franklin v. State, 37 Tex. Cr. 312, 39 S. W. 680; State v. Schaffer, 70 Iowa 371, 375, 30 N. W. 639; Brown v. State, 34 Tex. Cr. 150, 29 S. W. 772. So when the accused produces a bill of sale to account for his possession the state may be permitted to show its invalidity because procured by undue influence and fraud practiced upon the owner. Watson v. State, 36 Miss. 593, 609, 610. Where a party is found in the possession of recently stolen goods, and gives a reasonable and credible account of such possession or an account raising a reasonable doubt, the state must prove that such account is untrue, otherwise he must be acquitted, but the account may be reasonable and highly plausible, yet, if the jury do not believe, they have a right to convict on such evidence alone, though

the state does not put in any evidence to prove the falsity of such account. McDonald v. State (Fla.). 47 So. 485.

Effect of evidence of defendant's good character to rebut presumption from possession of stolen goods, 20 L. R. A. 614; sufficiency of evidence of possession of stolen goods, 101 Am. St. 505, 506.

² Walker v. State, 28 Ga. 254, 256; Hubbard v. State, 107 Ala. 33, 18 So. 225; Smith v. State, 103 Ala. 40, 10 So. 12, 14; State v. Moore, 101 Mo. 316, 331, 14 S. W. 182; Mason v. State (Ind., 1908), 85 N. E. 776; Bryant v. State, 116 Ala. 445, 23 So. 40; Echols v. State, 41 Sp. 298, 147 Ala. 700, not reported in full; Whart. C. E., § 761. The fact of possession, or acts evincing ownership, must always be proved prior to the admission of the declarations. Cameron v. State, 44 Tex. 652, 656.

sion. The declaration must have been uttered at the first moment he was expressly or by implication called on to explain.³

Some of the cases admit only such declarations as were made at the instant the defendant is discovered in possession,⁴ and obviously declarations made after the accused has had ample time to concoct an explanation are inadmissible.⁵ Though the declarations of the accused are admissible against him, the statements of a third person, having charge of the stolen property, are not admissible when they were not made in the presence of the accused.⁶ The presumption of larceny arising from possession, may be wholly rebutted by proof of the good character of the accused.⁷

§ 303. Evidence of footprints.—Evidence of the identity of the accused with the person who committed the theft, derived from a comparison of foot-tracks, is admissible, as in the case of prosecutions for burglary, homicide and arson.⁸ On a prosecution for larceny, it may be shown that the accused had purchased boots and shoes of the same size as those worn by a person whose foot-tracks were discovered in the vicinity of a house from which property was stolen.⁹ Evidence that wagon or foot-tracks were observed on a road leading from a place whence the stolen property was taken to where it was hidden, near the house of the accused, may, if unexplained or un rebutted, and particularly if there be some marked peculiarity in their form or character, with proof that the stolen property was found in the possession of the defendant, support a conviction.¹⁰

³ Ward v. State, 41 Tex. 611, 613; Taylor v. State, 15 Tex. App. 356, 360; Carreker v. State, 92 Ga. 471, 17 S. E. 671; State v. McClain, 130 Iowa 73, 106 N. W. 376; Lohrey v. State, 91 Miss. 853, 45 So. 145.

⁴ State v. Moore, 101 Mo. 316, 331, 14 S. W. 182; Henderson v. State, 70 Ala. 23, 25, 45 Am. 72, 2 Bish. Cr. Pro., § 746.

⁵ State v. Moore, 101 Mo. 316, 330, 14 S. W. 182; Cooper v. State, 63 Ala. 80, 81, 82.

⁶ State v. May, 20 Iowa 305; Gil-

ford v. State (Tex. Cr., 1903), 78 S. W. 692.

⁷ People v. Hurley, 60 Cal. 74, 77, 44 Am. 55; State v. Crooke, 129 Mo. App. 490, 107 S. W. 1104.

⁸ See § 337.

⁹ State v. Reed, 89 Mo. 168, 170, 1 S. W. 225.

¹⁰ Bryan v. State, 74 Ga. 393, 394; Holsey v. State, 89 Ga. 433, 434, 15 S. E. 588.

When evidence of footprints is admissible, 94 Am. St. 342, 343. Evidence that accused refused to make

Evidence that footprints were found in the vicinity of the larceny may be received, though the footprints are not shown to compare with the footgear of the accused, and though they may not be in any way connected with him.¹¹

§ 304. Financial standing and expenditures of the defendant.—Evidence that the defendant had always been poor, or was living extravagantly and beyond his means,¹² or that he was generally reputed to be in good circumstances,¹³ or as to the wages he was receiving,¹⁴ either before or after the larceny, is alike inadmissible. But evidence that, though in moderate circumstances before the larceny, he was profuse in his subsequent expenditures,¹⁵ or that he spent a sum of money about the date of the larceny nearly equivalent to what the stolen property may have sold for, is admissible.¹⁶ The reception of evidence that the person from whom money was taken a day or two before had a large sum in his possession is not error.¹⁷

§ 305. Evidence of other crimes.—Evidence of distinct larcenies by the accused is not generally admissible, though to this rule many important exceptions are made.¹⁸ It may be proper to

footprints not admissible, 94 Am. St. 343.

¹¹ Rucker v. State, 51 Tex. Cr. 222, 101 S. W. 804.

¹² Snapp v. Commonwealth, 82 Ky. 173, 183, 184.

¹³ Commonwealth v. Stebbins, 8 Gray (Mass.) 492, 495.

¹⁴ Dorsey v. State, 110 Ala. 38, 20 So. 450.

¹⁵ Perrin v. State, 81 Wis. 135, 140, 50 N. W. 516; Leonard v. State, 115 Ala. 80, 22 So. 564.

¹⁶ Commonwealth v. Grose, 99 Mass. 423, 424. Cf. Fulmer v. Commonwealth, 97 Pa. St. 503; Commonwealth v. Montgomery, 11 Met. (Mass.) 534, 45 Am. Dec. 227; State v. Grebe, 17 Kan. 458, 461; State v. Bruce, 106 N. Car. 792, 795, 11 S. E. 475. "In most cases, the fruits of

crime themselves are so well concealed from view by the perpetrator, as to furnish no immediate evidence against him. * * * But they sometimes betray themselves by their consequences, as by a sudden and material change in life or circumstances, indicating, beyond question, the recent receipt of money or property from some quarter. Where a person, previously known to be poor, is found, shortly after a robbery, larceny, or murder, in possession of considerable wealth, it is always a circumstance of suspicion." Burrell Circ. Ev., 457; Martin v. State, 104 Ala. 71, 16 So. 82, 85.

¹⁷ Van Syoc v. State, 69 Neb. 520, 96 N. W. 266.

¹⁸ See §§ 84, 85; Alexander v. State, 21 Tex. App. 406, 17 S. W. 139, 57

prove that other persons had their property stolen and that it was found in the possession of the accused, to show his felonious intention and guilty knowledge,¹⁹ or to identify him as the person mentioned in the indictment.²⁰ So where the accused was on trial for larceny of a horse it may be proved that a saddle was stolen at the same time.²¹ For where property is found in the possession of the accused and he attempts to justify his possession his possession of other property stolen at the same time is a strong circumstance against him.²² The accused must then be allowed to explain his possession of the other stolen property.²³ In many cases where the crimes are separate and distinct, in time, place or character, the courts refuse to admit evidence of similar crimes, even to show a criminal intent. This is particularly the case, if the evidence connecting the accused with the similar offense is very slight, remote or unconvincing.²⁴ The defendant's admission that at times not mentioned in the indictment he had stolen goods from a building in which were found goods

Am. 617; *State v. Vinson*, 63 N. Car. 335, 340; *Links v. State*, 13 Lea (Tenn.) 701, 711, 712; *People v. Tucker*, 104 Cal. 440, 448, 38 Pac. 195; *State v. Goetz*, 34 Mo. 85; *McQueen v. State*, 108 Ala. 54, 18 So. 843; *Echols v. State*, 41 So. 298, 147 Ala. 700, not reported in full; *People v. Cain*, 7 Cal. App. 163, 93 Pac. 1037; *Buck v. State*, 47 Tex. Cr. 319, 83 S. W. 387; *Bryan v. State*, 49 Tex. Cr. 200, 91 S. W. 581; *People v. Sekeson*, 111 App. Div. (N. Y.) 490, 97 N. Y. S. 917. Proof of other crimes in prosecution for larceny, see extensive note, 62 L. R. A. 231, 281, 315, 322, 105 Am. St. 976, *Elliott Evidence*, §§ 2720, 3057.

¹⁹ *Lynns v. State*, 53 Tex. Cr. 375, 111 S. W. 729.

²⁰ *State v. Moore*, 101 Mo. 316, 327, 14 S. W. 182; *People v. Robles*, 34 Cal. 591, 593; *Commonwealth v. Riggs*, 14 Gray (Mass.) 376, 77 Am. Dec. 333; *State v. White*, 89 N. Car. 462, 466; *Reed v. State*, 54 Ark. 621,

16 S. W. 819; *Bonnors v. State* (Tex. Cr., 1896), 35 S. W. 650; *People v. Hughes*, 91 Hun (N. Y.) 354, 36 N. Y. S. 493; *Hurley v. State*, 36 Tex. Cr. 73, 35 S. W. 371; *People v. Nagle*, 137 Mich. 88, 100 N. W. 273; *Housh v. People*, 24 Colo. 262, 50 Pac. 1036; *State v. Bates*, 182 Mo. 70, 81 S. W. 408; *Watters v. State* (Tex. Cr., 1906), 94 S. W. 1038; *Cohoe v. State* (Neb.), 118 N. W. 1088; *Brown v. United States*, 142 Fed. 1, 73 C. C. A. 187; *Territory v. Livingston*, 13 N. Mex. 318, 84 Pac. 1021.

²¹ *Robinson v. State* (Tex. Cr.), 48 S. W. 176.

²² *Penrice v. State* (Tex.), 105 S. W. 797.

²³ *People v. Dowling*, 84 N. Y. 478, 484; *State v. Levich*, 128 Iowa 372, 104 N. W. 334.

²⁴ *Snapp v. Commonwealth*, 82 Ky. 173, 177-183; *Boland v. People*, 19 Hun (N. Y.) 80; *Endaily v. State*, 39 Ark. 278, 280, 62 L. R. A. 231n.

similar to those referred to in the indictment, is admissible. But such an admission is only relevant to identify the prisoner and not as a confession of the crime charged.²⁵

The crimes of larceny and embezzlement are distinct and dissimilar offenses. Evidence tending to support either is not usually relevant to sustain an allegation of the other.²⁶ But if by statute the crime of larceny is made to include analogous offenses, as obtaining goods by false pretenses and embezzlement, evidence which is only relevant to show the latter offenses may be received, though a conviction of larceny under such circumstances will not be affirmed, unless the state shall prove beyond a reasonable doubt an act containing all the elements essential to obtain a conviction of the crime of obtaining goods by false pretenses.²⁷ Evidence is admissible to show the contents of a package of letters, under an indictment of a postoffice clerk for the larceny of letters from a package which he had no authority to disturb.²⁸

§ 306. Stolen goods found through inadmissible confession.—The rule that those portions of an inadmissible confession which are conclusively corroborated by the facts discovered are admissible²⁹ is particularly applicable in larceny when the accused has attempted to conceal the stolen goods. If he confesses he stole the goods, and that they are concealed in his house or elsewhere, where they are subsequently found, it may be shown that the property was found and where it was found.³⁰ The truthfulness of that part of the confession being established, all that the accused said explanatory of the hiding or discovery, of his possession, or the locality of the hiding place, should be received. But the rule excluding involuntary confessions remains intact, and excludes that part of the confession stating directly that he stole the goods or that he hid them.³¹

²⁵ Griffin v. State, 86 Ga. 257, 260, is part of the *res gestæ*, 62 L. R. A. 12 S. E. 409. 315.

²⁶ Fulton v. State, 13 Ark. 168.

²⁷ United States v. Falkenhainer, 21 Fed. 624.

²⁸ Fay v. Commonwealth, 28 Gratt. (Va.) 912; People v. Dumar, 106 N. Y. 502, 511, 13 N. E. 325. Evidence

²⁹ See, *ante*, § 137.

of other to prove defendant's connection with the acts charged, 62 L. R. A. 281; and when the other crime

³⁰ Warickshall's Case, 1 Leach C. C. 298.

³¹ Davis v. State, 8 Tex. App. 510, 515; Strait v. State, 43 Tex. 486;

§ 307. **Malicious mischief.**—This offense includes all acts of unnecessary and malicious injury to the property of others which impair the utility or diminish the value of such property to a material extent.³³ It was generally indictable at common law,³³ and proof of the destruction of the property was necessary;³⁴ and now statutes are found in most states defining the crime, regulating its punishment and sometimes expressly enumerating what acts must be proved to constitute it.³⁵

§ 308. **Malicious intent.**—Usually proof of the injury alone is not enough, and this is always the case where a statute requires that it shall be proved to have been wantonly or maliciously inflicted. Malice, it is said, must be alleged and proved.³⁶ But malice need not be express, nor need it be proved by direct evidence.³⁷ It may be inferred to exist from proof that the injury was done to the property to secure revenge on its owner.³⁸ In

Hudson v. State, 9 Yerg. (Tenn.) 407; White v. State, 3 Heisk. (Tenn.) 338; State v. Brick, 2 Harr. (Del.) 530; State v. Garvey, 28 La. Ann. 925, 927, 26 Am. 123; Laros v. Commonwealth, 84 Pa. St. 200; Yates v. State, 47 Ark. 172, 174; Belote v. State, 36 Miss. 96, 118, 72 Am. Dec. 163, 2 East P. C. 657, 658; Reg. v. Gould, 9 C. & P. (38 Eng. C. L.) 364; Johnson v. State, 119 Ga. 257, 45 S. E. 960.

³³ State v. Watts, 48 Ark. 56, 3 Am. St. 216; Elliott Evidence, § 3172.

³⁴ People v. Smith, 5 Cow. (N. Y.) 258, 260; Res. v. Teischer, 1 Dall. (Pa.) 335; Commonwealth v. Leach, 1 Mass. 59; State v. Batchelder, 5 N. H. 549, 552; State v. Simpson, 2 Hawks (N. Car.) 460, 461.

³⁵ State v. Martin, 141 N. Car. 832, 53 S. E. 874.

³⁶ State v. Tarlton (S. Dak.), 118 N. W. 706; Commonwealth v. Byard (Mass., 1908), 86 N. E. 285, construing Rev. Law, c. 208, § 100, punishing the willful and malicious cutting of trees. In California, by Act

March 12, 1887 (St. 1886-87, p. 112, c. 95), maliciously depositing and exploding any explosive near a building with intent to injure same or to injure a human being is a felony. *In re Mitchell*, 1 Cal. App. 396, 82 Pac. 347. See *Moody v. State*, 127 Ga. 821, 56 S. E. 993, as to mutilating a trespass notice maliciously.

³⁷ See next note; *Knudson v. State* (Tex. Cr. App., 1909), 120 S. W. 878.

³⁸ The malicious intent essential to constitute the offense of malicious mischief may be inferred from the nature of the act and the circumstances of the case. *State v. Tarlton* (S. Dak.), 118 N. W. 706.

³⁹ *Thompson v. State*, 51 Miss. 353, 356; *Commonwealth v. Walden*, 3 Cush. (Mass.) 558, 561; *North Carolina v. Vanderford*, 35 Fed. 282, 287; *Johnson v. State*, 61 Ala. 9, 11; *Harris v. State*, 73 Ga. 41, 43; *Goforth v. State*, 8 Humph. (Tenn.) 37, 39; *Lossen v. State*, 62 Ind. 437, 440; *Hughes v. State*, 103 Ind. 344, 347, 2 N. E. 956; *Pippen v. State*, 77 Ala.

this connection the declarations of the accused uttered at or about the time that he injured or destroyed the property are very useful, and are relevant as a part of the *res gestæ* to illustrate his state of mind. And where the accused stood charged with maliciously destroying the property of a church the state was permitted to put in evidence declarations evincing enmity on his part towards the officers and members of the church while the accused was engaged with them in the business of the church.³⁹

A malicious intent may be inferred from the means employed or the instrument used, or from the wantonness and cruelty by which the act of the accused was accompanied.⁴⁰ Portions of the property injured, if properly identified by independent evidence may be received in evidence.⁴¹ Whether the accused acted with a malicious intent is a question for the jury to determine.⁴²

81, 82; *Duncan v. State*, 49 Miss. 331, 339; *Brady v. State* (Tex. Cr., 1894), 26 S. W. 621; *Woodward v. State*, 33 Tex. Cr. 554, 28 S. W. 204; *State v. Flynn*, 28 Iowa 26, 27; *State v. Brigman*, 94 N. Car. 888, 889; *Brown v. State*, 26 Ohio St. 176, 183. *Contra*, *Reg. v. Tivey*, 1 Den. C. C. 63; *Territory v. Crozier*, 6 Dak. 8, 10, 50 N. W. 124. Cf. *Johnson v. State*, 61 Ala. 9, 11; *Funderburk v. State*, 75 Miss. 20, 21 So. 658; *Edwards v. State*, 115 Ala. 52, 22 So. 564; *Commonwealth v. Shaffer*, 32 Pa. Super. Ct. 375. The word "malicious" in a statute providing for the punishment of one who unlawfully destroys property must receive the construction usually given to it in criminal statutes. It is no defense that the accused was not prompted to his act by actual ill will to the owner of the property. *State v. Boies*, 68 Kan. 167, 74 Pac. 630.

³⁹ *People v. Ferguson*, 119 Mich. 373, 78 N. W. 334.

⁴⁰ *State v. Enslow*, 10 Iowa 115, 117; *Commonwealth v. Walden*, 3 Cush. (Mass.) 558, 561; *Hobson v. State*, 44 Ala. 380, 381; *State v. Mc-*

Dermott, 36 Iowa 107; *Harris v. State*, 73 Ga. 41, 44; *Shirley v. State* (Tex., 1893), 22 S. W. 42.

⁴¹ *People v. Boren*, 139 Cal. 210, 72 Pac. 899.

⁴² *McClurg v. State*, 2 Ga. App. 624, 58 S. E. 1064. "The only facts established by the verdict are, that the mare was injured by the defendant by the discharge of a gun loaded with powder and shot, and that the act was done willfully; but an act may be unlawful, and may be done willfully, with or without malice, according to the evidence of the motive, and of the circumstances attending the transaction. The evidence, therefore, should have been submitted to the jury, with instructions that they would not be warranted in finding a verdict of guilty, unless the injury charged in the indictment was done by the defendant, not only willfully, but also maliciously; that if the injury was done intentionally and by design, and not by mistake, accident, or inadvertence, that would fully support the allegation in the indictment that it was done willfully, according

§ 309. Ownership and value of property—Evidence that the accused acted in good faith.—The ownership of the property, whether it be real or personal, may, if possession is shown, be proved by parol,⁴³ but must be proved substantially as laid,⁴⁴ though not beyond a reasonable doubt.⁴⁵ The accused may prove by oral or written evidence that he in fact owned the property,⁴⁶ which is a valid defense,⁴⁷ or that (believing that he did) he had taken legal advice and acted in accordance therewith.⁴⁸ All facts tending to show that he was acting in good faith, or under a misapprehension of his rights when he injured or destroyed the property are relevant.⁴⁹ Proof of a total destruction is not necessary to sustain an allegation of maliciously destroying or injuring

to the true meaning of the statute. But the jury might infer malice from the fact that the injury was done by the discharge of a gun loaded with powder and shot, unless the inference were rebutted by the evidence, showing that the gun was so loaded that it was not likely to kill or do any great bodily harm; and the jury should have been so instructed. The jury should also have been instructed that, to authorize them to find the defendant guilty, they must be satisfied that the injury was done either out of a spirit of wanton cruelty or wicked revenge." By the court in *Commonwealth v. Walden*, 3 Cush. (Mass.) 558.

⁴³ *State v. Brant*, 14 Iowa 180, 182; *State v. Semotan*, 85 Iowa 57, 59, 51 N. W. 1161; *Craighead v. State* (Tex.), 117 S. W. 128.

⁴⁴ *Mayes v. State*, 33 Tex. 340, 341; *Smith v. State*, 43 Tex. 433, 439; *Hughes v. State*, 103 Ind. 344, 347, 2 N. E. 956; *Perry v. State*, 149 Ala. 40, 43 So. 18; *Holder v. State*, 127 Ga. 51, 56 S. E. 71.

⁴⁵ *State v. Sears*, Phill. (N. Car.) 146, 149. Proof that the property was in the possession of or occupied

by the alleged owner is sufficient. *People v. Coyne*, 116 Cal. 295, 48 Pac. 218; *State v. Semotan*, 85 Iowa 57, 59, 51 N. W. 1161, even though he is not the sole owner. *People v. Horr*, 7 Barb. (N. Y.) 9, 12.

⁴⁶ *State v. Zinn*, 26 Mo. App. 17, 18.

⁴⁷ *Commonwealth v. Shaffer*, 32 Pa. Super. Ct. 375.

⁴⁸ *People v. Kane*, 142 N. Y. 366, 369, 37 N. E. 104; *People v. Stevens*, 109 N. Y. 159, 163, 16 N. E. 53.

⁴⁹ *Lossen v. State*, 62 Ind. 437, 442; *Palmer v. State*, 45 Ind. 388, 391; *Barlow v. State*, 120 Ind. 56, 58, 22 N. E. 88; *Goforth v. State*, 8 Humph. (Tenn.) 37; *Reg. v. Langford*, 1 C. & M. 602; *Sattler v. People*, 59 Ill. 68, 70; *State v. Flynn*, 28 Iowa 26, 27; *Commonwealth v. Drass*, 29 W. N. C. (Pa.) 463, 465, 146 Pa. St. 55, 60, 23 Atl. 233; *Reg. v. Mathews*, 14 Cox C. L. 5, 7; *State v. Haney*, 32 Kan. 428, 430, 4 Pac. 831; *Adams v. State*, 47 Tex. Cr. 35, 81 S. W. 963. At common law the owner of the property was not a competent witness because of interest. *Blackstone v. State*, 15 Ala. 415, 417; *Pike v. State*, 35 Ala. 419.

property.⁵⁰ Proof of value is necessary and relevant only where the degree of the crime or the penalty depends on the value of the property destroyed.⁵¹

§ 310. **Maliciously injuring animals.**—Killing, wounding, maiming, injuring or disfiguring the animals of another is a very common form of malicious mischief,⁵² and is indictable at common law.⁵³ The killing, maiming or injuring must always be proved to be willful.⁵⁴ An allegation of injuring an animal which is described under its generic name is sustained by proof of an injury to any species of the animal. Thus proof of injuring horses, pigs, asses or mares, will sustain an allegation of injury to cattle.⁵⁵ And an allegation of injuring any species of animal is sustained by proof of injury to any one of that species irrespective of its age, sex or condition.⁵⁶

The question whether an indictment for maliciously injuring personal property, or for killing or maiming domestic animals can be sustained by proof of maiming, wounding or killing a dog has been variously decided.⁵⁷ Evidence that the injured

⁵⁰ *State v. McBeth*, 49 Kan. 584, 588, 31 Pac. 145; *Brown v. State*, 26 Ohio St. 176, 183; *State v. Cole*, 90 Ind. 112, 113; *State v. McKee*, 109 Ind. 497, 499, 10 N. E. 405; *Hannel v. State*, 4 Ind. App. 485, 486, 30 N. E. 1118.

⁵¹ *Holder v. State*, 127 Ga. 51, 56 S. E. 71; *State v. Heath*, 41 Tex. 426, 428; *State v. Garner*, 8 Port. (Ala.) 447, 448; *Commonwealth v. Cox*, 7 Allen (Mass.) 577, 578; *Walker v. State*, 89 Ala. 74, 75, 8 So. 144. If the defendant claims that he destroyed the property with the owner's consent, the burden is on him. *Ritter v. State*, 33 Tex. 608, 611; *McClurg v. State*, 2 Ga. App. 624, 58 S. E. 1064; *Commonwealth v. Shaffer*, 32 Pa. Super. 375.

⁵² *Davis v. Commonwealth*, 30 Pa. St. 421, 424; *Atwood v. State*, 106 S. W. 953, 84 Ark. 623, not reported in full.

⁵³ *People v. Smith*, 5 Cow. (N. Y.)

258, 259, in which the court says: "The direct tendency is a breach of the peace. What more likely to produce it than wantonly killing, out of mere malice, a useful domestic animal?"

⁵⁴ *Swinger v. State*, 51 Tex. Cr. 397, 102 S. W. 114.

⁵⁵ *Rex v. Moyle*, 2 East P. C. 1076; *Rex v. Mott*, 1 Leach C. L. 85n; *Rex v. Chapple, R. & R. C. C.* 77; *State v. Hambleton*, 22 Mo. 452; *Rex v. Whitney*, 1 Moody C. C. 3; *Oviatt v. State*, 19 Ohio St. 573; *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582; *State v. Grimes*, 101 Mo. 188, 190, 13 S. W. 956.

⁵⁶ *Shubrick v. State*, 2 S. Car. 21, 22; *Gholston v. State*, 33 Tex. 342, 343. *Contra*, where the statute enumerates various species of animals all belonging to one genus.

⁵⁷ *Pro. State v. Latham*, 13 Ired. (N. Car.) 33; *State v. Sumner*, 2 Ind.

animal was running at large, or even that it was trespassing, is irrelevant if it appear from all the evidence that the injury was malicious.⁵⁸

As a general rule, malice towards the owner of the animal must be proved.⁵⁹

§ 311. **Injuries to grain, trees, crops, etc.**—It is often provided by statute that it shall be an offense willfully and maliciously to

377; *State v. M'Duffie*, 34 N. H. 523, 69 Am. Dec. 516; *Kinsman v. State*, 77 Ind. 132, 135; *State v. Doe*, 79 Ind. 9, 41 Am. 599; *State v. McKee*, 109 Ind. 497, 499, 90 N. E. 405; *Sosat v. State*, 2 Ind. App. 586, 589, 28 N. E. 1017; *Nehr v. State*, 35 Neb. 638, 642; 53 N. W. 589, 17 L. R. A. 771. *Contra*, *Commonwealth v. Maclin*, 3 Leigh (Va.) 809; *State v. Harriman*, 75 Me. 562, 46 Am. 423n; *Patton v. State*, 93 Ga. 111, 112, 116, 19 S. E. 734, 24 L. R. A. 732.

⁵⁸ *Branch v. State*, 41 Tex. 622; *Wallace v. State*, 30 Tex. 758; *Cryer v. State*, 36 Tex. Cr. 621, 37 S. W. 753, 38 S. W. 203; *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582; *State v. Pierce*, 7 Ala. 728; *State v. Davis*, 2 Ired. (N. Car.) 153; *State v. Waters*, 6 Jones (N. Car.) 276, 277; *State v. Brigman*, 94 N. Car. 888, 890; *Bennefield v. State*, 62 Ark. 365, 35 S. W. 790. *Contra*, *McMahan v. State*, 29 Tex. App. 348, 349, 16 S. W. 171, where defendant was allowed to prove that his field was surrounded by a good fence. But evidence of the thievish and unmanageable character of the trespassing animal is relevant, not to justify maiming or wounding it, but to show that defendant's motive was to protect his crop and not spite toward the owner. *Sosat v. State*, 2 Ind. App. 586, 592, 28 N. E. 1017; *Wright v. State*, 30 Ga. 325, 327, 76

Am. Dec. 656; *Farmer v. State*, 21 Tex. App. 423, 2 S. W. 767; *Bennefield v. State*, 62 Ark. 365, 35 S. W. 790.

⁵⁹ *State v. Wilcox*, 3 Yerg. (Tenn.) 278, 279; *Hampton v. State*, 10 Lea (Tenn.) 639, 641; *Hobson v. State*, 44 Ala. 380, 381; *State v. Latham*, 13 Ired. (N. Car.) 33, 35; *Hill v. State*, 43 Ala. 335; *Shirley v. State* (Tex., 1893), 22 S. W. 42; *Shepherd's Case*, 2 Leach C. C. 609, 610. *Contra*, *Brown v. State*, 26 Ohio St. 176, 183; *State v. Phipps*, 95 Iowa 491, 64 N. W. 411. Evidence that animals found and ate poison where it was exposed with an intent that they should find and eat it will sustain a charge of causing them to eat it. *Commonwealth v. Falvey*, 108 Mass. 304, 307. Where one was indicted for maliciously poisoning the horses of another, the prosecution was allowed to prove that the defendant had bought poison, saying it was to kill rats, that he had never used it for that purpose, but that he had every opportunity to administer it to the horses, and a motive to do so. *Croy v. State*, 32 Ind. 384, 385. An allegation of poisoning animals by one means is sustained by proof of a means substantially similar. *Commonwealth v. McLaughlin*, 105 Mass. 460, 463.

burn, cut down, destroy or injure any trees, grain or growing crops.⁶⁰ When a statute points out specifically what injurious acts are punishable, it is usually required that the acts proved shall substantially conform thereto.⁶¹ If a man cut down a tree in a boundary line, with intent to destroy the marks, no express malice need be shown under a statute making such an act a crime. If the immediate consequence of cutting down the tree is to destroy certain marks upon it, the presumption will arise that he intended to destroy those marks. The particular intent must be left to the jury. If the act of destruction is criminal only when done with a particular intent, the presence of the intent must be proved.⁶² Where the statute makes it a crime to cut or injure trees without the consent of the owner the intent is not material, and the accused cannot show his motives for his actions.⁶³

⁶⁰ *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. 578, 24 L. R. A. 724; *People v. Horr*, 7 Barb. (N. Y.) 9, 12; *Parris v. People*, 76 Ill. 274, 277. To authorize a conviction for "willfully and maliciously" destroying any tree with malicious intent must be proved. *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131.

⁶¹ *State v. Allisbach*, 69 Ind. 50, 54. Cf. *State v. Jones*, 33 Vt. 443, 447.

⁶² *State v. Malloy*, 34 N. J. L. 410, 417.

⁶³ *Mettler v. People*, 36 Ill. App. 324.

CHAPTER XXIV.

HOMICIDE.

- § 312. Facts forming the *corpus delicti*—Evidence to prove the cause and manner of death.
- 313. The result of the autopsy as evidence.
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- 319. Relevancy of evidence to show poisoning.
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- 332. Threats against deceased by third persons.
- 333. Animosity between the accused and the deceased.
- 334. Expert and non-expert evidence as regards blood stains.
- 335. Conspiracy to commit homicide.
- 336. Preparations to commit homicide.
- 337. Foot prints.
- 338. Self-defense—Burden of proof—Malice.
- 338a. The alibi of the alleged victim.

§ 312. **Facts forming the *corpus delicti*—Evidence to prove the cause and manner of death.**—In homicide the necessary constituents of the *corpus delicti*, the death of a human being and the criminal agency producing it must be shown. The death of a person al-

leged to have been killed must be established by direct testimony or circumstantial evidence of the most cogent and irresistible force.¹ If the circumstances point to the death of the person alleged to have been killed the finding of fragments of a human body, or of tufts of hair and of articles known or proved to have been worn by the deceased is sufficient to establish the death.² But proof that the person alleged to have been killed had disappeared, and evidence that a body taken from the river had on it shoes and clothing similar to those worn by deceased is not such proof of the *corpus delicti* as is required to corroborate a confession by the accused.³ Any evidence referring to either of these facts and tending to establish or to disprove them is relevant. The physical condition of the deceased prior to, or at the instant of, his death, or when his body is found,⁴ may be shown,⁵ and the state may prove his declarations made to a physician or to a non-professional person concerning his physical health,⁶ or respecting his physical peculiarities, as, for example, that he had a peculiar

¹ State v. Williams, 46 Ore. 287, 80 Pac. 655. See State v. Nordall, 38 Mont. 327, 99 Pac. 960; Ausmus v. People (Colo. 1910), 107 Pac. 204.

² State v. Williams, 46 Ore. 287, 80 Pac. 655.

³ Follis v. State, 51 Tex. Cr. 186, 101 S. W. 242. It is competent to prove the color of the hair of a daughter of the deceased and that hair found on the person of the accused was of the same color where deceased and his family were burned in their home. State v. Nordall, 38 Mont. 327, 99 Pac. 960. The bones of a deceased person who was killed by the burning of his residence are competent to prove the *corpus delicti*. Their competency as evidence is not destroyed by other evidence of the *corpus delicti*. Sprouse v. Commonwealth (Ky. 1909), 116 S. W. 344.

For extensive note on "Proof of *corpus delicti* in criminal cases," see 68 L. R. A. 33. See also, Elliott Evidence, § 2708. Evidence in general in

prosecution for homicide, see Elliott Evidence, §§ 3043, 3044, 3045; confessions, § 3034. Conviction on testimony of accomplice, see 98 Am. St. Rep. 158n. Evidence in prosecution for negligent homicide, 61 L. R. A. 277n. Weight and sufficiency of evidence in prosecution for inciting or abetting a suicide, see 66 L. R. A. 304n. Proof in prosecution for homicide committed in resisting arrest, see 66 L. R. A. 353n. Proof in prosecution for homicide resulting from persons acting independently, see 67 L. R. A. 426n.

⁴ Terry v. State, 118 Ala. 79, 23 So. 776.

⁵ Williams v. State, 64 Md. 384, 389, 1 Atl. 887; State v. Baldwin, 36 Kan. 1, 12 Pac. 318. It is unnecessary but harmless to the accused to prove that deceased was a human being. Epps v. State, 102 Ind. 539, 549, 1 N. E. 491.

⁶ State v. Moxley, 102 Mo. 374, 385, 14 S. W. 969, 15 S. W. 556; State v. Fournier, 68 Vt. 262, 35 Atl. 178.

tooth in his mouth.⁷ It may be shown by the testimony of a physician that a wound discovered upon a dead body was inflicted before or after death.⁸ Any witness familiar by experience with the appearance or treatment of wounds,⁹ particularly a physician or surgeon, may give an opinion as to the manner in which a mortal wound was probably inflicted,¹⁰ as to the kind of weapon used, as to the distance from which a shot was fired,¹¹ as to the degree of force employed,¹² and as to direction of a blow,¹³ and that in

⁷ *Edmonds v. State*, 34 Ark. 720, 737.

⁸ *State v. Clark*, 15 S. Car. 403, 408; *State v. Harris*, 63 N. Car. 1, 3.

⁹ *Lemons v. State*, 97 Tenn. 560, 37 S. W. 552; *People v. Gibson*, *infra*; *Rash v. State*, 61 Ala. 89, 93; *Wise v. State*, 100 Ga. 68, 25 S. E. 846. That a wound was mortal is an inference for the jury so that it is not necessary for a physician to give his opinion that the wound is mortal. *Waller v. People*, 209 Ill. 284, 70 N. E. 681. Evidence of the locality and description of wounds on the body of deceased is always relevant. *Basye v. State*, 45 Neb. 261, 286, 63 N. W. 811; *People v. Gibson*, 106 Cal. 458, 39 Pac. 864, 870; *State v. Megorden*, 49 Ore. 259, 88 Pac. 306.

¹⁰ *People v. Fish*, 125 N. Y. 136, 147, 26 N. E. 319; *State v. Ginger*, 80 Iowa 574, 577, 46 N. W. 657; *State v. Asbell*, 57 Kan. 398, 46 Pac. 770; *State v. Baldwin*, 36 Kan. 1, 19, 12 Pac. 318; *Newton v. State*, 21 Fla. 53, 102; *Boyle v. State*, 61 Wis. 440, 448, 21 N. W. 289; *Carthaus v. State*, 78 Wis. 560, 564, 47 N. W. 629; *People v. Rector*, 19 Wend. (N. Y.) 569, 577; *State v. Seymour*, 94 Iowa 699, 63 N. W. 661; *Doolittle v. State*, 93 Ind. 272, 275; 1 Greenl., § 440; *Bowers v. State*, 122 Wis. 163, 99 N. W. 447; *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370; *Clemons v. State*, 48 Fla.

9, 37 So. 647; *State v. Usher*, 136 Iowa 606, 111 N. W. 811; *Ozark v. State*, 51 Tex. Cr. 106, 100 S. W. 927. ¹¹ *State v. Voorhies*, 115 La. 200, 38 So. 964.

¹² *People v. Fish*, 125 N. Y. 136, 147, 26 N. E. 319; *Owen v. State*, 52 Tex. Cr. 65, 105 S. W. 513. Where the medical evidence showed that the wounds on the deceased were caused by a powerful blow, it may be shown that defendant is a strong and powerful man. *Thiede v. Utah Territory*, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. 62.

¹³ *Territory v. Egan*, 3 Dak. 119, 127, 13 N. W. 568; *Commonwealth v. Sturtivant*, 117 Mass. 122, 123, 19 Am. 401n; *Kennedy v. People*, 39 N. Y. 245, 256; *Simon v. State*, 108 Ala. 27, 18 So. 731. The question may be, "What was the cause of a wound," describing it, as, "What would be the effect of a blow inflicted by a weapon specified." *Williams v. State*, 64 Md. 384, 392, 1 Atl. 887. The court, in *Hopt v. Utah*, 120 U. S. 430, 438, 30 L. ed. 708, 7 Sup. Ct. 614. "Upon the same principle, the testimony of the physician as to the direction from which the blow was delivered was admissible. * * * It was not expert testimony in the strict sense of the term, but a statement of a conclusion of fact, such as men who use their senses constantly draw from what

his opinion the deceased could not have inflicted the wound upon himself.¹⁴ A physician who has examined the wounds of the deceased may testify that a certain weapon was a deadly weapon.¹⁵ If he states that death was caused by a certain weapon or instrument, he may be shown an instrument, properly identified, as having been in the possession of the accused, and may be asked if that would have caused the wound.¹⁶ A non-expert witness may testify that the deceased was conscious at a certain time,¹⁷ and he may describe the wounds¹⁸ he saw on the body,¹⁹ and *a fortiori* a surgeon may give an opinion as to the probable cause of death,²⁰ and may state when, in his opinion, death occurred,²¹ and that it

they see and hear in the daily concerns of life." *State v. Megorden*, 49 Ore. 259, 88 Pac. 306.

¹⁴ *Miera v. Territory*, 13 N. Mex. 192, 81 Pac. 586.

¹⁵ *State v. Spaugh*, 199 Mo. 147, 97 S. W. 901.

¹⁶ *People v. Carpenter*, 102 N. Y. 238, 248, 6 N. E. 584; *Tune v. State*, 49 Tex. Cr. 445; 94 S. W. 231; *Hardin v. State*, 57 Tex. Cr. 559, 103 S. W. 401. Photographs are admissible for the purpose of identifying the deceased, *State v. Windahl*, 95 Iowa 470, 64 N. W. 420, and showing the wounds on his body. *Malachi v. State*, 89 Ala. 134, 139, 8 So. 104; *People v. Fish*, 125 N. Y. 136, 147, 26 N. E. 319; *Wilson v. United States*, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. 895.

¹⁷ *Walker v. State*, 41 So. 878, 147 Ala. 699 (not reported in full).

¹⁸ *Smith v. State*, 43 Tex. 643, 647-649; *Everett v. State*, 62 Ga. 65, 71; *State v. Nieuhaus*, 217 Mo. 332, 117 S. W. 73.

¹⁹ *Batten v. State*, 80 Ind. 394, 399; *Hill v. State*, 146 Ala. 51, 41 So. 621; *Fowler v. State*, 155 Ala. 21, 45 So. 913; *Patton v. State*, (Tex. Cr.),

80 S. W. 86; *Pitts v. State*, 140 Ala. 70, 37 So. 101. As for example that it appeared that the skull of deceased was crushed or broken. *Terry v. State*, 120 Ala. 286, 25 So. 176.

²⁰ *Boyle v. State*, 61 Wis. 440, 448, 21 N. W. 289; *Commonwealth v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *State v. Chiles*, 44 S. Car. 338, 22 S. E. 339; *People v. Barker*, 60 Mich. 277, 292, 293, 27 N. W. 539, 1 Am. St. 501n; *People v. Sessions*, 58 Mich. 594, 600, 26 N. W. 291; *Commonwealth v. Snell*, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019n; *State v. Wilcox*, 132 N. Car. 1120, 44 S. E. 625; *Smith v. State* (Tex. Cr.), 99 S. W. 100; *Nordan v. State*, 143 Ala. 13, 39 So. 406; *Burkett v. State*, 154 Ala. 19, 45 So. 682; *Stovall v. State*, 53 Tex. Cr. 30, 108 S. W. 699; *Levering v. Commonwealth* (Ky.), 117 S. W. 253; *State v. Usher*, 136 Iowa 606, 111 N. W. 811; *Sims v. State*, 139 Ala. 74, 36 So. 138, 101 Am. St. 17; *State v. Megorden*, 49 Ore. 259, 88 Pac. 306; *Fay v. State*, 52 Tex. Cr. 185, 107 S. W. 55; *Jones v. State*, 155 Ala. 1, 46 So. 579.

²¹ *State v. Clark*, 15 S. Car. 403.

was not suicidal.²² But the question whether a wound was accidentally self-inflicted is for the jury.²³

The physician who was in attendance upon the victim of the homicide during his mortal illness may properly repeat on the witness stand the declarations of the deceased as to his feelings and sufferings, the locality and character of his pain and as to his physical condition generally. The physician may then testify as to his opinion of the extent and character of the wounds, his opinion being based in part upon what the deceased told him.²⁴ A physician who is called to give an opinion as to the cause of death may state that from his experience and learning as a practicing physician he is competent to give an opinion as to the cause of death. On such a statement he may be regarded as an expert.²⁵ But expert evidence is not admissible to show the probable position of the deceased when the fatal blow was struck,²⁶ or whether he would, after receiving it, have sufficient strength to inflict a blow with an effect specified,²⁷ as these are questions which the jury can determine as well as any expert.

²² *Everett v. State*, 62 Ga. 65.

²³ *State v. Bradley*, 34 S. Car. 136, 13 S. E. 315; *Beene v. State*, 79 Ark. 460, 96 S. W. 151; *Covington v. People*, 36 Colo. 183, 85 Pac. 832; *Brock v. Commonwealth (Ky.)*, 110 S. W. 878, 33 Ky. L. 630; *People v. Williamson*, 6 Cal. App. 336, 92 Pac. 313; *State v. Trusty*, 1 Penn. (Del.) 319, 40 Atl. 766. A non-expert witness may testify as matter of common knowledge that a pistol must be held very close to clothing, when fired, to scorch it. *Miller v. State*, 110 Ala. 674, 19 So. 37; *State v. Cater*, 100 Iowa 501, 69 N. W. 880. A woman who has seen burns and who testifies that she and her children have been burned, though she is a non-expert witness may state that wounds were caused by burns. *State v. Nieuhaus*, 217 Mo. 332, 117 S. W. 73. A radiograph showing the vertebra and an object located near it has been ac-

cepted as competent. There must be some evidence that the radiograph correctly represents the condition of the body though it is not absolutely necessary that either a physician who was present or the operator who took the radiograph shall say that the object in the radiograph is a bullet. *State v. Matheson*, 142 Iowa 414, 120 N. W. 1036.

²⁴ *Gregory v. State*, 148 Ala. 566, 42 So. 829.

²⁵ *State v. Wilcox*, 132 N. Car. 1120, 44 S. E. 625.

²⁶ *Brown v. State*, 55 Ark. 593, 18 S. W. 1051; *Kennedy v. People*, 39 N. Y. 245, 256, 257; *Watkins v. State*, 89 Ala. 82, 88, 8 So. 134; *People v. Hill*, 116 Cal. 562, 48 Pac. 711. *Contra*, *State v. Sullivan*, 43 S. Car. 205, 208, 21 S. E. 4; *Miera v. Territory*, 13 N. Mex. 192, 81 Pac. 586.

²⁷ *People v. Rector*, 19 Wend. (N. Y.) 569, 577.

The fact that the deceased died suddenly never warrants an inference that he was foully dealt with. It is for the state to prove that his death was the result of a criminal act, and, unless or until this is proved, it is presumed that death resulted from natural causes.²⁸ The accused may show the deceased was of a melancholy temperament or inclined to suicide,²⁹ and may show any acts or declarations on the part of the deceased showing his suicidal purpose,³⁰ while the state may prove the cheerful disposition and good health,³¹ the social condition and favorable prospects and the pleasant personal surroundings of the deceased, to show the absence of a suicidal intent.³² So the state may prove that the accused had threatened to kill a third person at a particular place and in a particular manner, and that the killing of the deceased corresponded in time and manner with the threat to contradict the contention by the accused that the deceased had committed suicide.³³

§ 313. The result of the autopsy as evidence.—The testimony of a competent surgeon or medical practitioner, who conducted the autopsy, is admissible, though some minor statutory details were not observed,³⁴ and though the accused was not notified to be present, or, being present, was without counsel. The physician may describe what tests are necessary to ascertain the cause of

²⁸ *State v. Moxley*, 102 Mo. 374, 391, 14 S. W. 969, 15 S. W. 556; *Roberts v. State*, 123 Ga. 146, 51 S. E. 374; *State v. McDaniel*, 68 S. Car. 304, 47 S. E. 384, 102 Am. St. 661. A physician may testify which of two wounds, both certainly fatal, caused death. *Eggler v. People*, 56 N. Y. 642, 643.

²⁹ *Boyd v. State*, 14 Lea (Tenn.) 161, 175-177; *Blackman v. State*, 23 Ohio St. 146, 165; *Cf. Hall v. State*, 132 Ind. 317, 325, 31 N. E. 536. Such evidence is of peculiar relevancy in case of death by poisoning. *Hall v. State*, 132 Ind. 317, 325, 31 N. E. 536. Threats by deceased to commit suicide, unaccompanied by any attempt to carry them into execution, are in-

admissible, as they are merely hearsay. *State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113; *State v. Punshon*, 133 Mo. 44, 34 S. W. 25; *State v. Fournier*, 68 Vt. 262, 35 Atl. 178.

³⁰ *Nardan v. State*, 143 Ala. 13, 39 So. 406.

³¹ *State v. Marsh*, 70 Vt. 288, 40 Atl. 836; *Commonwealth v. Howard* (Mass. 1910), 91 N. E. 397.

³² *State v. Lentz*, 45 Minn. 177, 180, 47 N. W. 720.

³³ *Commonwealth v. Snell*, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019n.

³⁴ *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *Commonwealth v. Taylor*, 132 Mass. 261, 263.

death, and, after relating the facts revealed by the autopsy, may give his opinion, based thereon, as to the cause and mode of death.³⁵

In order that evidence of the result of an autopsy shall be received it is not absolutely necessary for the prosecution to account for the whereabouts of the viscera of the deceased during the whole period which separates their removal from the body at the morgue or elsewhere by an undertaker or physician, and the *post mortem* examination. In the absence of evidence to the contrary it will be presumed that the viscera remained in proper custody during this period.³⁶

The mere fact that the autopsy was made some time after the death will not exclude its results as evidence unless the delay was great, and the condition of the body at the autopsy was such that it was impossible to determine whether its condition was attributable to *ante-mortem* or *post-mortem* causes.³⁷ One of several physicians who conducted an autopsy may prove what was done by the others, and what appeared as the result of a manual investigation by another.³⁸ A physician who has performed the autopsy and has made an expert examination of the stomach of deceased may state the probable length of time intervening between the time the deceased had eaten supper until his death.³⁹ An expert who has heard the autopsy described may be asked if, in his opinion, it was properly conducted,⁴⁰ and he may be also asked whether it is possible for a physician to determine, on the facts which were observed, the exact point of time a poison which was discovered began to operate.⁴¹ A physician may, though a person who is not familiar with anatomy can not, give an opinion of a person's sex, based upon his examination of a skeleton.⁴²

³⁵ State v. Merriman, 34 S. Car. 16, 12 S. E. 619, 626; proceedings at inquest, see Elliott Evidence, § 3037; admissibility of evidence of accused at coroner's inquest, see 70 L. R. A. 33, note; admissibility of coroner's finding to show cause of death, see 68 L. R. A. 285, note.

³⁶ State v. Daly, 210 Mo. 664, 109 S. W. 53.

³⁷ Williams v. State, 64 Md. 384, 391, 1 Atl. 887.

³⁸ People v. Willson, 109 N. Y. 345, 354, 16 N. E. 540.

³⁹ State v. Mortensen, 26 Utah 312, 73 Pac. 562.

⁴⁰ State v. Moxley, 102 Mo. 374, 386, 14 S. W. 969, 15 S. W. 556.

⁴¹ Hartung v. People, 4 Park. Cr. (N. Y.) 319, 325, 327.

⁴² Wilson v. State, 41 Tex. 320, 323-325.

§ 314. Variance in proof of means or weapon producing death—

The substance of homicide being the felonious killing, proof of a killing, in any manner or by any means, that correspond substantially with the indictment, is sufficient. All the details of the offense need not be proved precisely as alleged. Proof of a shooting with a pistol will sustain an averment of shooting with a gun and *vice versa*,⁴³ and proof of killing with a dagger or bowie-knife will sustain an averment of death from stabbing with a dirk, sword, or similar weapon.⁴⁴ But proof of a knife will not sustain an allegation of killing by shooting, and, as a rule, where the killing is alleged to have been with a particular weapon, proof of a totally diverse weapon is a fatal variance.⁴⁵ Proof of strangling with a scarf is sufficient where strangling with the hands was alleged.⁴⁶ Allegations of the place or nature of wounds are generally immaterial.⁴⁷

Evidence that a weapon, similar to that with which the deceased was slain, was seen near the defendant's house shortly before the homicide and subsequently disappeared,⁴⁸ or that defendant borrowed,⁴⁹ purchased, stole,⁵⁰ had in his possession,⁵¹ or practiced

⁴³ Commonwealth v. Webster, 5 Cush. (Mass.) 295, 321, 322, 52 Am. Dec. 711n; Rodgers v. State, 50 Ala. 102, 104; State v. Lautenschlager, 22 Minn. 514, 522; Turner v. State, 97 Ala. 57, 58, 12 So. 54; State v. Smith, 32 Me. 369, 373, 54 Am. Dec. 578.

⁴⁴ Hernandez v. State, 32 Tex. Cr. 271, 22 S. W. 972; Jones v. State, 137 Ala. 12, 34 So. 681.

⁴⁵ Witt v. State, 6 Cold. (Tenn.) 5, 8; Reg. v. Warman, 2 Car. & K. 195, 1 Den. C. C. 183.

⁴⁶ Thomas v. Commonwealth (Ky.), 20 S. W. 226, 14 Ky. L. 288; Rex v. Waters, 7 Car. & P. 250, 1 Moody C. C. 457.

⁴⁷ Commonwealth v. Coy, 157 Mass. 200, 214, 32 N. E. 4; State v. Waller, 88 Mo. 402, 404; Nelson v. State, 1 Tex. App. 41.

⁴⁸ State v. Brabham, 108 N. Car. 793, 794, 13 S. E. 217.

⁴⁹ Finch v. State, 81 Ala. 41, 49, 1 So. 565; Webb v. State, 138 Ala. 53, 34 So. 1011; Glass v. State, 147 Ala. 50, 41 So. 727; People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690; Armwine v. State, 54 Tex. Cr. 213, 114 S. W. 796, 802; People v. Haxer, 144 Mich. 575, 108 N. W. 90; McKinney v. State, 49 Tex. Cr. 591, 96 S. W. 48. The question on cross-examination of the accused "What did you have the gun for?" is competent as bearing on motive. Hill v. State, 156 Ala. 3, 46 So. 864.

⁵⁰ People v. Rogers, 71 Cal. 565, 567, 568, 12 Pac. 679; People v. McKay, 122 Cal. 628, 55 Pac. 594.

⁵¹ Nicholas v. Commonwealth, 91 Va. 741, 21 S. E. 364; Walsh v. People, 88 N. Y. 458, 466; Collins v. State, 138 Ala. 57, 34 So. 993; Webb v. State, 138 Ala. 53, 34 So. 1011; Smith v. State, 165 Ind. 180, 74 N.

using,⁵² a similar weapon, is always receivable as relevant to show preparation to commit a homicide.

Evidence of the finding of weapons, known to belong to the defendant, near where the dead body was found,⁵³ or the testimony of a witness who is familiar with firearms, as to the kind of gun by which a wound was inflicted,⁵⁴ or that a jacketed bullet would probably produce infection and inflammation,⁵⁵ that a gun or pistol belonging to the defendant had⁵⁶ or had not⁵⁶ been recently used, is admissible.⁵⁷

So a person familiar with firearms may be allowed to give his opinion that, judging from the report he heard, the weapon used was a pistol.⁵⁸

E. 983; *Rollings v. State* (Ala. 1909), 49 So. 329; *Morgan v. Territory*, 16 Okla. 530, 85 Pac. 718; *Poe v. State*, 155 Ala. 31, 46 So. 521; *Richardson v. State*, 145 Ala. 46, 41 So. 82; *Smith v. Commonwealth* (Ky.), 92 S. W. 610, 29 Ky. L. 231; *State v. Ruck*, 194 Mo. 416, 92 S. W. 706; *Johnson v. Commonwealth* (Ky.), 93 S. W. 581, 29 Ky. L. 442; *Hardy v. Commonwealth* (Va. 1910), 67 S. E. 522; *Graham v. State* (Tex. Cr. App.), 123 S. W. 691.

⁵² *Bolling v. State*, 54 Ark. 588, 596, 16 S. W. 658; *Burton v. State*, 18 So. 284, 107 Ala. 108; *Allen v. Commonwealth* (Ky.), 82 S. W. 589, 26 Ky. L. 807.

⁵³ *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614; *Yancey v. State*, 45 Tex. Cr. 366, 76 S. W. 571; *State v. Smalls*, 73 S. Car. 516, 53 S. E. 976. *Cf. Thornton v. State*, 113 Ala. 43, 21 So. 356, 59 Am. St. 97, where a memorandum book and pencil found at the *locus in quo* and shown to have belonged to the defendant was admitted in evidence against him.

⁵⁴ *Franklin v. Commonwealth*, 48 S. W. 986, 20 Ky. L. 1137.

⁵⁵ *Harper v. State*, 129 Ga. 770, 59 S. E. 792.

⁵⁶ *Meyers v. State*, 14 Tex. App. 35, 39, 48. Non-expert permitted to testify in *Patton v. State*, 156 Ala. 23, 46 So. 862.

⁵⁷ *People v. Driscoll*, 107 N. Y. 414, 420, 14 N. E. 305. Where the defendant, when arrested, had in his possession a revolver containing four empty shells, it is proper to prove the caliber of the weapon, that a witness heard four reports of fire arms in the direction of the house where the killing occurred, that, on going there, bullet holes were found in the ceiling of the room and the description of the holes. *State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113.

⁵⁸ If it is proved that the defendant carried a concealed weapon similar to that with which the homicide was committed, he cannot show that it is a custom, where he resides, to carry such weapons, though he may prove his habit and motive in going armed. *Creswell v. State*, 14 Tex. App. 1, 18. Nor usually should the accused be permitted to state why he carried a concealed weapon. *Gregory v. State*, 140 Ala. 16, 37 So. 259.

⁵⁹ *State v. Graham*, 116 La. 779, 41 So. 90.

The state should always be allowed to prove that there was found, either upon the person of the accused or in his house at the time of his arrest, if not too remote, a weapon similar to that with which the homicide was committed. Thus, it is proper for the state to show that the accused told a witness his pistol was at his house, and that it was dug up where he had buried it some distance from his house; but it is clear that evidence of the finding of a pistol under such circumstances would have no force unless it was of the caliber of that used.⁵⁹ Evidence that a pistol was found in the possession of the accused corresponding in caliber with the bullet taken from the body of the deceased was admitted where the accused was arrested six months after the crime.⁶⁰ There must be some evidence, however, from which the jury may reasonably infer that the pistol found in the possession of the accused was that used in the commission of the crime.⁶¹ The fact of the finding of a pistol cartridge, loaded or not, or of a pistol near the scene of the shooting shortly thereafter, or, if the shooting was done with a gun, the presence of cartridges used is always competent, though there is no evidence to show that the accused owned these articles. Such proof is usually received in cases where the state has to rely on circumstantial evidence.⁶²

Where an article of a peculiar and exceptional nature is found near the scene of the crime, a witness may identify it with an article which is proved to have been owned by or to have been in the possession of the accused before the crime.⁶³ If the state shows that the accused was in the possession of a particular weapon after returning from the homicide, and it is impossible that he could have disposed of, or concealed it except in a particular place, evidence that this place has been searched and the weapon not found, was admitted.⁶⁴ If there is a question as to the caliber of the bullet by which the wound was made it is proper to permit a physician to testify that on his examination of the

⁵⁹ Moss v. State, 152 Ala. 30, 44 So. 598.

⁶⁰ State v. Green, 115 La. 1041, 40 So. 451.

⁶¹ State v. Kehr, 133 Iowa 35, 110 N. W. 149.

⁶² Nickles v. State, 48 Fla. 46, 37 So. 312.

⁶³ Richards v. Commonwealth, 107 Va. 881, 59 S. E. 1104.

⁶⁴ Burton v. State, 115 Ala. 1, 22 So. 585.

wound he could not tell the caliber of the cartridge.⁶⁵ A physician may always testify that the wound which he has discovered could not have been made with the gun or pistol of the accused.⁶⁶

§ 315. Weapons as evidence.—The state may introduce in evidence the weapon with which it is charged the homicide was committed⁶⁷ if properly identified as belonging to the defendant,⁶⁸ or bullets taken from the body of the deceased,⁶⁹ or cartridges of the caliber of a rifle apparently carried by the accused in his flight after the crime and found on a highway some distance from the scene of the crime,⁷⁰ or a bullet of the size and caliber of the pistol owned by the accused found near the scene of the crime,⁷¹ or any weapon found in the possession of the accused or his criminal associates, which is similar in form and character to that which was employed.⁷² A weapon found on the person of the deceased a few minutes after the homicide has been

⁶⁵ *Humphrey v. State*, 74 Ark. 554, 86 S. W. 431.

⁶⁶ *Franklin v. Commonwealth*, 105 Ky. 237, 48 S. W. 986, 20 Ky. L. 1137.

⁶⁷ *Siberry v. State*, 133 Ind. 677, 685, 33 N. E. 681, 683; *Thomas v. State*, 67 Ga. 460, 465; *Crawford v. State*, 112 Ala. 1, 21 So. 214; *McBayer v. State* (Tex. Cr., 1896), 34 S. W. 114; *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. 883; *Burton v. State*, 107 Ala. 108, 18 So. 284; *State v. Bean*, 77 Vt. 384, 60 Atl. 807; *Fay v. State*, 52 Tex. Cr. 185, 107 S. W. 55; *Fuller v. State*, 147 Ala. 35, 41 So. 774; *Long v. State*, 48 Tex. Cr. 175, 88 S. W. 203; *State v. Sherouk*, 61 Atl. 897, 78 Conn. 718, not reported in full; *People v. Lagroppo*, 90 App. Div. (N. Y.) 219, 86 N. Y. S. 116; means used and cause of death, see *Elliott Evidence*, § 3027; articles in evidence, § 3028. See § 48. A broken gun found near the locality of the crime, and apparently the instrument of death, is admissible, though it was again broken after its

discovery. *Ezell v. State*, 103 Ala. 8, 15 So. 818, 819.

⁶⁸ *State v. Tippet*, 94 Iowa 646, 63 N. W. 445, 447; *Roberts v. State*, 123 Ga. 146, 51 S. E. 374; *Tolliver v. State*, 53 Tex. Cr. 329, 111 S. W. 655. ⁶⁹ *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Morales*, 143 Cal. 550, 77 Pac. 470.

⁷⁰ *Harn v. State*, 12 Wyo. 80, 73 Pac. 705.

⁷¹ *Hickey v. State*, 51 Tex. Cr. 230, 102 S. W. 417.

⁷² *Rodriguez v. State*, 32 Tex. Cr. 259, 22 S. W. 978; *State v. Gallman*, 79 S. Car. 229, 60 S. E. 682. A witness may state the result of a comparison of shot taken from defendant's gun with other shot found in the body of deceased. *Granger v. State* (Tex. Cr., 1895), 31 S. W. 671; *Lemons v. State*, 97 Tenn. 560, 37 S. W. 552; *Dean v. Commonwealth*, 32 Gratt. (Va.) 912, 922; *State v. Lem Woon* (Ore. 1910), 107 Pac. 974; *People v. Mar Gin Suie* (Cal. App. 1909), 103 Pac. 951.

received in evidence.⁷³ It is improper to allow experiments with weapons in the presence of the jury,⁷⁴ nor is expert evidence admissible to show that a cartridge is marked in such a way as to indicate it had been fired from a pistol belonging to the deceased.⁷⁵

On the other hand, if a number of shells are found on the accused which are marked with a peculiar mark, and it appears that only two shots were fired, two empty shells bearing the mark, and which were found near the scene of the crime, should be received in evidence.⁷⁶

§ 316. Identity of the deceased.—The identity of the deceased with the party named in the indictment must be proved beyond a reasonable doubt. And where the body of the deceased has been wholly destroyed so that an ordinary identification is impossible, as, for example, where it has been destroyed by fire in the burning of a house, it is proper to permit great latitude to the prosecution in the presentation of evidence of identity.⁷⁷ The name must be proved as alleged. Failure to prove the christian name of the deceased is fatal,⁷⁸ though this variance may be cured if the occupation and surname are proved as alleged.⁷⁹ And when the name is proved as *idem sonans*, with respect to that alleged, slight divergencies in spelling will be disregarded.⁸⁰

§ 317. The identification of the body of the deceased.—The structure and condition of the teeth of a deceased person, by reason of the imperishable nature of the materials which compose them, furnish an excellent means of identification. And a witness who

⁷³ Watson v. State, 52 Tex. Cr. 85, 105 S. W. 509.

⁷⁴ United States v. Ball, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. 1192; Polin v. State, 14 Neb. 540, 545, 16 N. W. 898.

⁷⁵ People v. Mitchell, 94 Cal. 550, 555, 29 Pac. 1106.

⁷⁶ Fuller v. State, 147 Ala. 35, 41 So. 774.

⁷⁷ State v. Nordall, 38 Mont. 327, 99 Pac. 960; Elliott Evidence, § 2715.

⁷⁸ Penrod v. People, 89 Ill. 150, 151.

⁷⁹ Shepherd v. People, 72 Ill. 480, 481; State v. Lincoln, 17 Wis. 597, 599, 601.

⁸⁰ Girous v. State, 29 Ind. 93, 94; State v. Witt, 34 Kan. 488, 494, 8 Pac. 769; State v. Lincoln, 17 Wis. 597, 599. The fact that the deceased was a white man may be proved by the confession of the accused. Isaacs v. United States, 159 U. S. 487, 40 L. ed. 229, 16 Sup. Ct. 51.

was acquainted with the appearance and conformation of the teeth of the person in question may describe their condition of soundness or decay, and point out whatever he may have observed which was abnormal or peculiar in them, as, for example, fillings, etc. This evidence may then be followed up by the testimony of experts, preferably dentists or dental surgeons, who have made an examination of the teeth after death. The jury may then determine as an inference from the points of similarity, if any, the identity of the remains with the person whose death is under consideration.⁸¹

§ 318. Expert testimony and the employment of a chemical analysis in cases of homicide by poisoning.—A conviction of homicide by poisoning will stand though every fact, except, perhaps, the death of the party, which must be proved by direct evidence, is sustained by circumstantial evidence alone.⁸² It is usually indispensable to prove that the accused was in possession at the time of the crime of the poison alleged to have been administered by him.⁸³ A chemical analysis, an autopsy and the aid of expert testimony, though very desirable, are never indispensable.⁸⁴

A physician cannot testify as an expert on symptoms of poisoning who has never treated or seen a case of poisoning in his practice, and whose knowledge is only such as he has obtained by reading books and from his instruction at the medical school.⁸⁵

A properly qualified medical witness may state that, in his

⁸¹ The subject is fully discussed in Reh fuss on Dental Jurisprudence, § 9, pp. 17-32. See also, Udderzook v. Commonwealth, 76 Pa. St. 340; Rex v. Clewes, 4 Car. & P. 221; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n; and *ante*, § 7.

⁸² Zoldoske v. State, 82 Wis. 580, 597, 52 N. W. 778; Commonwealth v. Kennedy, 170 Mass. 18, 48 N. E. 770.

⁸³ State v. Blydenburg, 135 Iowa 264, 112 N. W. 634. See Stanley v.

State, 82 Miss. 498, 34 So. 360, as to necessity for proof of the *corpus delicti*.

⁸⁴ Johnson v. State, 29 Tex. App. 150, 153, 15 S. W. 647; Polk v. State, 36 Ark. 117, 126; State v. Slagle, 83 N. Car. 630, 631; Nordan v. State, 143 Ala. 13, 39 So. 406; Levering v. Commonwealth (Ky.), 117 S. W. 253.

⁸⁵ Soquet v. State, 72 Wis. 659, 662-665, 40 N. W. 391. *Contra*, People v. Thacker, 108 Mich. 652, 66 N. W. 562.

opinion, death was caused by a certain poison,⁸⁷ that he found a certain poison in the stomach of the deceased,⁸⁸ or may describe symptoms which accompany poisoning,⁸⁹ or may state that symptoms described in a hypothetical question indicate the presence of arsenic or other poison.⁹⁰

He cannot, perhaps, state the result of a chemical analysis unless he has had some special experience in chemical research and a knowledge of the science.⁹¹

The competency of the chemical expert is always a judicial question, though his knowledge and experience may be brought out to enable the jury to give proper weight to his evidence.⁹² It is now very customary in criminal trials to employ trained analysts, or experienced physicians who have made a specialty of the study of organic chemistry, to conduct the analysis of the contents of the viscera where poisoning is suspected,⁹³ and obviously the opinions of such persons would have greater weight with the jury than those of ordinary physicians.⁹⁴

One who is by occupation a chemist and a professor of chemistry in a college and who has for many years made a study of poisons, may testify as to the effect of poison on the human system and also may state a particular poison in his opinion caused the death of the deceased, though he is neither a druggist

See also *Rice v. State*, 54 Tex. Cr. 149, 112 S. W. 299, where a physician was accepted as an expert on strychnine poisoning who had no practical knowledge of the subject.

⁸⁷ *Mitchell v. State*, 58 Ala. 417, 419; *Davis v. State*, 54 Tex. Cr. 236, 114 S. W. 366.

⁸⁸ *People v. Quimby*, 134 Mich. 625, 96 N. W. 1061, 10 Det. Leg. N. 618.

⁸⁹ *People v. Robinson*, 2 Park Cr. (N. Y.) 235, 243, 245; *Polk v. State*, 36 Ark. 117, 124; *State v. Terrell*, 12 Rich. (S. Car.) 321.

⁹⁰ *Stephens v. People*, 4 Park. Cr. (N. Y.) 396, 432-438; *State v. Rocker*, 138 Iowa 653, 116 N. W. 797.

⁹¹ *Soquet v. State*, 72 Wis. 659, 40 N. W. 391; *State v. Cook*, 17 Kan. 392, 395. But he need not be a prac-

tical analyst or chemist. *Zoldoske v. State*, 82 Wis. 580, 597, 52 N. W. 778; *State v. Hinkle*, 6 Iowa 380, 386; *Epps v. State*, 102 Ind. 539, 548, 1 N. E. 491; *Hartung v. People*, 4 Park. Cr. (N. Y.) 319.

⁹² The fact that the opinion of an expert chemist given on the witness stand is based partly on his reading is immaterial. *State v. Baldwin*, 36 Kan. 1, 17, 12 Pac. 318; *People v. Pekarz*, 185 N. Y. 470, 78 N. E. 294.

⁹³ *People v. Buchanan*, 145 N. Y. 1, 11-14, 39 N. E. 846; *State v. Bowman*, 78 N. Car. 509, 511, 514; *State v. Cook*, 17 Kan. 392, 394; *Joe v. State*, 6 Fla. 591, 601-606, 65 Am. Dec. 579n.

⁹⁴ *State v. Hinkle*, 6 Iowa 380, 386. Cf. *Sanders v. State*, 94 Ind. 147, 149.

nor a physician.⁹⁵ The identity of the subject analyzed with that involved in the case, and the fact that it has not been improperly tampered with, must be shown,^{96a} though the evidence of identity need not be absolutely convincing before it should be permitted to go to the jury.⁹⁶ A hypothetical question containing facts proved or claimed to be proved in connection with the poisoning may be asked, and it is not material that the question does not contain all the facts if those omitted are brought out on the cross-examination.⁹⁷ The fact that the expert heard that there was poison in the house, which fact, being viewed by him in conjunction with the symptoms, influenced him in forming an opinion that the deceased was poisoned, will not exclude his opinion.⁹⁸

§ 319. Relevancy of evidence to show poisoning.—Malice may be reasonably presumed from the willful administration of poison in a quantity sufficient to cause death under ordinary circumstances.⁹⁹ Evidence that a member of a family with whom the defendant had lived had died from the same poison which he is now accused of having administered is relevant to aid the jury in determining the probability that the death of the person with whose murder he is charged was accidental.¹⁰⁰

The evidence which tends to show the poisoning or death of any other person than the deceased should usually be confined in its bearing to the motive of the accused, or should be only considered by the jury in determining whether the death of the deceased was accidental or not. The accused is usually in such cases entitled to have the court charge to that effect.¹

⁹⁵ *Scott v. State*, 141 Ala. 1, 37 So. 357.

^{96a} *State v. Cook*, 17 Kan. 392, 394. The fact that the jars containing the organs of the deceased were not hermetically sealed, *State v. Thompson*, 132 Mo. 301, 34 S. W. 31, and were not kept under lock and key does not exclude the analysis. *State v. Cook*, 17 Kan. 392, 394.

⁹⁶ *People v. Williams*, 3 Park Cr. (N. Y.) 84, 94-96.

⁹⁷ *Goodwin v. State*, 96 Ind. 550, 554-556; *Epps v. State*, 102 Ind. 539, 554, 1 N. E. 491; *Zoldoske v. State*, 82 Wis. 580, 597, 52 N. W. 778; Con-

way v. *State*, 118 Ind. 482, 490, 21 N. E. 285.

⁹⁸ *Mitchell v. State*, 58 Ala. 417, 420.

⁹⁹ *People v. Sanchez*, 24 Cal. 17; *Commonwealth v. Danz*, 211 Pa. St. 507, 60 Atl. 1070.

¹⁰⁰ *Zoldoske v. State*, 82 Wis. 580, 597, 52 N. W. 778. See *ante*, § 89. For evidence in prosecution for homicide in commission or attempt to commit abortion, see 63 L. R. A. 902, note; evidence in prosecution for homicide by commission of unlawful act, see 63 L. R. A. 353, note.

¹ *People v. Zajicek*, 233 Ill. 198, 84 N. E. 249.

The possession of poison by the accused is an important fact and may always be proved.² But evidence that the accused mixed poison or had poison in his possession is of little weight unless it is also shown that he had an opportunity to administer it.³ The evidence to show possession need not be direct, nor need the possession be exclusive. If it is shown that poison was in a house where the accused lived, within easy reach, and that he had knowledge of the fact, a conviction will be sustained.⁴

It is always proper for the state to show that the accused, or a person closely resembling him, purchased or had in his possession the poison⁵ which, it is charged, was the cause of the death of the deceased.⁶ Where the poison was mixed in food eaten by deceased it is competent to prove that the accused purchased the food.⁷ The inability of the witness to identify positively the accused as the person who purchased the poison or the food does not render his testimony incompetent.⁸ The witness, in fixing the date of the sale, may, if necessary, refresh his memory by reading from a shop book in which sales of poison are recorded,⁹ and may also testify that sales of a certain poison were not common and that there was only a small quantity on hand at the time as tending to show facts which aided him in remembering the sale.¹⁰

The inference unfavorable to the accused, which may be created by proof that prior to the death of the deceased he had purchased and had in his possession, poison similar in character to that found in the stomach of the accused may be rebutted by evidence that he owned a farm and that farmers in his locality generally kept this poison for poisoning vermin.¹¹

² *People v. Cuff*, 122 Cal. 589, 55 Pac. 407.

³ *Madden v. State*, 1 Kan. 340.

⁴ *Zoldoske v. State*, 82 Wis. 580, 597, 52 N. W. 778; *State v. Woodard*, 132 Iowa 675, 108 N. W. 753. The court may, with propriety, enlighten the jury in its charge by defining such words as "anæsthetic," "chloroform" and "poison." *State v. Baldwin*, 36 Kan. 1, 22, 12 Pac. 318.

⁵ *State v. Woodard*, 132 Iowa 675, 108 N. W. 753; *State v. Rocker*, 138 Iowa 653, 116 N. W. 797.

⁶ *State v. Blydenburg*, 135 Iowa 264, 112 N. W. 634; *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770.

⁷ *State v. Thompson*, 141 Mo. 408, 42 S. W. 949.

⁸ *State v. Thompson*, 141 Mo. 408, 42 S. W. 949; *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770.

⁹ *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770.

¹⁰ *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770.

¹¹ *People v. Cuff*, 122 Cal. 589, 55 Pac. 407.

§ 319a. **The declarations of the deceased.**—The opinion of a physician that the accused died from natural causes may be received where it is based on his examination and on the declarations of the deceased as to her condition past and present made to him to enable him to prescribe for her.¹² Hence, it follows that his declarations and statements of present pain and suffering should be received in evidence. His statements which constitute a part of the *res gestæ* are always received. Thus the statements of the deceased made after he has taken medicine given him by the accused that he had taken it and describing its effect, should be received.¹³ And the statements of the deceased made while he was eating the food in which it is alleged the poison was contained is also admissible.¹⁴

But a statement by the deceased descriptive of her illness made sometime after the date on which the illness commenced must be rejected.¹⁵ The dying declarations of the deceased so far as they are statements of fact and not of mere opinions are always received.¹⁶ Under the claim that the deceased has committed suicide it may be shown that he was at times despondent and ill, providing this condition is not too remote.¹⁷ So also it may be shown under the plea of suicide that the deceased had poison in his possession and his declarations showing an intention on his part to commit suicide have been received providing they are within a reasonable period before her death.¹⁸ There is, however, some difference of opinion in the cases as to the propriety of admitting the declarations of an intention to commit suicide. It seems that a statement that he intended to take his life is admissible but statements that he had poison in his possession is not received to show such possession or to show that the deceased knew the effects of the poison administered.¹⁹ In other words declarations of intent to commit suicide are received to show that the death of the deceased was not caused by the accused; but statements

¹² State v. Blydenburg, 135 Iowa 264, 112 N. W. 634.

¹³ Nordan v. State, 143 Ala. 13, 39 So. 406.

¹⁴ State v. Thompson, 141 Mo. 408, 42 S. W. 949.

¹⁵ Boyd v. State, 84 Miss. 414, 36 So. 525.

¹⁶ Rice v. State, 54 Tex. Cr. 149, 112

S. W. 299; Boyd v. State, 84 Miss. 414, 36 So. 525.

¹⁷ State v. Kelly, 77 Conn. 266, 58 Atl. 705.

¹⁸ State v. Kelly, 77 Conn. 266, 58 Atl. 705; Nordgren v. People, 211 Ill. 425, 71 N. E. 1042.

¹⁹ State v. Kelly, 77 Conn. 266, 58 Atl. 705; State v. Marsh, 70 Vt. 288, 40 Atl. 836.

accompanying these declarations of intention will be rejected as hearsay.²⁰

§ 320. Presumption and proof of malice.—The character of homicide, whether murder or manslaughter, and the validity and cogency of a defense involving justification or excuse for the act of killing, which itself is not denied, depends wholly upon the presence or absence of a malicious intent. To constitute the killing murder in the first degree malice existing at the instant of the killing, or, at least, at some time not too remote, must be shown. or circumstances must be shown from which it may be presumed.²¹

"Malice aforethought," or that degree of malice which makes a homicide murder, need not be shown by direct evidence. Malice is the outcome of a mental condition, and direct proof of a mental condition is usually impossible from the customary secrecy of motive leading to the crime.

If an unlawful homicide is proved to have been committed and is shown to have been the intentional and deliberate act of the accused, the law will presume malice from these facts alone and the intention to kill until he shall offer evidence to show mitigating, excusing or justifying circumstances. The legal presumption of malice aforethought arises from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death.²²

²⁰ State v. Marsh, 70 Vt. 288, 40 Atl. 836. For dying declarations, see Ch. X; also, Elliott Evidence, §§ 3031, 3032, 3033; 86 Am. St. 637, note; 56 L. R. A. 353, note; 63 L. R. A. 916, note.

²¹ State v. Johnson, 8 Iowa 525, 74 Am. Dec. 321; State v. Decklots, 19 Iowa 447; State v. Peterson, 149 N. Car. 533, 63 S. E. 87; State v. Harmon, 4 Penn. (Del.) 580, 60 Atl. 866; Bonner v. State, 125 Ga. 237, 54 S. E. 143; State v. Di Guglielmo (Del.), 55 Atl. 350; State v. Kindred, 148 Mo. 270, 49 S. W. 845; State v. Strong, 85 Ark. 536, 109 S. W. 536. See Elliott Evidence, §§ 3016, 3017; 4 L. R. A. (N. S.) 934, note.

Other presumptions, § 3020; presumption of innocence, Elliott Evidence, § 3013; of intent, Elliott Evidence, § 3014; as to degree of offense, Elliott Evidence, § 3015; presumptions not conclusive, Elliott Evidence, § 3015; when no presumption arises, Elliott Evidence, § 3018.

²² McLeod v. State, 128 Ga. 17, 57 S. E. 83; Ewing v. Commonwealth (Ky.), 111 S. W. 352, 33 Ky. L. 749; State v. Moore, 25 Iowa 128, 95 Am. Dec. 776n. See Commonwealth v. York, 9 Met. (Mass.) 93, 121, 43 Am. Dec. 373; Pressley v. State, 132 Ga. 64, 63 S. E. 784; State v. Prolow, 98 Minn. 459, 108 N. W. 873; State v. Hayden, 131 Iowa 1, 107 N. W. 929;

The use of such a weapon is a fact which, when proved, if no other evidence is offered on either side to show the contrary, raises a presumption of law that a deliberately formed design existed in the mind of the accused to kill the person on whom that weapon was used.²³ Usually modifying facts are proved in connection with the killing. These facts may be of such a character that no necessity may exist for drawing a presumption from the use of a deadly weapon, or they may rebut the presumption. It is then for the jury to say on all the facts, whether malice or the deliberate intention to kill was present.²⁴

State v. Cole, 132 N. Car. 1069, 44 S. E. 391; *State v. Powell*, 5 Penn. (Del.) 24, 61 Atl. 966; *State v. Harmon*, 4 Penn. (Del.) 580, 60 Atl. 866; *State v. Honey*, 6 Penn. (Del.) 148, 65 Atl. 764; *State v. Rochester*, 72 S. Car. 194, 51 S. E. 685.

²³ *State v. Johns*, 6 Penn. (Del.) 174, 65 Atl. 763; *State v. Roberson*, 150 N. Car. 837, 64 S. E. 122; *Rosemond v. State*, 86 Ark. 160, 110 S. W. 229; *State v. Moore* (Del. 1909), 74 Atl. 1112. See cases in next note.

²⁴ The cases which may be consulted upon the presumption or proof of malice are as follows: *Compton v. State*, 110 Ala. 24, 20 So. 119; *State v. Davis*, 9 Houst. (Del.) 407, 33 Atl. 55; *State v. Peo*, 9 Houst. (Del.) 488, 33 Atl. 257; *State v. Earnest*, 56 Kan. 31, 42 Pac. 359; *State v. Jimmerson*, 118 N. Car. 1173, 24 S. E. 494; *State v. Patterson*, 45 Vt. 308, 315, 12 Am. 200n; *State v. Knight*, 43 Me. 11, 138; *Simmons v. Commonwealth* (Ky.), 18 S. W. 534, 13 Ky. L. 839; *State v. Douglass*, 28 W. Va. 297, 302; *Jackson v. State*, 81 Ala. 33, 35, 1 So. 33; *Dacey v. People*, 116 Ill. 555, 575, *et seq.*, 6 N. E. 165; *Erwin v. State*, 29 Ohio St. 186, 192, 23 Am. 733; *Lamar v. State*, 63 Miss. 265, 272, 274; *McAdams v. State*, 25 Ark. 405, 408; *State v. Chavis*, 80 N. Car. 353, 358; *State v. Ariel*, 38 S. Car. 221, 223, 16

S. E. 779; *Commonwealth v. Drum*, 58 Pa. St. 9; *Young v. State*, 95 Ala. 4, 10 So. 913; *Hill v. Commonwealth*, 2 Gratt. (Va.) 594, 599, 603; *State v. Willis*, 63 N. Car. 26, 29; *Murphy v. People*, 9 Colo. 435, 439, 13 Pac. 528; *Hart v. State*, 21 Tex. App. 163, 171, 17 S. W. 421; *Boyle v. State*, 105 Ind. 469, 477, 5 N. E. 203, 55 Am. 218; *Thomas v. People*, 67 N. Y. 218, 225; *State v. Hockett*, 70 Iowa 442, 450, 30 N. W. 742; *State v. Whitson*, 111 N. Car. 695, 698, 16 S. E. 332; *Stokes v. People*, 53 N. Y. 164, 182, 13 Am. 492; *State v. Howell*, 9 Ired. (N. Car.) 485, 487; *Hansford v. State* (Miss., 1891), 11 So. 106; *State v. Evans*, 65 Mo. 574, 580; *Commonwealth v. York*, 9 Met. (Mass.) 93, 103, 43 Am. Dec. 373; *Davison v. People*, 90 Ill. 221, 229; *Cherry v. State* (Miss., 1897), 20 So. 837; *State v. Zeibart*, 40 Iowa 169; *State v. Sullivan*, 51 Iowa 142, 50 N. W. 572; *State v. Townsend*, 66 Iowa 741, 24 N. W. 535; *Donnellan v. Commonwealth*, 7 Bush (Ky.) 676, 679; *State v. Miller*, 9 Houst. (Del.) 564, 570, 32 Atl. 137; *McDermott v. State*, 89 Ind. 187, 193; *Allen v. United States*, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. 154; *Burkett v. State*, 154 Ala. 19, 45 So. 682; *Allen v. State*, 148 Ala. 588, 42 So. 1006; *State v. Cephus*

In other words, a rebuttable presumption of law of a malicious intention always arises as soon as a homicide with a deadly weapon is proved. This may become conclusive if no defense is made. But it may be rebutted by evidence coming from the state. If this does not happen, the accused may offer evidence to show he did the killing in self-defense, or while insane. The presumption of malice thus removed, it is for the jury to find whether malice existed on all the facts, and not merely from the use of a deadly weapon alone. If malice is ascertained to have existed before the killing, as, for example, from evidence of threats, its continuance down to the homicide will be presumed as matter of law, in the absence of evidence to the contrary.²⁵

§ 321. **Connected crimes.**—Crimes leading up to or connected with the homicide, so that they form parts of one transaction, may be proved as part of the *res gestæ* to illustrate the conduct and disposition of the accused about the time of the homicide.²⁶

(Del.), 67 Atl. 150; State v. Tilghman (Del.), 63 Atl. 772; Burley v. State, 130 Ga. 343, 60 S. E. 1006; Nelson v. State, 4 Ga. App. 223, 60 S. E. 1072; Tolbirt v. State, 124 Ga. 767, 53 S. E. 327; State v. Hayden, 131 Iowa 1, 107 N. W. 929; State v. DiGuglielmo (Del.), 55 Atl. 350; Ewing v. Commonwealth (Ky.), 111 S. W. 352, 33 Ky. L. 749; Adams v. State, 125 Ga. 11, 53 S. E. 804; Kennedy v. State, 40 So. 658, 147 Ala. 687, not reported in full; State v. Whitbeck (Iowa, 1909) 123 N. W. 982; State v. Blackburn (Del. O. & T. 1892), 75 Atl. 536.

²⁵ Riggs v. State, 30 Miss. 635, 648; State v. Johnson, 1 Ired. (N. Car.) 354, 363, 364, 35 Am. Dec. 742; Commonwealth v. Gibson, 211 Pa. 546, 60 Atl. 1086; State v. Powell, 5 Penn. (Del.) 24, 61 Atl. 966; State v. Harmon, 4 Penn. (Del.) 580, 60 Atl. 866. In most cases, in order to prove malice as the term is understood in law, it is necessary to prove a killing with a weapon or instrument calculated to

take life or inflict grievous bodily harm. The law implies malice where the circumstances of the homicide indicate that the act proceeded from an evil disposition or a heart regardless of social duty and bent on mischief. For example, if death results from a blow with the hand, inflicted on a person of mature years and great physical strength, no presumption of malice arises, for usually death does not ensue from the use of such means. The case would be quite otherwise if death should be caused by the same blow, inflicted upon a new-born infant, or feeble, old person, or upon one whose physical frame is debilitated from disease or hunger. See remarks of the court in Commonwealth v. Fox, 7 Gray (Mass.) 585, 588.

²⁶ State v. Williamson, 106 Mo. 162, 170, 17 S. W. 172; Cortez v. State, 47 Tex. Cr. 10, 83 S. W. 812; Dudley v. State, 40 Tex. Cr. 31, 48 S. W. 170; 62 L. R. A. 193, note; People v. Hill, 198 N. Y. 64, 91 N. E. 272.

It may be shown that in the same affray,²⁷ or immediately before,²⁸ or thereafter, the accused killed, or attempted to kill,²⁹ another person than the one for whose homicide he is on trial.³⁰ Again, if the evidence shows that two or more persons were killed at or about the same time and place, and by the same weapon, so that the several crimes form one transaction, evidence of the condition of any one of the bodies, showing the cause or means of death, as ascertained by an autopsy, or otherwise, is admissible against one on trial for the homicide of any one of the deceased persons.³¹ So it may be shown that after the killing of the deceased the accused immediately shot the brother of the deceased.³² But evidence of similar crimes committed by the accused, not connected with that for which he is tried, is not generally admissible, as such evidence casts no light upon his guilt and may prejudice the jury against him.³³

Thus, to illustrate, it may be shown that the accused after the homicide, took money from the pocket of the deceased as this is a part of the main transaction.³⁴ Again, where the accused is on trial for the homicide of a policeman it may be shown that the

²⁷ *People v. Pallister*, 138 N. Y. 601, 605, 33 N. E. 741; *Hickam v. People*, 137 Ill. 75, 27 N. E. 88, 89; *State v. Testerman*, 68 Mo. 408, 415; *State v. Vaughan*, 200 Mo. 1, 98 S. W. 2.

²⁸ *State v. Fontenot*, 48 La. Ann. 305, 19 So. 111; *State v. La Rose* (Ore. 1909), 104 Pac. 299.

²⁹ *Killins v. State*, 28 Fla. 313, 334, 9 So. 711; *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *State v. Gainor*, 84 Iowa 209, 50 N. W. 947; *Benson v. State*, 119 Ind. 488, 491, 21 N. E. 1109; *Wilkerson v. State*, 31 Tex. Cr. 86, 90, 19 S. W. 903.

³⁰ Evidence may also be given that the accused committed a burglary for the purpose of obtaining a weapon to commit the homicide. *People v. Rogers*, 71 Cal. 565, 568, 12 Pac. 679.

³¹ *Commonwealth v. Sturtivant*, 117 Mass. 122, 132, 19 Am. 401n; *State*

v. Hayes, 14 Utah 118, 46 Pac. 752; *People v. Foley*, 64 Mich. 148, 157, 158, 31 N. W. 94; *State v. Williamson*, 106 Mo. 162, 170, 17 S. W. 172; *State v. Perry*, 136 Mo. 126, 37 S. W. 804; *Heath v. Commonwealth*, 1 Rob. (Va.) 735, 743; *Crews v. State*, 34 Tex. Cr. 533, 31 S. W. 373; *Brown v. Commonwealth*, 76 Pa. St. 319, 337; *Commonwealth v. Robinson*, 146 Mass. 571, 578, 16 N. E. 452; *Green v. Commonwealth* (Ky.), 33 S. W. 100, 17 Ky. L. 943; *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757; *Elliott Evidence*, § 2720. Reason for admitting, 105 Am. St. 979, note; 63 L. R. A. 398, note.

³² *Hammond v. State*, 147 Ala. 79, 41 So. 761.

³³ See §§ 84, 85, 88, *et seq.*

³⁴ *Moran v. Territory*, 14 Okla. 544, 78 Pac. 111.

accused or a member of his party had, immediately before the homicide, attempted to rob a person on the street. All the facts and circumstances of the attempt at robbery, as for example, the conduct and outcries of the intended victim, and the flight of the accused and his companions, may be received to show the cause of the homicide.³⁵ Where the accused is charged with having killed a member of a particular class of persons and it appears that he had threatened all members of that class, it may be shown that a short time before the homicide he had attempted to kill other members of the same class.³⁶ Proof of crimes which differ in their character from that of homicide has been received; thus, it has been permitted the state to put in evidence a forged writing, apparently signed by the deceased, but found in the possession of the accused.³⁷ So, also, where the motive of the accused was apparently to obtain insurance money on a policy on the life of the deceased, a note for premiums and other instruments purporting to give the benefit of the policy to the accused, were received, though their reception in evidence tended to prove the accused was guilty of the crime of forgery.³⁸

§ 322. Conduct of the accused subsequent to the crime.—The perpetration of a homicide is well calculated to create a perturbation in the mind of any one implicated in it, that will manifest itself by the agitation subsequently noticeable in his conduct. If the charge that the accused did the killing is disputed, or if it is supported by circumstantial evidence only, such evidence is peculiarly appropriate. It is proper to show the conduct of the accused on the night of the killing if any way unusual.³⁹ It is proper, therefore, to show that the accused acted unnaturally and confusedly,⁴⁰ was excited and nervous in manner, spoke hurriedly and in a low tone, looked pale and appeared greatly distressed shortly after the crime, or when accused of it.⁴¹

³⁵ *People v. Woods*, 147 Cal. 265, 81 Pac. 652; *Streety v. State* (Ala. 1909), 51 So. 415.

³⁶ *State v. Davis*, 6 Idaho 159, 53 Pac. 678. ³⁷ *Noftsinger v. State*, 7 Tex. App. 301, 323.

³⁸ *State v. Sassaman*, 214 Mo. 695, 114 S. W. 590. ³⁹ *Lillie v. State*, 72 Neb. 228, 100 N. W. 316; *Burton v. State*, 107 Ala. 108, 18 So. 284; *Campbell v. State*, 23 Ala. 44, 69, 70; *Williams v. State*

⁴⁰ *State v. Coleman*, 17 S. Dak. 594, 98 N. W. 175. ⁴¹ *Terry v. State*, 118 Ala. 79, 23 So.

If from his relation to the deceased it would be natural to expect that the accused would manifest grief or distress upon hearing of the death of the deceased it is competent to show that he did not do so. Where being a relative of the deceased the accused would naturally attend his funeral, it may be shown that he did not do so.⁴²

The conduct of the accused after he hears that he is suspected is also relevant. Any act proving, or tending to prove, an effort or a desire on his part to obliterate the evidence of a crime, as by washing his hands or clothing to remove blood stains, or by hiding or destroying weapons, concealing property proved to have belonged to the deceased,⁴³ or his flight or attempts to escape,⁴⁴ or his nervousness or silence when first charged with the crime, is always relevant, for from these facts, if unexplained, the jury may justly apprehend his mental condition and may infer that they indicate a consciousness of guilt on his part.⁴⁵

§ 323. **Facts showing possible motive.**—Motive upon a trial for murder need not be shown. The absence of motive does not alone require that the accused shall be acquitted though it may be considered in determining the presence of intention.⁴⁶ Any evidence that tends to show that the defendant had a motive for killing the deceased is always relevant as rendering more probable the inference that he did kill him.⁴⁷ Thus it may be shown that the deceased was possessed of a large sum of money or of personal

(Ark., 1891), 16 S. W. 816, 818; McCann v. State, 13 Sm. & M. (Miss.) 471, 497; State v. Brabham, 108 N. Car. 793, 794, 13 S. E. 217; State v. Nash, 7 Iowa 347, 382; State v. Baldwin, 36 Kan. 1, 12 Pac. 318. The conduct and appearance of defendant's wife after the crime is irrelevant, if she had no connection with it. People v. Wood, 126 N. Y. 249, 271, 272, 27 N. E. 362.

⁴² State v. Myers, 198 Mo. 225, 94 S. W. 242.

⁴³ Morris v. State, 30 Tex. App. 95, 117, 16 S. W. 757; Braham v. State, 143 Ala. 28, 38 So. 919.

⁴⁴ Batten v. State, 80 Ind. 394, 401;

Benjamin v. State, 41 So. 739, 148 Ala. 671, not reported in full; Rollings v. State (Ala., 1909), 49 So. 329; People v. Quimby, 134 Mich. 625, 96 N. W. 1061, 10 Det. Leg. N. 618.

⁴⁵ Thomas v. State, 139 Ala. 80, 36 So. 734.

⁴⁶ See, also, chapter Consciousness of Guilt.

⁴⁷ State v. Thrailkill, 73 S. Car. 314, 53 S. E. 482; Morris v. State, 146 Ala. 66, 41 So. 274.

⁴⁸ Bonner v. State, 107 Ala. 97, 18 So. 226; State v. West, 120 La. 747, 45 So. 594; Maloy v. State, 52 Fla. 101, 41 So. 791; State v. Wilcox, 132 N. Car. 1120, 44 S. E. 625; State v.

property,⁴⁸ that the defendant knew this⁴⁹ and spoke about being the heir of the deceased,⁵⁰ or might have known this⁵¹ and that personal property owned by the deceased was found in the defendant's possession,⁵² leading to an inference that his covetousness or necessity was tempted.⁵³ Whether the possession of money by the deceased is so remote as to render it incompetent depends on circumstances. If he was an active business man, or kept a bank account, it would be of little value to prove that the accused knew he received money several months before his death unless other evidence showed its retention in his actual possession. But in the case of a person of solitary and miserly habits, who lived poorly and kept money in his house, a contrary inference may be drawn by the jury,⁵⁴ from the fact that he had received money some

Dull, 67 Kan. 793, 74 Pac. 235; Burton v. Commonwealth, 108 Va. 892, 62 S. E. 376; State v. Thrailkill, 73 S. Car. 314, 53 S. E. 482; State v. Gregory, 178 Mo. 48, 76 S. W. 970; State v. Stratford, 149 N. Car. 483, 62 S. E. 882; State v. Bobbitt, 215 Mo. 10, 114 S. W. 511; Streety v. State (Ala., 1909), 51 So. 415; People v. Argentos (Cal., 1909), 106 Pac. 65; State v. Whitbeck (Iowa, 1909), 123 N. W. 982; State v. Vanella (Mont., 1909), 106 Pac. 364; Elliott Evidence, §§ 2719, 3026; evidence of motive or malice, 66 L. R. A. 384, note; burden of proving malice, Elliott Evidence, § 3021.

⁴⁸ Kennedy v. People, 39 N. Y. 245, 254; Shumway v. State, 82 Neb. 152, 117 N. W. 407; Johnson v. State, 48 Tex. Cr. 423, 88 S. W. 223; People v. Bonier, 189 N. Y. 108, 81 N. E. 949; Dean v. State, 85 Miss. 40, 37 So. 501; Fouse v. State (Neb., 1909), 119 N. W. 478.

⁴⁹ People v. Wolf, 95 Mich. 625, 55 N. W. 357; Byers v. State, 105 Ala. 31, 16 So. 716; State v. Donnelly, 130 Mo. 642, 32 S. W. 1124; Ettinger v. Commonwealth, 98 Pa. St. 338, 349. Under such circumstance a declaration by the deceased that he had no

money is incompetent. Lancaster v. State, 36 Tex. Cr. 16, 35 S. W. 165; Kennedy v. People, 39 N. Y. 245, 253.
⁵⁰ Johnson v. State, 128 Ga. 71, 57 S. E. 84, 130 Ga. 22, 60 S. E. 158.

⁵¹ Marable v. State, 89 Ga. 425, 426, 427, 15 S. E. 453. See Carwile v. State, 148 Ala. 576, 39 So. 220.

⁵² Morris v. State, 30 Tex. App. 95, 117, 16 S. W. 757; People v. Smith, 106 Cal. 73, 39 Pac. 40; Garza v. State, 39 Tex. Cr. 358, 46 S. W. 242, 73 Am. St. 927. It may be shown that accused before the killing had no money, that immediately thereafter he had a \$10 bill and a \$5 bill; that about the time of the killing the deceased had a \$10 bill and a \$5 bill, and that no money was found on the remains after the murder. Commonwealth v. O'Neil, 169 Mass. 394, 48 N. E. 134.

⁵³ Deceased being a Mexican, it may be shown that defendant attended meetings the object of which was to get rid of Mexicans in that community. Chalk v. State, 35 Tex. Cr. 116, 32 S. W. 534.

⁵⁴ Kennedy v. People, 39 N. Y. 245, 255; Commonwealth v. Williams, 171 Mass. 461, 50 N. E. 1035.

time prior to the homicide and that the accused knew it. It may also be shown that the accused was the heir at law of the deceased or a devisee under his will, that the deceased was a man of some wealth and that the accused was aware of these circumstances. So, too, as proving motive, it is competent to show that the accused was a beneficiary named in an insurance policy on the life of the accused.⁵⁵ In connection with such evidence it may be allowed for the prosecution to prove the value of the estate belonging to the ancestor or the amount of the insurance to emphasize the motive which may have prompted the accused.⁵⁶

The statement of the accused that he attempted to borrow money of the deceased and that instead of loaning it to him he made a present of it, is admissible where it seems that the motive of the homicide was to obtain money belonging to the deceased.⁵⁷ And usually evidence which tends to show that the homicide was committed for the purpose of obtaining the possession of papers which were in the possession of the accused is admissible.⁵⁸

Many motives equally strong may be shown. The incitement of jealousy,⁵⁹ or envy, or the desire to be revenged for real or fancied injuries, is often a potent motive for homicide. The means and mode of showing that the defendant was prompted by revenge are elsewhere treated,⁶⁰ and here it need only be said that it is

⁵⁵ *Commonwealth v. Clemmer*, 190 Pa. St. 202, 42 Atl. 675; *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154, holding that the accused may prove the policy was of small value.

⁵⁶ *People v. Weber*, 149 Cal. 325, 86 Pac. 671. See *Van Wyk v. People*, 45 Colo. 1, 99 Pac. 1009, as to falsehoods by the wife of the accused where the deceased applied for the policy of insurance.

⁵⁷ *Bess v. Commonwealth*, 116 Ky. 927, 77 S. W. 349, 25 Ky. L. 1091.

⁵⁸ *State v. Mortensen*, 26 Utah 312, 73 Pac. 562, 633.

⁵⁹ *McCorquodale v. State* (Tex. Cr., 1906), 98 S. W. 879; *Mathley v. Commonwealth*, 120 Ky. 389, 86 S. W. 988, 27 Ky. L. 785; *Moore v. State*, 52 Tex. Cr. 336, 107 S. W. 540; *State v.*

Andrews, 73 S. Car. 257, 53 S. E. 423; *State v. Beckner*, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535n. It is relevant to show that the defendant and the deceased were both suitors for the hand of the same woman, that the former had been rejected and the latter accepted, and that reports of the engagement and contemplated marriage had come to defendant. *Hunter v. State*, 43 Ga. 483, 489, 522, 523; *McCue v. Commonwealth*, 78 Pa. St. 185, 189, 21 Am. 7n. See, also, *Brown v. Commonwealth* (Ky.), 17 S. W. 220, 13 Ky. L. 372; *Commonwealth v. McManus*, 143 Pa. St. 64, 83, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89; *People v. Broste* (Mich., 1910), 125 N. W. 87.

⁶⁰ See §§ 327-333.

relevant to show that the daughter of the deceased had, by his direction, caused the arrest of the accused for bastardy,⁶¹ or that the deceased had procured the indictment of the accused,⁶² or was a witness against him or a friend, or relation of his in some judicial proceeding then pending or soon to be begun.⁶³ And testimony of litigation pending between the accused and the deceased is not to be excluded merely because it is not proved that ill feeling actually existed in connection with it.⁶⁴ The papers in a prior litigation, civil or criminal, instigated by the deceased against the accused or in which he was a witness, such as for example, the indictment, bail bond and sentence, are admissible against the accused to show motive.⁶⁵ The fact of an improper intimacy,⁶⁶ or illicit or incestuous connection,⁶⁷ may always be proved to show a motive, when the defendant is charged with the homicide of a person whose existence was an obstacle to the complete gratifica-

⁶¹ *Franklin v. Commonwealth*, 92 Ky. 612, 18 S. W. 532, 533, 534, 13 Ky. L. 814; *State v. Martin*, 47 Ore. 282, 83 Pac. 849. Letters written by the accused showing the relations between him and deceased who had instituted bastardy proceedings against accused prior to her marriage are competent. *Nordan v. State*, 143 Ala. 13, 39 So. 406.

⁶² *Gillum v. State*, 62 Miss. 547, 552; *Martin v. Commonwealth*, 93 Ky. 189, 193, 19 S. W. 580, 14 Ky. L. 95; *Ball v. Commonwealth*, 125 Ky. 601, 101 S. W. 956, 31 Ky. L. 188; *Zipperian v. People*, 331 Colo. 134, 79 Pac. 1018; *State v. Goodson*, 116 La. 388, 40 So. 771.

⁶³ *Murphy v. People*, 63 N. Y. 590, 594; *Turner v. State*, 33 Tex. Cr. 103, 25 S. W. 635; *Marler v. State*, 68 Ala. 580, 583; *Easterwood v. State*, 34 Tex. Cr. 400, 31 S. W. 294; *Johnson v. State*, 29 Tex. App. 150, 153, 15 S. W. 647; *State v. Fontenot*, 48 La. Ann. 305, 19 So. 111; *Hayes v. State*, 126 Ga. 95, 54 S. E. 809; *Terry v. State*, 45 Tex. Cr. 264, 76 S. W. 928; *State v. Walker*, 145 N. Car.

567, 59 S. E. 878; *Porch v. State*, 50 Tex. Cr. 335, 99 S. W. 102; *Hardy v. Commonwealth (Va., 1910)*, 67 S. E. 522.

⁶⁴ *Maloy v. State*, 52 Fla. 101, 41 So. 791.

⁶⁵ *Hayes v. State*, 126 Ga. 95, 54 S. E. 809.

⁶⁶ *Webb v. State*, 73 Miss. 456, 19 So. 238; *Hall v. State*, 40 Ala. 698; *People v. Montgomery*, 176 N. Y. 219, 68 N. E. 258; *State v. Stratford*, 149 N. Car. 483, 62 S. E. 882; *Lawson v. State*, 171 Ind. 431, 84 N. E. 974; *Mencfee v. State*, 50 Tex. Cr. 249, 97 S. W. 486; *Sasser v. State*, 129 Ga. 541, 59 S. E. 255; *State v. Marsh*, 70 Vt. 288, 40 Atl. 836; *Sullivan v. State*, 100 Wis. 283, 75 N. W. 956; *State v. Myers*, 198 Mo. 225, 94 S. W. 242; *Commonwealth v. Howard (Mass., 1910)*, 91 N. E. 397.

⁶⁷ *Stout v. People*, 4 Park. Cr. (N. Y.) 71, 128, 129; *Davis v. State*, 54 Tex. Cr. 236, 114 S. W. 366; *Reyes v. State*, 55 Tex. Cr. 422, 117 S. W. 152; *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861.

tion of his wrongful desires.⁶⁷ It may be shown to illustrate the motive of the accused that an improper intimacy existed between the accused and the wife of the deceased,⁶⁸ or between the deceased and the wife of the accused. Evidence of improper relations between the accused and the sister of the deceased has been received.⁶⁹ But evidence of an adulterous intercourse between the accused and the divorced wife of the deceased has been rejected.⁷⁰ And, again, it may be shown that the defendant was a suitor of the sister of the deceased, that the only opposition to his suit was from the deceased, and that this fact, with the intention of the woman to defer to her brother's wishes, was known to the accused.⁷¹ The pendency of a suit brought by the deceased against the accused for a divorce,⁷² or previous ill-treatment and lack of affection⁷³ towards the wife,⁷⁴ or unlawful relations with another woman,⁷⁵ may be shown where the homicide of a wife is concerned, as supplying a motive. On the other hand the recent infidelity of a wife may be shown on the trial of her husband for

⁶⁷ *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Commonwealth v. Ferrigan*, 44 Pa. St. 386, 387; *Marler v. State*, 67 Ala. 55, 56, 42 Am. 95; *Pierson v. People*, 79 N. Y. 424, 435, 436, 35 Am. 524; *State v. Green*, 35 Conn. 203, 206; *Traverse v. State*, 61 Wis. 144, 20 N. W. 724; *Stout v. People*, 4 Park. Cr. (N. Y.) 71, 128; *Fraser v. State*, 55 Ga. 325, 327; *People v. Parmelee*, 112 Mich. 291, 70 N. W. 577; *State v. Chase*, 68 Vt. 405, 35 Atl. 336; *People v. Bero-bute*, 196 N. Y. 293, 89 N. E. 837.

⁶⁸ *State v. Page*, 212 Mo. 224, 110 S. W. 1057; *Young v. State*, 54 Tex. Cr. 417, 113 S. W. 276.

⁶⁹ *Morrison v. Commonwealth* (Ky.), 74 S. W. 277, 24 Ky. L. 2493; *Copeland v. State* (Fla. 1909), 50 So. 621.

⁷⁰ *People v. Wright*, 144 Cal. 161, 77 Pac. 877.

⁷¹ *State v. Lentz*, 45 Minn. 177, 180, 47 N. W. 720.

⁷² *Binns v. State*, 57 Ind. 46, 52, 26 Am. 48.

⁷³ The witness cannot testify to the bad conduct of accused where the basis of his evidence is only hearsay. *State v. McNamara*, 212 Mo. 150, 110 S. W. 1067; *Commonwealth v. Howard* (Mass. 1910), 91 N. E. 397.

⁷⁴ *Siberry v. State*, 133 Ind. 677, 33 N. E. 681, 683; *Burley v. State*, 130 Ga. 343, 60 S. E. 1006; *Nordan v. State*, 143 Ala. 13, 39 So. 406; *Clem-sons v. State*, 92 Miss. 244, 45 So. 834; *Green v. State*, 125 Ga. 742, 54 S. E. 724 (various acts of ill treatment need not be proved by same witness); *Roberts v. State*, 123 Ga. 146, 51 S. E. 374; *Owen v. State*, 52 Tex. Cr. 65, 105 S. W. 513; *State v. Blydenburg*, 135 Iowa 264, 112 N. W. 634; *Fowler v. State*, 155 Ala. 21, 45 So. 913. See *State v. Cummings*, 189 Mo. 626, 88 S. W. 706.

⁷⁵ *Johnson v. State*, 94 Ala. 35, 40, 10 So. 667; *Wilkerson v. State*, 31 Tex. Cr. 86, 90, 19 S. W. 903; *State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152n; *Sasser v. State*, 129 Ga. 541, 59 S. E. 255.

her murder, if it appears that he knew of it, but not otherwise. And evidence that the wife of the accused shortly prior to the homicide confessed to her husband that she had been guilty of adultery with decedent is relevant to show the motive of the accused which prompted him to commit the alleged criminal act.⁷⁶

§ 324. Competency of evidence showing the habits, character and disposition of the deceased.—Evidence of the quiet, peaceable disposition, or sober and industrious habits of the deceased, or of his general reputation as a good man or worthy citizen cannot be proved in advance. These are relevant to rebut the presumption which may result from an attack on his character by the accused.⁷⁷ The rule is also well settled that the reputation of the deceased for turbulence, recklessness or violence is inadmissible, unless the circumstances of the case at least raise a doubt whether the prisoner acted in self-defense. A murderer is not excusable merely because the person murdered was a bad man.⁷⁸

⁷⁶ *Shipp v. Commonwealth*, 124 Ky. 643, 99 S. W. 945, 30 Ky. L. 904, 10 L. R. A. (N. S.) 335n.

⁷⁷ *Roten v. State*, 31 Fla. 514, 523, 12 So. 910; *Lemons v. State*, 97 Tenn. 560, 37 S. W. 552; *Ben v. State*, 37 Ala. 103; *Chase v. State*, 46 Miss. 683, 707; *Pound v. State*, 43 Ga. 88, 128; *Bowman v. State* (Tex., 1893), 21 S. W. 48; *State v. Potter*, 13 Kan. 414, 424; *People v. Powell*, 87 Cal. 348, 363, 25 Pac. 481, 11 L. R. A. 75; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162n; *Parker v. Commonwealth*, 96 Ky. 212, 28 S. W. 500, 16 Ky. L. 449; *State v. Nash*, 45 La. Ann. 974, 13 So. 265; *Weaver v. State*, 83 Ark. 119, 102 S. W. 713; *Tribble v. State*, 145 Ala. 23, 40 So. 938; *Bloomer v. State*, 75 Ark. 297, 87 S. W. 438; *Woods v. State*, 90 Miss. 245, 43 So. 433; *Connell v. State*, 45 Tex. Cr. 142, 75 S. W. 512; *Keith v. State*, 50 Tex. Cr. 63, 94 S. W. 1044; *Jones v. State*, 52 Tex. Cr. 206, 106 S. W. 126; *Kirby v. State*, 151 Ala. 66, 44 So. 38; *Moore v.*

State, 46 Tex. Cr. 54, 79 S. W. 565; *State v. Lejeune*, 116 La. 193, 40 So. 632; *Pettis v. State*, 47 Tex. Cr. 66, 81 S. W. 312; *State v. Peterson*, 149 N. Car. 533, 63 S. E. 87.

⁷⁸ *Wise v. State*, 2 Kan. 419, 85 Am. Dec. 595; *People v. Lamb*, 2 Keyes (N. Y.) 360, 365, 372; *People v. Murray*, 10 Cal. 309, 310; *People v. Edwards*, 41 Cal. 640; *State v. Thawley*, 4 Harr. (Del.) 562; *State v. Riddle*, 20 Kan. 711, 715; *State v. Jackson*, 12 La. Ann. 679; *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Commonwealth v. Hilliard*, 2 Gray (Mass.) 294; *Commonwealth v. Ferrigan*, 44 Pa. St. 386, 388; *State v. Field*, 14 Me. 244, 248, 249, 31 Am. Dec. 52; *Wesley v. State*, 37 Miss. 327, 349, 75 Am. Dec. 62; *State v. Jackson*, 17 Mo. 544, 548, 59 Am. Dec. 281; *Dock's Case*, 21 Gratt. (Va.) 909, 911; *State v. Tilly*, 3 Ired. (N. Car.) 424, 435; *State v. Barfield*, 8 Ired. (N. Car.) 344, 349; *Franklin v. State*, 29 Ala. 14, 17, 19; *Miers v. State*, 34 Tex. Cr. 161, 29 S. W. 1074.

But when the evidence tends to show, in the slightest degree, that the killing was in self-defense, or shows a hostile demonstration by the deceased against the accused at the time of the killing, or even leaves it in doubt who was the aggressor, it is always relevant to show that the deceased was a quarrelsome, desperate and revengeful man,⁷⁰ provided it also appears that his reputation

53 Am. St. 705; *Jenkins v. State*, 80 Md. 72, 30 Atl. 566; *State v. Stewart*, 47 La. Ann. 410, 16 So. 945; *Roten v. State*, 31 Fla. 514, 523, 12 So. 910; *Gardner v. State*, 90 Ga. 310, 17 S. E. 86, 35 Am. St. 202; *Evers v. State*, 31 Tex. Cr. 318, 20 S. W. 744, 37 Am. St. 811, 18 L. R. A. 421; *Commonwealth v. Straesser*, 153 Pa. St. 451, 456, 26 Atl. 17; *Davidson v. State*, 135 Ind. 254, 261, 34 N. E. 972. See also, *Pfomer v. People*, 4 Park. Cr. (N. Y.) 558, 570-571, where all the important cases are discussed and harmonized. *Patterson v. State* 156 Ala. 62, 47 So. 52; *Earles v. State*, 52 Tex. Cr. 140, 106 S. W. 138; *State v. Churchill*, 52 Wash. 210, 100 Pac. 309. Evidence of bad character of deceased, 2 L. R. A. (N. S.) 102, note; 3 L. R. A. (N. S.) 351, note. Specific instances to prove character, 14 L. R. A. (N. S.) 689, note.

⁷⁰ *Perry v. State*, 94 Ala. 25, 30, 10 So. 650; *People v. Anderson*, 39 Cal. 703, 704; *Roten v. State*, 31 Fla. 514, 523, 12 So. 910; *People v. Harris*, 95 Mich. 87, 91, 54 N. W. 648; *State v. Matthews*, 78 N. Car. 523, 530; *Brownell v. People*, 38 Mich. 732; *State v. Kenyon*, 18 R. I. 217, 26 Atl. 199; *Franklin v. State*, 29 Ala. 14, 17, 19; *Fields v. State*, 47 Ala. 603, 11 Am. 771; *State v. Collins*, 32 Iowa 36; *State v. Peffers*, 80 Iowa 580, 583, 46 N. W. 662; *State v. Downs*, 91 Mo. 19, 24, 3 S. W. 219; *State v. Claude*, 35 La. Ann. 71, 74, 75; *May v. People*, 8 Colo. 210, 227, 228, 6, Pac. 816;

State v. Zellers, 2 Halst. (N. Y.) 220, 230; *State v. Dumphey*, 4 Minn. 438; *Sindram v. People*, 88 N. Y. 196; *State v. Lull*, 48 Vt. 581; *Pfomer v. People*, 4 Park. Cr. (N. Y.) 558, 570-581, citing cases; *Tiffany v. Commonwealth*, 121 Pa. St. 165, 15 Atl. 462, 6 Am. St. 775; *Rapp v. Commonwealth*, 14 B. Mon. (Ky.) 614; *State v. Horne*, 9 Kan. 119; *Smith v. United States*, 161 U. S. 85, 40 L. ed. 626, 16 Sup. Ct. 483; *State v. Dill*, 48 S. Car. 249, 26 S. E. 567; *State v. Thompson*, 49 Ore. 46, 88 Pac. 583, 124 Am. St. 1015n; *Commonwealth v. Tircinski*, 189 Mass. 257, 75 N. E. 261, 2 L. R. A. (N. S.) 102n; *Moseley v. State*, 89 Miss. 802, 41 So. 384; *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1; *State v. Feeley*, 194 Mo. 300, 92 S. W. 663, 112 Am. St. 511, 3 L. R. A. (N. S.) 351n; *Humber v. Commonwealth (Ky.)*, 102 S. W. 1179, 31 Ky. L. 606; *Kipley v. People*, 215 Ill. 358, 74 N. E. 379; *Teague v. State*, 120 Ala. 309, 25 So. 309; *State v. Zorn*, 202 Mo. 12, 100 S. W. 591; *Morrison v. Commonwealth (Ky.)*, 74 S. W. 277, 24 Ky. L. 2493; *State v. Banner*, 149 N. Car. 519, 63 S. E. 84; *State v. Dunlap*, 149 N. Car. 550, 63 S. E. 164; *State v. Fisher*, 149 N. Car. 557, 63 S. E. 153; *State v. Shafer*, 22 Mont. 17, 55 Pac. 526; *Lawson v. State*, 155 Ala. 44, 46 So. 259. Evidence of habits and disposition, *Elliott Evidence*, § 3040; evidence of physical condition, *Elliott Evidence*, § 3025.

as such was known to the defendant.⁸⁰ The evidence of the character of the deceased must not be too remote or it may be excluded as irrelevant. It is his character for peace and quietude at the date of the homicide which is relevant.⁸¹

§ 325. Nature of the proof required to show character of deceased.

—The majority of the cases reject evidence to prove the actual moral character or disposition of the deceased, *i. e.*, his inclination to do right, but admit his reputation in evidence, that is, the general knowledge or opinion of his character and disposition which prevails among his neighbors and acquaintances.⁸² The

⁸⁰ *People v. Powell*, 87 Cal. 348, 363, 25 Pac. 481, 11 L. R. A. 75; *People v. Lamb*, 2 Keyes (N. Y.) 360, 364; *State v. Kennade*, 121 Mo. 405, 415, 26 S. W. 347; *State v. Nash*, 45 La. Ann. 974, 13 So. 265; *State v. Rollins*, 113 N. Car. 722, 18 S. E. 394; *Commonwealth v. Straesser*, 153 Pa. St. 451, 26 Atl. 17; *McGowan v. Commonwealth* (Ky.), 117 S. W. 387; *Arnwine v. State*, 50 Tex. Cr. 477, 99 S. W. 97; *State v. Roderick*, 77 Ohio St. 301, 82 N. E. 1082; *State v. Ronk*, 91 Minn. 419, 98 N. W. 334. "The general principle, then, is this: not that it is lawful coolly to attack and kill a person of ferocious and blood-thirsty character, * * * but that, whenever it is shown that a person honestly and non-negligently believed himself attacked, it is admissible for him to put in evidence whatever could show the *bona fides* of his belief. He may prove that the person assailing him had with him burglar's instruments, or was armed with deadly weapons, or had been lurking in the neighborhood on other plans of violence" * * * and may reason, "this man now attacking me is a notorious ruffian, he has no peaceable business with me; his character and relations

forbid any other conclusion than that his present attack is felonious." *Wharton Cr. Ev.*, § 69.

"As a general principle such evidence is inadmissible. When admissible, it must be in a case where the defendant had reason to be in fear of his life, or had reasonable ground to apprehend great bodily harm. * * * Again, it is fundamental to the admission of this class of testimony in a proper case, that knowledge of the character of the deceased must be brought home to the knowledge of the defendant himself. It might be presumed that a man would know the character of his wife in this respect. Yet, I think this would not dispense with the rule, that it should affirmatively appear that the defendant had such knowledge." *People v. Lamb*, 2 Keyes (N. Y.) 360, 364.

⁸¹ *State v. Pettit*, 119 Mo. 410, 415, 24 S. W. 1014; *Brooks v. State*, 85 Ark. 376, 108 S. W. 205.

⁸² *People v. Anderson*, 39 Cal. 703, 705; *State v. Turpin*, 77 N. Car. 473, 478, 24 Am. 455; *Moriarity v. State*, 62 Miss. 654, 661; *State v. Riddle*, 20 Kan. 711, 714; *Thomas v. People*, 67 N. Y. 218, 222; *Abbott v. People*, 80 N. Y. 460, 470; *State v. Ford*, 37 La.

reputation of the deceased for vindictiveness or quarrelsomeness cannot be shown by proving specific acts of violence to third persons,⁸³ or acts of violence unless so connected with the fatal rencontre as to produce a reasonable apprehension of grievous bodily harm,⁸⁴ as, for example, that he was an escaped convict, or that he had threatened to shoot or kill a third person.⁸⁵ The prosecution may show that deceased was unarmed when killed, but not that he was in the habit of going unarmed and had refused to arm himself.⁸⁶ Nor can the prosecution put in evidence that the deceased was not in the habit of using vulgar and profane lan-

Ann. 443, 460; *State v. Kenyon*, 18 R. I. 217, 26 Atl. 199; *State v. Smith*, 12 Rich. (S. Car.) 430, 441; *Payne v. Commonwealth*, 1 Met. (Ky.) 370, 397; *State v. Keefe*, 54 Kan. 197, 203, 204, 38 Pac. 302; *Dukes v. State*, 11 Ind. 557, 565, 71 Am. Dec. 370; *Keener v. State*, 18 Ga. 194, 222-224, 63 Am. Dec. 269; *Commonwealth v. Hoskins* (Ky.), 35 S. W. 284, 18 Ky. L. 59; *Stalcup v. State*, 146 Ind. 270, 45 N. E. 334; *Elliott Evidence*, § 3038; 14 L. R. A. (N. S.) 708, note. *Contra*, *State v. Brown*, 63 Mo. 439, 443; *Marts v. State*, 26 Ohio St. 162, 168, admitting evidence of disposition. *Weaver v. State*, 83 Ark. 119, 102 S. W. 713; *Brownlee v. State*, 48 Tex. Cr. 408, 87 S. W. 1153; *Kennedy v. Commonwealth* (Ky.), 102 S. W. 863, 31 Ky. L. 546.

⁸³ *People v. Powell*, 87 Cal. 348, 361, 25 Pac. 481, 11 L. R. A. 75; *State v. Dean*, 72 S. Car. 74, 51 S. E. 524; *McCoy v. State*, 91 Miss. 257, 44 So. 814; *People v. Gaimari*, 176 N. Y. 84, 68 N. E. 112; *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1; *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027; *Smith v. State*, 142 Ala. 14, 39 So. 329; *State v. Roderick*, 77 Ohio St. 301, 82 N. E. 1082, 14 L. R. A. (N. S.) 704n; *Hardgraves v. State* 88 Ark. 261, 114 S. W. 216; *Sturgeon*

v. Commonwealth (Ky.), 102 S. W. 812, 31 Ky. L. 536.

⁸⁴ *Ferrel v. Commonwealth* (Ky.), 23 S. W. 344, 15 Ky. L. 321; *Eggler v. People*, 56 N. Y. 642, 643; *People v. Druse*, 103 N. Y. 655, 656, 8 N. E. 733; *Campbell v. State*, 38 Ark. 498; *Garrett v. State*, 97 Ala. 18, 25, 14 So. 327; *Dupree v. State*, 33 Ala. 380, 387, 73 Am. Dec. 422; *Nichols v. People*, 23 Hun (N. Y.) 165, 167; *Croom v. State*, 90 Ga. 430, 434, 17 S. E. 1003; *State v. Jones*, 134 Mo. 254, 35 S. W. 607; *State v. Peffers*, 80 Iowa 580, 583, 46 N. W. 662; *People v. Smith*, 9 Cal. App. 644, 99 Pac. 1111; *Dean v. Commonwealth* (Ky.), 78 S. W. 1112, 25 Ky. L. 1876; *Cole v. State*, 51 Tex. Cr. 89, 101 S. W. 218; *St. Clair v. State*, 49 Tex. Cr. 479, 92 S. W. 1095; *State v. Foster*, 136 Iowa 527, 114 N. W. 36; *Cole v. State*, 48 Tex. Cr. 439, 88 S. W. 341; *United States v. Densmore*, 12 N. Mex. 99, 75 Pac. 31; *Darter v. State*, 39 Tex. Cr. 40, 44 S. W. 850; *State v. Andrews*, 73 S. Car. 257, 53 S. E. 423; *Sneed v. Territory*, 16 Okla. 641, 86 Pac. 70.

⁸⁵ *Jenkins v. State*, 80 Md. 72, 30 Atl. 566; *Ryan v. State* (Tex., 1896), 35 S. W. 288.

⁸⁶ *People v. Powell*, 87 Cal. 348, 363, 25 Pac. 481, 11 L. R. A. 75; *Jackson*

guage or that he was a good church member.^{87a} In a case where the accused alleges that the killing was in self-defense he may prove that the deceased was in the habit of carrying a pistol or other concealed weapon. But as a preliminary to such evidence the accused must show some justification and must also show that he had knowledge of the habit of the deceased in carrying weapons.⁸⁷

In some states the threats of the deceased or his dangerous, violent or vindictive character are only admissible when it is proved that, at the time of the homicide, he assaulted the accused, indulged in hostile demonstrations against him or did some act indicating a purpose to do him serious bodily harm.⁸⁸ Mere evidence of an overt act, not amounting to proof, is not enough. Whether an overt act has been proved is a preliminary question bearing on the competency of evidence, and is for the judge. His determination is conclusive.⁸⁹ But it has been held that the court cannot exclude evidence of bad character and threats unless it is satisfied, not only that no overt act has been proved, but that there is no evidence from which an overt act can be inferred. If the evidence of an overt act is conflicting, it should go to the jury with evidence of the bad reputation and threats.⁹⁰ The overt act must have been against the accused and not a third person.⁹¹

§ 326. Evidence of threats by the deceased.—Evidence of threats by the deceased, whether made to the accused or to others, and

v. State, 41 So. 178, 147 Ala. 699, not reported in full; Moore v. State, 86 Miss. 160, 38 So. 504.

^{87a} Bowles v. Commonwealth, 103 Va. 816, 48 S. E. 527.

⁸⁷ Gibbs v. State, 156 Ala. 70, 47 So. 65; State v. Exum, 138 N. Car. 599, 50 S. E. 283; Sims v. State, 139 Ala. 74, 36 So. 138, 101 Am. St. 17; Jackson v. State, 41 So. 178, 147 Ala. 699, not reported in full; Commonwealth v. Booker (Ky.), 76 S. W. 838, 25 Ky. L. 1025; Warrick v. State, 125 Ga. 133, 53 S. E. 1027; Rodgers v. State, 144 Ala. 32, 40 So. 572.

⁸⁸ State v. King, 47 La. Ann. 28, 16 So. 566; West v. State, 18 Tex. App. 640, 652; Eiland v. State, 52 Ala. 322,

333; Hill v. State (Miss., 1895), 16 So. 901; Travers v. United States, 6 App. D. C. 450; Smith v. State, 142 Ala. 14, 39 So. 329; Roch v. State, 52 Tex. Cr. 48, 105 S. W. 202; Green v. State, 143 Ala. 2, 39 So. 362.

⁸⁹ State v. Ford, 37 La. Ann. 443, 460.

⁹⁰ State v. Abbott, 8 W. Va. 741, 759; Hawthorne v. State, 61 Miss. 749, 753; Smith v. State, 75 Miss. 542, 23 So. 260; McHugh v. Territory, 17 Okla. 1, 86 Pac. 433.

⁹¹ Moriarity v. State, 62 Miss. 654, 661; White v. Commonwealth, 125 Ky. 699, 102 S. W. 298, 1199, 31 Ky. L. 271, 720.

communicated to him, is always admissible to show the defendant's motive. If the evidence tends to show that the killing was in self-defense, threats may be proved to show that the accused believed he was in imminent danger of death or wounding by the deceased.⁹² The accused may prove the existence of a conspiracy to kill or assault him in which deceased participated. If the homicide occurred in an affray growing out of the conspiracy, he may prove the acts and threats of any or all the conspirators as the acts and declarations of the deceased, for the same purposes that threats actually made by the deceased may be shown.⁹³ The general rule permits the communicated threats of the deceased to be proved, though no evidence of any overt act is offered.⁹⁴ But threats are inadmissible if it indubitably appears that the accused was the aggressor, or that he had no reasonable grounds for apprehending an attack when he killed the deceased.⁹⁵ Usually there

⁹² *Pate v. State*, 54 Tex. Cr. 462, 113 S. W. 759; *State v. Rideau*, 116 La. 245, 40 So. 691; *State v. Barksdale*, 122 La. 788, 48 So. 264; *State v. Coleman*, 119 La. 669, 44 So. 338; *Dunn v. State*, 143 Ala. 67, 39 So. 147; *Bluett v. State*, 151 Ala. 41, 44 So. 84; *Sue v. State*, 52 Tex. Cr. 122, 105 S. W. 804; *State v. Doris*, 51 Ore. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660n; *State v. Jackman*, 29 Nev. 403, 91 Pac. 143; *Fleming v. State*, 150 Ala. 19, 43 So. 219; *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035; *Martin v. State*, 144 Ala. 8, 40 So. 275; *State v. Scaduto*, 74 N. J. L. 289, 65 Atl. 908; *Neathery v. People*, 227 Ill. 110, 81 N. E. 16; *State v. Turpin*, 77 N. Car. 473, 480; *State v. Abbott*, 8 W. Va. 741, 759; *State v. Gainor*, 84 Iowa 209, 214, 50 N. W. 947; *State v. Dodson*, 4 Ore. 64, 68, 69; *King v. State*, 55 Ark. 604, 607, 19 S. W. 110; *Lewis v. Commonwealth*, 78 Va. 732, 735; *Eiland v. State*, 52 Ala. 322, 333; *State v. Robertson*, 30 La. Ann. 340, 341; *Hawthorne v. State*, 61 Miss. 749, 752;

Dickson v. State, 39 Ohio St. 73, 78; *Wood v. State*, 92 Ind. 269, 273-275; *Pitman v. State*, 22 Ark. 354, 357; *Wallace v. United States*, 162 U. S. 466, 40 L. ed. 1039, 16 Sup. Ct. 859; *State v. Sullivan*, 43 S. Car. 205, 21 S. E. 4; *Grayson v. Commonwealth (Ky.)*, 35 S. W. 1035, 18 Ky. L. 205; *Lester v. State*, 37 Fla. 382, 20 So. 232; *Henson v. State*, 112 Ala. 41, 21 So. 79; *Underhill on Ev.*, pp. 27 and 69.

⁹³ *Williams v. People*, 54 Ill. 422, 423, 426; *People v. Lee Chuck*, 74 Cal. 30, 35, 36, 15 Pac. 322; *State v. Hennessy*, 29 Nev. 320, 90 Pac. 221; *State v. Lindsay*, 122 La. 375, 47 So. 687; *Drane v. State*, 92 Miss. 180, 45 So. 149.

⁹⁴ *State v. Abbott*, 8 W. Va. 741, 759; *State v. Powell*, 5 Penn. (Del.) 24, 61 Atl. 966; *Hammond v. State*, 147 Ala. 79, 41 So. 761.

⁹⁵ *Steele v. State*, 33 Fla. 348, 14 So. 841; *State v. Spell*, 38 La. Ann. 20, 22; *Moriarity v. State*, 62 Miss. 654, 661; *Ball v. State*, 29 Tex. App. 107, 125, 14 S. W. 1012; *Payne v.*

must be some overt act of violence on the part of the deceased sufficient to raise the issue of self-defense.^{95a} The admissibility of threats usually depends on the fact that they were communicated to the accused before the homicide.⁹⁶ But uncommunicated threats may be received to corroborate those communicated,⁹⁷ and to show the mental condition of the deceased toward the accused where there is doubt who was the aggressor. Sometimes the former may be regarded as of the *res gesta*, explaining some act already in evidence, as, for example, to show the mental state of the deceased when the question is, did he intend to harm the accused, and was he the attacking party in the affray during which he was killed? Uncommunicated threats are then relevant to show he provoked the affray, or to explain the intention with which he participated in it, or to illustrate the character of the attack.⁹⁸ Evidence from the accused showing the communication

State, 60 Ala. 80, 87; State v. Guy, 69 Mo. 430, 435; Hill v. State (Miss., 1894), 16 So. 901; People v. Lynch, 101 Cal. 229, 231, 35 Pac. 860; State v. Reed, 137 Mo. 125, 38 S. W. 574; State v. Nocton, 121 Mo. 537, 552, 26 S. W. 551; State v. Vaughan, 22 Nev. 285, 39 Pac. 733; State v. King, 47 La. Ann. 28, 16 So. 566; State v. Fontenot, 48 La. Ann. 305, 19 So. 111; State v. Barber, 13 Idaho 65, 88 Pac. 418; State v. Peace, 121 La. 107, 47 So. 28; Brooks v. State, 85 Ark. 376, 108 S. W. 205; Smith v. State, 142 Ala. 14, 39 So. 329; State v. Birks, 199 Mo. 263, 97 S. W. 578; Kirby v. State, 151 Ala. 66, 44 So. 38; Dunn v. State, 143 Ala. 67, 39 So. 147; Oates v. State, 156 Ala. 99, 47 So. 74; State v. Bouvy, 124 La. 1054, 50 So. 849; Reed v. State (Okla. Cr. App. 1909), 103 Pac. 1042.

^{95a} State v. Hanlon, 38 Mont. 557, 100 Pac. 1035.

⁹⁶ Henson v. State, 120 Ala. 316, 25 So. 23; State v. Quinn (Wash. 1909), 105 Pac. 818.

⁹⁷ Wilson v. State, 140 Ala. 43, 37 So. 93; State v. Kelleher, 201 Mo. 614, 100 S. W. 470; Tetterton v.

Commonwealth (Ky.), 89 S. W. & 28 Ky. L. 146; Neathery v. People, 227 Ill. 110, 81 N. E. 16; State v. Edwards, 203 Mo. 528, 102 S. W. 520; State v. Byrd, 121 N. Car. 684, 28 S. E. 353; State v. Thomas, 111 La. 804, 35 So. 914; State v. Nix, 111 La. 812, 35 So. 917; Commonwealth v. Thomas (Ky.), 104 S. W. 326, 31 Ky. L. 899; State v. Blee, 133 Iowa 725, 111 N. W. 19; State v. Davis, 123 La. 133, 48 So. 771.

⁹⁸ State v. Downs, 91 Mo. 19, 25, 3 S. W. 219; People v. Travis, 56 Cal. 251, 253, 254; Stokes v. People, 53 N. Y. 164, 165, 13 Am. 492; Mayfield v. State, 110 Ind. 591, 594, 11 N. E. 618; Leverich v. State, 105 Ind. 277, 280, 4 N. E. 852; Martin v. State, 5 Ind. App. 453, 456, 32 N. E. 594; State v. Turpin, 77 N. Car. 473, 480, 24 Am. 455; Hart v. Commonwealth, 85 Ky. 77, 80, 2 S. W. 673, 8 Ky. L. 714, 7 Am. St. 576; State v. Labuzan, 37 La. Ann. 489; Little v. State, 6 Baxt. (Tenn.) 491, 493; Dickson v. State, 39 Ohio St. 73, 76; State v. Faile, 43 S. Car. 52, 20 S. E. 798; Garner v. State, 28 Fla. 113, 9 So.

to him of a threat does not permit him to testify that he then said he had never injured the deceased and intended to avoid trouble with him.⁹⁹ A witness, called to prove threats, may state his reply thereto as a part of the *res gestæ*.¹⁰⁰ But he cannot be allowed to express an opinion that the threats have been carried into execution. That question is for the determination of the jury.¹ Evidence to prove threats must tend directly to show an intention to injure the accused by violence. A statement by the deceased that he is prejudiced against the accused is not a threat.² In conclusion it may be said that declarations of peaceful intent by the deceased communicated to the accused are competent to rebut evidence of previous threats by the deceased.³

§ 327. Evidence to prove the peaceable character of the accused.—

The rules regulating evidence of character in criminal cases are applicable.⁴ The state cannot attack the character of the defendant in the first instance,⁵ though it may do so after he has sought to prove his good character. An accused person may always offer evidence of his reputation, as a quiet, peaceable and inoffensive man wherever the fact that he committed the homicide, or, if he admits that he did commit it, the criminal intent, is in doubt upon the whole evidence.⁶ The state must not be permitted to intro-

835, 29 Am. St. 232; *Brown v. State*, 55 Ark. 593, 603, 18 S. W. 1051; *State v. Helm*, 92 Iowa 540, 61 N. W. 246; *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. 883; *Wiggins v. Utah*, 93 U. S. 465, 23 L. ed. 941; *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49n; *Prine v. State*, 73 Miss. 838, 19 So. 711; *Newton v. Commonwealth (Ky.)*, 102 S. W. 264, 31 Ky. L. 327; *Hargis v. Commonwealth (Ky., 1909)*, 123 S. W. 239.

⁹⁹ *Angus v. State*, 29 Tex. App. 52, 14 S. W. 443.

¹⁰⁰ *People v. Palmer*, 105 Mich. 568, 63 N. W. 656.

¹ *State v. Coella*, 3 Wash. St. 99, 28 Pac. 28.

² *State v. Wyse*, 33 S. Car. 582, 594, 12 S. E. 556.

³ *Taylor v. State*, 121 Ga. 348, 49 S. E. 303.

⁴ *Supra*, chap. VII.

⁵ *State v. Lodge*, 9 Houst. (Del.) 542, 33 Atl. 312; *People v. Smith (Cal. App.)*, 99 Pac. 1111; *Sims v. State*, 38 Tex. Cr. 637, 44 S. W. 522; *State v. Richardson*, 194 Mo. 326, 92 S. W. 649; *State v. Frederickson*, 81 Kan. 854, 106 Pac. 1061. The state may introduce evidence of the bad reputation of the accused in rebuttal where he attempts to justify the homicide on the ground that the deceased was attempting to ruin his daughter and he was protecting her. *Gossett v. State*, 123 Ga. 431, 51 S. E. 394.

⁶ *Warren v. State*, 31 Tex. Cr. 573, 576, 21 S. W. 680; *Walker v. State*, 102 Ind. 502, 506, 1 N. E. 856; *State*

duce evidence of the bad disposition of the accused as distinguished from his reputation,⁷ nor may it show that he possessed a nervous temperament, was excitable and eccentric,⁸ or likely to resent in a violent manner an indecent and insulting message, or that he has been guilty of particular acts of bad conduct. All such evidence is equally irrelevant to show guilt.

§ 328. Threats by the accused.—General nature of these threats.—

Evidence of threats made by the accused, or by a co-defendant in the presence of the accused, or, if in his absence, subsequent to the date when a conspiracy existed,⁹ prior to the killing, is always relevant to show malice, or, when made long before, to show deliberation and premeditation.¹⁰ It is immaterial that the threats

v. Cross, 68 Iowa 180, 195, 26 N. W. 62; Hall v. State, 132 Ind. 317, 323, 31 N. E. 536; McCarty v. People, 51 Ill. 231, 232, 99 Am. Dec. 542; McDaniel v. State, 8 Sm. & M. (Miss.) 401, 405, 47 Am. Dec. 93; People v. Van Gaasbeck, 118 App. Div. (N. Y.) 511, 103 N. Y. S. 249, aff'd, 189 N. Y. 408, 82 N. E. 718; State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969, 122 Am. St. 479, 13 L. R. A. (N. S.) 341; Maston v. State, 83 Miss. 647, 36 So. 70; Elliott Evidence, § 3039. Evidence of good reputation of defendant, 103 Am. St. 897, note.

⁷ Thomas v. People, 67 N. Y. 218, 223; Barnett v. State (Ala., 1909), 51 So. 299.

⁸ Commonwealth v. Cleary, 148 Pa. St. 26, 23 Atl. 1110.

⁹ Ford v. State, 112 Ind. 373, 382, 14 N. E. 241; Rush v. State (Tex. Cr.), 76 S. W. 927; People v. Barthleman, 120 Cal. 7, 52 Pac. 112; State v. Wright, 141 Mo. 333, 42 S. W. 934; Poole v. State, 45 Tex. Cr. 348, 76 S. W. 565. Previous circumstances, threats, preparation and previous attempts, Elliott Evidence, §§ 3035, 3036. Evidence of being accused of threats by person injured or killed, 17 L. R. A. 654, note. Evidence of threats in prose-

cution for homicide, 89 Am. St. 691, note.

¹⁰ State v. Birdwell, 36 La. Ann. 850; Carr v. State, 23 Neb. 749, 37 N. W. 630; Mathis v. State, 34 Tex. Cr. 39, 28 S. W. 817; State v. Rash, 12 Ired. (N. Car.) 382, 384, 55 Am. Dec. 420; State v. Green, 1 Houst. Cr. (Del.) 217; Griffin v. State, 90 Ala. 596, 599, 8 So. 670; State v. Partlow, 90 Mo. 608, 609, 4 S. W. 14, 59 Am. 31; State v. McCahill, 72 Iowa 111, 117, 30 N. W. 553, 33 N. W. 599; Goodwin v. State, 96 Ind. 550, 552; La Beau v. People, 34 N. Y. 223, 229; Westbrook v. People, 126 Ill. 81, 91, 18 N. E. 304; Schoolcraft v. People, 117 Ill. 271, 7 N. E. 649; Riggs v. State, 30 Miss. 635; Nichols v. Commonwealth, 11 Bush (Ky.) 575, 580; State v. Hoyt, 46 Conn. 330, 336; State v. Larkins, 5 Idaho 200, 47 Pac. 945; Brooks v. Commonwealth, 100 Ky. 194, 37 S. W. 1043, 18 Ky. L. 702; Wilson v. State, 110 Ala. 1, 20 So. 415, 55 Am. St. 17; Drake v. State, 110 Ala. 9, 20 So. 450; Allen v. State, 111 Ala. 80, 20 So. 490; Phillips v. State, 62 Ark. 119, 34 S. W. 539; People v. Evans (Cal., 1895), 41 Pac. 444; Tuttle v.

were not directed against the deceased individually,¹¹ as where they were made against a railroad company by which the deceased was employed,¹² or against "anyone who hits A,"¹³ against a family by name,¹⁴ or a class of men,¹⁵ as policemen,¹⁶ or non-union men, to which class the deceased belong,¹⁷ or against any

Commonwealth (Ky.), 33 S. W. 823, 17 Ky. L. 1139; State v. Pain, 48 La. Ann. 311, 19 So. 138; Linehan v. State, 113 Ala. 70, 21 So. 497; McDaniel v. State, 100 Ga. 67, 27 S. E. 158; Underhill on Ev., §§ 5, 9, 52; Morris v. State, 50 Tex. Cr. 515, 98 S. W. 873; State v. Feeley, 194 Mo. 300, 92 S. W. 663, 112 Am. St. 511, 3 L. R. A. (N. S.) 351n; State v. King, 203 Mo. 560, 102 S. W. 515; Golatt v. State, 130 Ga. 18, 60 S. E. 107; State v. Rideau, 116 La. 245, 40 So. 691; Washington v. State, 46 Tex. Cr. 184, 79 S. W. 811; People v. Gaimari, 176 N. Y. 84, 68 N. E. 112; State v. Fielding, 135 Iowa 255, 112 N. W. 539; Owen v. State, 52 Tex. Cr. 65, 105 S. W. 513; Tipton v. State, 140 Ala. 39, 37 So. 231; Wheeler v. Commonwealth, 120 Ky. 697, 87 S. W. 1106, 27 Ky. L. 1090; Miller v. State, 40 So. 342, 146 Ala. 686, not reported in full; Glenn v. State, 157 Ala. 12, 47 So. 1034; Bluett v. State, 151 Ala. 41, 44 So. 84; Powers v. Commonwealth (Ky.), 92 S. W. 975, 29 Ky. L. 277; State v. Allen, 111 La. 154, 35 So. 495; State v. Stratford, 149 N. Car. 483, 62 S. E. 882; State v. Thompson, 127 Iowa 440, 103 N. W. 377; Graham v. State, 125 Ga. 48, 53 S. E. 816; Johns v. State, 46 Fla. 153, 35 So. 71; Jarvis v. State, 138 Ala. 17, 34 So. 1025; State v. Demming, 79 Kan. 526, 100 Pac. 285; Blocker v. State, 55 Tex. Cr. 30, 114 S. W. 814; State v. McKellar (S. Car., 1910), 67 S. E. 314; Singleton v. State (Tex. Cr. App. 1909), 124 S. W. 92.

¹¹ Benedict v. State, 14 Wis. 423, 426; Harrison v. State, 79 Ala. 29; State v. Harlan, 130 Mo. 381, 407, 32 S. W. 997; State v. Hymer, 15 Nev. 49; State v. Hoyt, 47 Conn. 518, 36 Am. 89n; Friday v. State (Tex. Cr.), 79 S. W. 815; Starr v. State, 160 Ind. 661, 67 N. E. 527; McMahon v. State, 46 Tex. Cr. 540, 81 S. W. 296; State v. Exum, 138 N. Car. 599, 50 S. E. 283; Bateson v. State, 46 Tex. Cr. 34, 80 S. W. 88; Holland v. State 55 Tex. Cr. 27, 115 S. W. 48; Williams v. State, 147 Ala. 10, 41 So. 992; Hixon v. State, 130 Ga. 479, 61 S. E. 14; Hardy v. Commonwealth (Va., 1910), 67 S. E. 522.

¹² Newton v. State, 92 Ala. 33, 36, 9 So. 404.

¹³ Jordan v. State, 79 Ala. 9, 12.

¹⁴ People v. Craig, 111 Cal. 460, 44 Pac. 186; State v. Belton, 24 S. Car. 185, 187, 190, 58 Am. 245; Hobbs v. State, 86 Ark. 360, 111 S. W. 264; Morris v. State, 146 Ala. 66, 41 So. 274; George v. State, 145 Ala. 41, 40 So. 961, 117 Am. St. 17; People v. Owen, 154 Mich. 571, 118 N. W. 590, 15 Det. Leg. N. 881, 21 L. R. A. (N. S.) 520.

¹⁵ State v. Davis, 6 Idaho 159, 53 Pac. 678; Commonwealth v. Lam-tampa, 226 Pa. 23, 74 Atl. 736.

¹⁶ Dixon v. State, 13 Fla. 636, 645; Whittaker v. Commonwealth (Ky.), 17 S. W. 358, 13 Ky. L. 504; State v. Grant, 79 Mo. 113, 49 Am. 218.

¹⁷ State v. Bailey, 190 Mo. 257, 88 S. W. 733. See State v. Cochran, 147 Mo. 504, 49 S. W. 558, where accused said he would like to kill a

man whose attentions should be received by the woman with whom he was intimate,¹⁸ and one member only of the class or family is slain by the accused. Under certain circumstances the vague and uncertain threats of the accused may be shown to prove the condition of his mind at the time of the crime. This rule is applied to his declarations that he is going to kill somebody without mentioning any names or that he is going to make trouble or that he is going to shoot someone or similar indefinite threats which indicate that he is in an ugly frame of mind and disposed to commit some crime though not the particular crime for which he is on trial.¹⁹ When, however, it clearly appears that the accused and the deceased were acquainted, and had always been friends down to the homicide, general threats by the accused are incompetent.²⁰ So, too, a specific threat directed against one person by name is not relevant on a trial for the homicide of another,²¹ unless, perhaps, when the threat has been executed and the motive for the killing of both persons was the same.²²

§ 329. Form, character and mode of proving threats.—The relevancy of threats depends largely upon the light they shed upon previous malice or premeditation. Hence their remoteness in time is no objection to their reception,²³ though it may, and indeed

Grand Army man and the deceased was not a Grand Army man.

¹⁸ *Brown v. State*, 105 Ind. 385, 392; *Garrett v. State*, 52 Tex. Cr. 255, 106 S. W. 389; *Cardwell v. Commonwealth (Ky.)*, 46 S. W. 705, 20 Ky. L. 496.

¹⁹ *State v. Brown*, 188 Mo. 451, 87 S. W. 519; *Helvenston v. State*, 53 Tex. Cr. 636, 111 S. W. 959; *Burton v. State*, 115 Ala. 1, 22 So. 585.

²⁰ *State v. Crabtree*, 111 Mo. 136, 20 S. W. 7; *State v. McGreevey (Idaho, 1909)*, 105 Pac. 1047.

²¹ *Carr v. State*, 23 Neb. 749, 761, 37 N. W. 630; *Abernethy v. Commonwealth*, 101 Pa. St. 322, 330; *People v. Bezy*, 67 Cal. 223, 7 Pac. 643; *Clarke v. State*, 78 Ala. 474, 56 Am. 45.

²² *Woolfolk v. State*, 85 Ga. 69, 104,

105, 11 S. E. 814; *State v. McCahill*, 72 Iowa 111, 33 N. W. 599; *State v. Compagnet*, 48 La. Ann. 1470, 21 So. 46; *Bradley v. State (Tex. Cr.)*, 111 S. W. 733; *Stafford v. State*, 50 Fla. 134, 39 So. 106; *Sprouse v. Commonwealth (Ky., 1909)*, 116 S. W. 344.

²³ *Jefferds v. People*, 5 Park. Cr. (N. Y.) 522 (two years); *Redd v. State*, 68 Ala. 492; *Everett v. State*, 62 Ga. 65; *State v. Campbell*, 35 S. Car. 28, 32, 14 S. E. 292; *Goodwin v. State*, 96 Ind. 550, 552; *Graham v. State*, 125 Ga. 48, 53 S. E. 816; *State v. Schuyler*, 75 N. J. L. 487, 68 Atl. 56; *People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164; *State v. Demming*, 79 Kan. 526, 100 Pac. 285; *Rush v. State (Tex. Cr., 1907)*, 76 S. W. 927; *Ward v. Commonwealth (Ky.)*, 91 S. W. 700, 29 Ky. L. 62;

must, be considered in determining their weight as evidence of existing intent.²⁴ For it is manifest that a threat made long prior to the commission of a homicide may indicate that it was the culmination and outcome of long-continued rancor rather than the result of a sudden and momentary outburst of passion,²⁵ while the fact that a threat is unrepeatd and unexecuted for many years may indicate that the feelings of hatred or revenge have died out.²⁶ The language used need not be specific as regards the means by which,²⁷ or as to the time, place or manner in which, violence is to be inflicted. It is for the court to say whether the utterance of the defendant imports a threat, and the cases go very far in admitting as a threat any declaration which indicates, however vaguely and indefinitely, an intention on the part of the accused to inflict violence upon the deceased.²⁸ Nor is it material that the killing was accomplished by the use of means which differ widely from those mentioned in the threat.²⁹ It is not necessary that the witness should be able to relate the whole conversation of which the threat formed a part,³⁰ or that the threat should have been uttered in his presence, or to him, or that he should have recognized the defendant's voice, if the evidence shows that the accused and the deceased were so situated, as respects the witness, that he must have heard all that was said,³¹ as when he overhears threats made by the deceased, who, while intoxicated and alone, was talking to himself.³² It is always

State v. Rodriguez, 115 La. 1004, 40 So. 438; State v. Porter, 213 Mo. 43, 111 S. W. 529, 127 Am. St. 589; State v. Benjamin (R. I., 1908), 71 Atl. 65. Evidence of threats in prosecution for homicide, 89 Am. St. 691, note; State v. Quinn (Wash., 1909), 105 Pac. 818.

²⁴ State v. Hoyt, 46 Conn. 330, 337 (thirteen years); Frizzell v. State, 30 Tex. App. 42, 16 S. W. 751; Sprouse v. Commonwealth (Ky., 1909), 116 S. W. 344.

²⁵ Jeffers v. People, 5 Park. Cr. (N. Y.) 522, 541, 561.

²⁶ State v. Hoyt, 46 Conn. 330, 337; People v. Johnson, 185 N. Y. 219, 77 N. E. 1164.

²⁷ Schoolcraft v. People, 117 Ill. 271, 7 N. E. 649.

²⁸ Drake v. State, 110 Ala. 9, 20 So. 450. In this case the defendant said to the deceased, "I will see you later."

²⁹ La Beau v. People, 34 N. Y. 223, 229.

³⁰ State v. Oliver, 43 La. Ann. 1003, 10 So. 201; People v. Dice, 120 Cal. 189, 52 Pac. 477; Woodward v. State, 50 Tex. Cr. 294, 97 S. W. 499; State v. Benjamin (R. I., 1908), 71 Atl. 65.

³¹ Short v. Commonwealth (Ky.), 4 S. W. 810, 811, 9 Ky. L. 255; State v. Gilliam, 66 S. Car. 419, 45 S. E. 6.

³² Smith v. Commonwealth (Ky.), 4 S. W. 798, 799, 9 Ky. L. 215.

competent to receive any evidence explanatory of the threats and which shows their true character and which may add weight to or detract from their force as evidence that the deceased was moved by hatred of the accused.³³ But in conclusion, though the remoteness in point of time will not exclude the threat, it may be said that if a long period intervenes between the threat and the act threatened, and there have been opportunities for carrying out the threat and the accused has made no attempt to do so, the value of the threat as indicating that the accused hated the deceased is greatly weakened; and if between the threat and the act an existing state of ill will is changed to one of good will, then the value of the threat as evidence amounts to nothing.³⁴

§ 330. *Declarations forming a part of the res gestae.*—The rule of the *res gestae* is applicable to the acts and declarations of the accused and other persons which are attendant upon the homicide.³⁵ All the occurrences and conversation of the period in which the killing took place, from the instant the accused appeared until the homicide, may be taken as constituting the *res gestae*.³⁶ Hence statements by the deceased made before or immediately after the killing,³⁷ but connected with and explanatory of an act which led up to or prepared for it, are relevant to show his mental state and motives,³⁸ to show where he was going about the time of the homicide,³⁹ or to identify the defendants.⁴⁰ His declara-

³³ Price v. State (Okla., 1908), 98 Pac. 447.

³⁴ Crumley v. State, 5 Ga. App. 231, 62 S. E. 1005.

³⁵ See §§ 94-103, *ante*; Robinson v. State, 118 Ga. 198, 44 S. E. 985; State v. Heidelberg, 120 La. 300, 45 So. 256. *Res gestae*—attendant circumstances in prosecution for homicide, Elliott Evidence, § 3029.

³⁶ Glass v. State, 147 Ala. 50, 41 So. 727.

³⁷ Starks v. State, 137 Ala. 9, 34 So. 687.

³⁸ State v. Moelchen, 53 Iowa 310, 5 N. W. 186; State v. Rollins, 113 N. Car. 722, 18 S. E. 394; People v. Hawes, 98 Cal. 648, 33 Pac. 791;

State v. Talbert, 41 S. Car. 526, 19 S. E. 852; Commonwealth v. Wernitz, 161 Pa. St. 591, 29 Atl. 272; Von Pollnitz v. State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. 72; Boyle v. State, 97 Ind. 322; Appleton v. State, 61 Ark. 590, 33 S. W. 1066; Harris v. State, 96 Ala. 24, 29, 11 So. 255; Edmonds v. State, 34 Ark. 720, 734-736; Gibson v. State (Miss., 1894), 16 So. 298; State v. Harris, 63 N. Car. 1, 6; Harris v. Commonwealth (Ky.), 74 S. W. 1044, 25 Ky. L. 297; State v. Lattin, 19 Wash. 57, 52 Pac. 314.

³⁹ State v. Vincent, 24 Iowa 570, 95 Am. Dec. 753; State v. Mortensen, 26 Utah 312, 73 Pac. 562.

⁴⁰ Cox v. State, 8 Tex. App. 254;

tion that he preferred to use a knife in assaulting persons as it was more reliable than a pistol,⁴¹ or that he wished to procure the arrest of the defendant for threatening him,⁴² is relevant to show the motive and inclination of the deceased to commit crime.

But declarations prior to the crime forming no part of the *res gestæ* of a relevant act and not communicated to the accused, or if known to him not acquiesced in,⁴³ or statements and accusations by deceased which are narrative in their form and character and inadmissible as dying declarations, are generally rejected.⁴⁴

The declarations of the accused prior to the crime cannot be put in evidence in his favor unless they are so closely connected with the crime or with some relevant and connected transaction as to form a part of it. Usually the accused will not be permitted to introduce his statements of intention; thus he cannot prove that before the homicide he stated that he wished to get out of the neighborhood fearing he might have trouble with him.⁴⁵ He cannot prove his utterances at the time he bought the weapon with which the homicide was committed to show the innocence of the motives which prompted the purchase.⁴⁶ But the declarations of

Warrick v. State, 125 Ga. 133, 53 S. E. 1027; Gibbs v. State, 156 Ala. 70, 47 So. 65; Grant v. United States, 28 App. D. C. 169. How near the main transaction must be to the declaration made in order to be part of the *res gestæ*, 19 L. R. A. 737, note.

⁴¹ Boyle v. State, 97 Ind. 322, 325.

⁴² State v. Moelchen, 53 Iowa 310, 5 N. W. 186.

⁴³ People v. Gress, 107 Cal. 461, 40 Pac. 752; State v. Punshon, 124 Mo. 448, 27 S. W. 1111; Commonwealth v. Gray (Ky.), 30 S. W. 1015, 17 Ky. L. 354; Macklin v. Commonwealth, 93 Ky. 294, 19 S. W. 931, 14 Ky. L. 180; Weyrich v. People, 89 Ill. 90, 96-98; McBride v. Commonwealth, 95 Va. 818, 30 S. E. 454; Bowles v. Commonwealth, 103 Va. 816, 48 S. E. 527; State v. Shafer, 22 Mont. 17, 55 Pac. 526; Ausmus v. People (Colo., 1910), 107 Pac. 204.

⁴⁴ State v. Noeninger, 108 Mo. 166,

18 S. W. 990; State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; Stevenson v. State, 69 Ga. 68; Hall v. State, 132 Ind. 317, 322, 31 N. E. 536; State v. Carlton, 48 Vt. 636, 641; Reg. v. Bedingfield, 14 Cox C. C. 341; Lambright v. State, 34 Fla. 564, 16 So. 582; Livingston v. Commonwealth, 14 Gratt. (Va.) 592; State v. Frazier, 1 Houst. Cr. (Del.) 176; Wilson v. People, 94 Ill. 299. Declarations as to slayer not made in *extremis* must be a part of the *res gestæ*. Mayes v. State, 64 Miss. 329, 333, 1 So. 733, 60 Am. 58; Jones v. State, 71 Ind. 66. Declarations must be spontaneous. Lockhart v. State, 53 Tex. Cr. 589, 111 S. W. 1024.

⁴⁵ Red v. State, 39 Tex. Cr. 414, 46 S. W. 408.

⁴⁶ State v. Holcomb, 86 Mo. 371, 378; Johnson v. State, 22 Tex. App. 206, 2 S. W. 609. *Contra*, Koller v.

the accused uttered before the crime indicating that he entertained enmity towards the deceased or towards a class of persons to which he belonged,⁴⁷ or that he was contemplating the commission of a homicide,⁴⁸ or other crime upon him,⁴⁹ or some person whose name is not mentioned,⁵⁰ are always admissible as of the *res gestæ* tending to increase the probability that he is the slayer.⁵¹

Declarations of the accused uttered before the crime may be competent in his favor or against him when they are spontaneous and also when they explain or illustrate the circumstances of the crime. They are received to show his state of mind towards the deceased and to show the motives and intentions of the accused. Thus it may be shown that before the commission of the homicide the accused inquired as to the whereabouts of the deceased,⁵² and that on seeing the deceased the accused said to him, "Now I have found you,"⁵³ or uttered some other language showing anger towards or hatred of the deceased.⁵⁴ The statements of the accused may also be received in his favor. Where the accused, being a police officer, was charged with homicide it was held that he might prove that on the occasion of the crime he was about placing the deceased under arrest and that he ordered him to throw up his hands saying that he was a policeman.⁵⁵

§ 330a. **Declarations of the accused after the crime.**—The declarations and statements of the accused uttered immediately after

State, 36 Tex. Cr. 496, 38 S. W. 44; Arnwine v. State, 54 Tex. Cr. 213, 114 S. W. 796, 802.

⁴⁷ People v. Hayes, 9 Cal. App. 301, 99 Pac. 386.

⁴⁸ State v. Ellis, 101 N. Car. 765, 768, 7 S. E. 704, 9 Am. St. 49; State v. Vallery, 47 La. Ann. 182, 16 So. 745, 49 Am. St. 363; State v. Horne, 9 Kan. 119; State v. Windahl, 95 Iowa 470, 64 N. W. 420; Denson v. State (Tex. Cr., 1896), 35 S. W. 150; State v. Lance, 149 N. Car. 551, 63 S. E. 198; Self v. State, 39 Tex. Cr. 455, 47 S. W. 26.

⁴⁹ Mimms v. State, 16 Ohio St. 221, 223.

⁵⁰ Butler v. State, 33 Tex. Cr. 232,

26 S. W. 201; Palmer v. People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. 146.

Declarations of accused, just before the killing, that he felt like killing some one, are admissible. Muscoe v. Commonwealth, 87 Va. 460, 12 S. E. 790.

⁵¹ Newcomb v. State, 37 Miss. 383, 399.

⁵² Morris v. State, 146 Ala. 66, 41 So. 274.

⁵³ Hamblin v. State, 41 Tex. Cr. 135, 50 S. W. 1019, 51 S. W. 1111.

⁵⁴ Harris v. Commonwealth (Ky.), 74 S. W. 1044, 25 Ky. L. 297.

⁵⁵ People v. Lee, 1 Cal. App. 169, 81 Pac. 969.

the homicide and connected with it are often received as a part of the *res gestæ*.⁵⁶ They may be received in favor of the accused. Thus, he may prove that after the homicide he said he had shot the deceased and that he wanted somebody to go to him as quick as possible, that he would be glad if a doctor could be procured, and that he was going for a doctor himself.⁵⁷ And the accused may also prove that he stated to a physician who was dressing his wound how he received that wound and that it was inflicted on him by the deceased.⁵⁸ The accused may show that, within a minute or two after the shooting, he stated to a third person that he had shot the deceased in self-defense.⁵⁹ The declarations of the accused when he was arrested are admissible;⁶⁰ though where he surrendered himself to an officer some time after the commission of the homicide he cannot prove what he said at the time.⁶¹ The statements of the accused made immediately after the crime are usually received if they are admissions or confessions.⁶²

§ 331. Declarations of third parties and cries and exclamations of bystanders.—Declarations or exclamations uttered by third persons, not associated with the accused, after the commission of the homicide, not forming a part of the *res gestæ*, and not acquiesced in by the defendant, are not admissible against him,⁶³ except so far as such declarations may be introduced for the sole purpose of

⁵⁶ Taggart v. Commonwealth, 104 Ky. 301, 46 S. W. 674, 20 Ky. L. 493.

⁵⁷ Cole v. State, 45 Tex. Cr. 225, 75 S. W. 527.

⁵⁸ Wakefield v. State, 50 Tex. Cr. 124, 94 S. W. 1046.

⁵⁹ State v. Rutledge, 135 Iowa 581, 113 N. W. 461.

⁶⁰ Darter v. State, 39 Tex. Cr. 40, 44 S. W. 850.

⁶¹ People v. Dice, 120 Cal. 189, 52 Pac. 477.

⁶² Graham v. State, 125 Ga. 48, 53 S. E. 816; Collins v. State, 137 Ala. 50, 34 So. 403; Stacy v. Commonwealth (Ky.), 97 S. W. 39, 29 Ky. L. 1242.

⁶³ Allen v. State, 111 Ala. 80, 20 So. 490; State v. Ramsey, 48 La. Ann. 1407, 20 So. 904. See Sanders v. Commonwealth (Ky.), 18 S. W. 528, 13 Ky. L. 820; Brooks v. State, 96 Ga. 353, 23 S. E. 413; State v. Sneed, 88 Mo. 138, 140-142; People v. Wallace, 89 Cal. 158, 26 Pac. 650; People v. Shattuck, 109 Cal. 673, 42 Pac. 315; Marks v. State, 49 Tex. Cr. 274, 92 S. W. 414; Trinkle v. State, 52 Tex. Cr. 42, 105 S. W. 201; Gorman v. State, 52 Tex. Cr. 24, 105 S. W. 200; State v. Gallman, 79 S. Car. 229, 60 S. E. 682; Alford v. State, 52 Tex. Cr. 621, 108 S. W. 364; Bunderick v. State, 125 Ga. 753, 54 S. E.

impeaching a witness by showing contradictory statements.⁶⁴ The exclamations or declarations of bystanders uttered during or immediately after the commission of the crime are often received as a part of the *res gesta*.⁶⁵ In order that the exclamations of bystanders may be received, it must be shown that they were in some way connected with the main fact. So where it was alleged that defendant had shot deceased with a pistol on a car platform, and had thrown the body from the train while it was in motion, passengers on the train were not permitted to testify to exclamations made by persons standing on the platform where the homicide had been committed.⁶⁶

§ 332. Threats against deceased by third persons.—The general rule is that threats by a third person against the deceased are inadmissible to absolve the accused.⁶⁷ The latter may introduce direct evidence to show that some one else committed the crime. If the connection of the third party with the crime is shown *prima facie*,⁶⁸ his threats may be received in corroboration or to show a motive to kill the deceased.⁶⁹ If the accused admits the killing, threats of a third person should be rejected. If this fact

683; *State v. Newman*, 73 N. J. L. 202, 62 Atl. 1008; *Coker v. State*, 144 Ala. 28, 40 So. 576. Attendant circumstances—declarations, *Elliott Evidence*, § 3030.

* *Mixon v. State*, 55 Miss. 525; *Kendall v. Commonwealth (Ky.)*, 19 S. W. 173, 14 Ky. L. 15; *Jones v. Commonwealth (Ky.)*, 46 S. W. 217, 20 Ky. L. 355; *State v. Blee*, 133 Iowa 725, 111 N. W. 19.

* *Johnson v. State*, 88 Ga. 203, 14 S. E. 208. See cases, § 101. Exclamations of bystanders "there he comes with a gun," referring to the accused, have been received. *State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709; *Shumate v. State*, 38 Tex. Cr. 266, 42 S. W. 600.

* *Bradshaw v. Commonwealth*, 10 Bush (Ky.) 576. See also, *Felder v. State*, 23 Tex. App. 477, 486, 5 S. W. 145, 59 Am. 777n.

* *Henry v. State (Tex., 1895)*, 30

S. W. 802; *Wilkins v. State*, 35 Tex. Cr. 525, 34 S. W. 627; *State v. Beaudet*, 53 Conn. 536, 4 Atl. 237, 55 Am. 155; *Morris v. Territory*, 1 Okla. Cr. 617, 99 Pac. 760, 101 Pac. 111; *Hall v. Commonwealth (Ky.)*, 93 S. W. 904, 29 Ky. L. 485.

* There should be some proof of an overt act on the part of the third party directed against the deceased or of some fact or circumstance of his conduct which would tend to connect the third person with the crime. *Harn v. State*, 12 Wyo. 80, 73 Pac. 705.

* *State v. Davis*, 77 N. Car. 483; *State v. Haynes*, 71 N. Car. 79; *Crookham v. State*, 5 W. Va. 510; *Boothe v. State*, 4 Tex. App. 202; *Morris v. Territory*, 1 Okla. Cr. 617, 99 Pac. 760, 101 Pac. 111; *State v. Cremeans*, 62 W. Va. 134, 57 S. E. 405.

is in doubt, and particularly if the evidence is wholly circumstantial, the threats of a third person, not shown to have been connected with the crime, may be received.⁷⁰ The names of the persons and the circumstances attending the threats must be stated.⁷¹ The defendant may prove threats against the deceased made by a witness who, testifying as an accomplice, alleges he was instigated by defendant to commit the crime to show that the witness was actuated by personal motives involving malicious intent.⁷²

§ 333. Animosity between the accused and the deceased.—Where the existence of present malice or premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the deceased is always received⁷³ if the parties have not become completely and permanently reconciled.⁷⁴ Thus, evidence that the

⁷⁰ *Murphy v. State*, 36 Tex. Cr. 24, 35 S. W. 174; *Commonwealth v. Abbott*, 130 Mass. 472, 476; *State v. Hawley*, 63 Conn. 47, 27 Atl. 417; *Alexander v. United States*, 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. 350; *Pollard v. State* (Tex. Cr. App. 1910), 125 S. W. 390.

⁷¹ *State v. Johnson*, 31 La. Ann. 368; *Pace v. Commonwealth* (Ky.), 37 S. W. 948, 18 Ky. L. 690. It is improper to admit evidence that some third person had a motive to kill deceased and was near the scene of the crime where such third person is in no wise connected with the crime by other evidence. *Walker v. State*, 139 Ala. 56, 35 So. 1011.

⁷² *Marler v. State*, 67 Ala. 55, 66, 42 Am. 95; *Sanford v. State*, 143 Ala. 78, 39 So. 370.

⁷³ *Nicholas v. Commonwealth*, 91 Va. 741, 21 S. E. 364, 366; *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106; *State v. Rash*, 12 Ired. (N. Car.) 382, 55 Am. Dec. 420; *State v. Pike*, 65 Me. 111; *State v. Petsch*, 43 S. Car. 132, 20 S. E. 993; *State v. Crafton*, 89 Iowa 109, 56 N. W. 257; *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953; *People v. M'Kay*, 122

Cal. 628, 55 Pac. 594; *State v. Coleman*, 111 La. 303, 35 So. 560; *State v. Brooks*, 79 S. Car. 144, 60 S. E. 518, 128 Am. St. 836, 17 L. R. A. (N. S.) 483; *Pratt v. State*, 53 Tex. Cr. 281, 109 S. W. 138; *Waters v. State*, 54 Tex. Cr. 322, 114 S. W. 628; *State v. Churchill*, 52 Wash. 210, 100 Pac. 309; *State v. Clark*, 119 La. 733, 44 So. 449; *State v. Baudoin*, 115 La. 837, 40 So. 239; *State v. Exum*, 138 N. Car. 599, 50 S. E. 283; *Shirley v. State*, 144 Ala. 35, 40 So. 269; *People v. Williamson*, 6 Cal. App. 336, 92 Pac. 313; *Sylvester v. State*, 46 Fla. 166, 35 So. 142; *Gallegos v. State*, 48 Tex. Cr. 58, 85 S. W. 1150; *Sanderson v. State*, 169 Ind. 301, 82 N. E. 525; *People v. Dinser*, 49 Misc. (N. Y.) 82, 98 N. Y. S. 314; *Spencer v. Commonwealth* (Ky.), 107 S. W. 342, 32 Ky. L. 880. The rule of the text is applicable to a prosecution for assault with intent to murder. *Ellis v. State*, 120 Ala. 333, 25 So. 1; *Barnett v. State* (Ala., 1909), 51 So. 299; *State v. Butler* (Iowa, 1910), 125 N. W. 196.

⁷⁴ *Tidwell v. State*, 70 Ala. 33, 46; *Early v. State*, 51 Tex. Cr. 382, 103

accused had frequently quarreled with, brutally beaten and threatened to kill his wife, with whose murder he is charged, or had made remarks reflecting on her character,⁷⁶ is competent to enable the jury to determine whether malice was present. The fact that these marital bickerings cover a period of years and continue down to the death, strengthens this evidence.⁷⁶ This evidence is received for the same reason that previous threats by any person are admissible.⁷⁷ It tends to show the existence of animosity between the parties, and its relevancy results from the fact that the existence of prior ill-feeling not only renders the commission of the crime more probable, but tends to show the malice or premeditation of the accused.⁷⁸ It is immaterial how remote in time the hostile acts were, as far as the competency of the evidence is concerned,⁷⁹ nor can the details of the previous difficulty be proved to show which party was in the wrong.⁸⁰

Evidence of prior ill-feeling between the defendant and the deceased is admissible in favor of the former as well as against him. This is the case where a plea of provocation or self-defense is made and the evidence is contradictory as to whom was the aggressor.⁸¹ The prosecution may prove that when a third person

S. W. 868, 123 Am. St. 889. Evidence of friendly conduct and declarations on the part of the parties is always competent in rebuttal of a former difficulty and threats and ill will of the deceased. *Watson v. State*, 52 Tex. Cr. 85, 105 S. W. 509.

⁷⁶ *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846.

⁷⁷ 3 Greenl. Ev., § 145; *Koerner v. State*, 98 Ind. 7, 25; *State v. O'Neil*, 51 Kan. 651, 665, 33 Pac. 287, 24 L. R. A. 555; *McCann v. People*, 3 Park. Cr. (N. Y.) 272; *Sayres v. Commonwealth*, 88 Pa. St. 291; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238; *Phillips v. State*, 62 Ark. 119, 34 S. W. 539; *Thiede v. Utah Territory*, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. 62.

⁷⁸ A non-expert witness may be permitted to give an opinion that the

deceased and the defendant were on good terms. *State v. Stackhouse*, 24 Kan. 445, 453.

⁷⁹ *White v. State*, 30 Tex. App. 652, 18 S. W. 462; *Finch v. State*, 81 Ala. 41, 50, 1 So. 565.

⁸⁰ *Sayres v. Commonwealth*, 88 Pa. St. 291; *Koerner v. State*, 98 Ind. 7. But compare *Poe v. State*, 155 Ala. 31, 46 So. 521.

⁸¹ *People v. Thomson*, 92 Cal. 506, 512, 28 Pac. 589; *Gordon v. State*, 140 Ala. 29, 36 So. 1009; *Logan v. State*, 149 Ala. 11, 43 So. 10; *Patterson v. State*, 156 Ala. 62, 47 So. 52; *Stallworth v. State*, 146 Ala. 8, 41 So. 184; *Thompson v. State*, 84 Miss. 758, 36 So. 389; *State v. Birks*, 199 Mo. 263, 97 S. W. 578; *Jay v. State*, 52 Tex. Cr. 567, 109 S. W. 131; *Bluett v. State*, 151 Ala. 41, 44 So. 84.

⁸² *Coxwell v. State*, 66 Ga. 309, 313;

attempted to make peace between the deceased and the accused that the latter refused to settle the trouble amicably and said he would not accept an apology from the deceased.⁸²

§ 334. Expert and non-expert evidence as regards blood stains.—

All persons are more or less familiar with the appearance of stains caused by blood. It has, therefore, been repeatedly held from time immemorial that ordinary witnesses may testify that certain stains on clothing or other articles "look like" or resemble blood stains. A non-expert may state that he saw stains and describe their color,⁸³ or that garments "looked like the blood had been washed off."⁸⁴ No peculiar skill or experience is required to be possessed by a witness who saw the stains in court or elsewhere to render his evidence admissible, nor need a chemical analysis, or test, or a microscopical examination have been made.⁸⁵

The testimony of a witness that he recognized blood stains on an article which he has seen is not secondary evidence, compared with the opinion of a chemist, based solely on an analysis,⁸⁶ though the opinion of the expert witness may be received with more confidence in the minds of the jury. Though any witness may testify that a stain looks like a blood stain, only a skilled physician or microscopist should be permitted to give an opinion, after analysis, on the question, was the stain in question caused

Wellar v. People, 30 Mich. 16; Gunter v. State, 111 Ala. 23, 20 So. 632, 56 Am. St. 17; People v. Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; Stewart v. State, 78 Ala. 436; State v. Cooper, 32 La. Ann. 1084; McMeen v. Commonwealth, 114 Pa. St. 300, 9 Atl. 878; Marnoch v. State, 7 Tex. App. 269, 272 (to explain why defendant went armed to the place where he met deceased); State v. Seymour, 94 Iowa 699, 63 N. W. 661; Austin v. Commonwealth (Ky.), 40 S. W. 905, 19 Ky. L. 474.

⁸² Pettis v. State, 47 Tex. Cr. 66, 81 S. W. 312.

⁸³ Gantling v. State, 40 Fla. 237, 23 So. 857.

⁸⁴ Walker v. State, 153 Ala. 31, 45 So. 640.

⁸⁵ People v. Gonzalez, 35 N. Y. 49, 61; State v. Bradley, 67 Vt. 465, 32 Atl. 238; State v. Welch, 36 W. Va. 690, 15 S. E. 419; Thomas v. State, 67 Ga. 460, 464; McLain v. Commonwealth, 99 Pa. St. 86, 100; Greenfield v. People, 85 N. Y. 75, 83, 39 Am. 636; Dillard v. State, 58 Miss. 368; People v. Deacons, 109 N. Y. 374, 382, 16 N. E. 676; People v. Smith, 106 Cal. 73, 39 Pac. 40.

⁸⁶ People v. Gonzalez, 35 N. Y. 49, 61. A piece of board cut from the floor of a room in which a homicide was committed is admissible to show the stains. State v. Martin, 47 S. Car. 67, 25 S. E. 113.

by the blood of a human being or by that of other animals.⁸⁷ Evidence that there was a great effusion of blood may be admissible to show the nature of the wound.⁸⁸ A fatal blow with a heavy blunt instrument produces little effusion of blood, while a cut or a stab with a sword or knife will cause an outpouring that may spatter with blood every person and object in the vicinity. Evidence that the clothing of the accused was spattered with blood is relevant, and may justify a strong inference that he is guilty. On the other hand, the absence of such stains is not relevant, and usually would have no force as indicating innocence. The accused may have removed the incriminating marks or, even in the case of homicide by cutting, may have inflicted the wound in such a way that no blood was spattered on him.

The direction and form of blood stains on doors, walls or furniture is relevant to show the position of the deceased when he was killed. So the position of such stains on the clothing of deceased may be relevant to show whether he was standing or reclining when the fatal blow was received.⁸⁹

⁸⁷ *People v. Bell*, 49 Cal. 485; *Commonwealth v. Dorsey*, 103 Mass. 412, 420; *Gaines v. Commonwealth*, 50 Pa. St. 319; *State v. Knight*, 43 Me. 11; *Lindsay v. People*, 63 N. Y. 143; *State v. Miller*, 9 *Houst. (Del.)* 564, 32 *Atl.* 137; *State v. Alton*, 105 *Minn.* 410, 117 *N. W.* 617. In *State v. Knight*, 43 Me. 11, pp. 19-25, will be found fully reported the language of an expert chemist who had made a chemical and microscopical examination of blood stains, detailing in full the methods of examination, the facts observed and the results achieved. Some microscopists affirm that it is easy to recognize human blood by the size and shape of the corpuscles. The more recent and, perhaps, better opinion is, that "while a skillful expert can, with certainty, distinguish between human blood corpuscles and those of the blood of a cow, pig or other domestic animals with which it

would be likely to be confounded, still, in a murder trial, where human life is at stake, the expert is hardly warranted to swear that the blood stain is any more than that of an animal." See *Reese Med. Jurisprudence*, p. 132 (2d ed.), 1889; *Beale's Microscope in Medicine*, 4th ed., p. 266, 10 *Cent. Law Jour.* (Feb., 1880) 183, and the remarks of the court in pointing out with what caution such expert evidence should be received. *State v. Miller*, 9 *Houst. (Del.)* 564, 32 *Atl.* 137.

⁸⁸ *O'Mara v. Commonwealth*, 75 Pa. St. 424.

⁸⁹ *Richardson v. State*, 7 *Tex. App.* 486, 492; *Wilson v. United States*, 162 *U. S.* 613, 40 *L. ed.* 1090, 16 *Sup. Ct.* 895; *Jackson v. Commonwealth*, 100 *Ky.* 239, 38 *S. W.* 422, 1091, 18 *Ky. L.* 795, 66 *Am. St.* 336; *Hinshaw v. State*, 147 *Ind.* 334, 47 *N. E.* 157.

§ 335. Conspiracy to commit homicide.—If the homicide is the result of a conspiracy the acts or declarations of any one of the conspirators are binding upon his criminal associates if made during the existence of the conspiracy and in furtherance of its object.⁹⁰

§ 336. Preparation to commit homicide.—Evidence of preparation to commit a homicide, or of attempts to prepare for its commission, is always relevant. It may be shown that the accused was armed shortly before the commission of the crime.⁹¹ It is always relevant to show that the defendant at or immediately before the date of the crime had in his possession the means for its commission. It may be shown that a few days before the crime he bought shells for use in his gun where similar shells were found near the scene of the crime.⁹² It may also be proved that a third person purchased cartridges a short time before the crime if there is evidence of a conspiracy between the purchaser and the accused.⁹³ And such evidence is competent, it seems, even where the purchaser was present at the commission of the

⁹⁰ See §§ 492, 493; *State v. McCahill*, 72 Iowa 111. This rule is well illustrated in *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320n, commonly called the "Anarchists' Case." Here it appeared from the evidence that an illegal association had been formed, having for its object the overturning of government and the abolition of law. It was proved that certain newspapers and a book entitled the "Science of Revolutionary Warfare," advocating these views and pointing out how they might be advanced and the purposes of the society accomplished by the use of dynamite bombs and other violent means, were read and circulated by members of the association and approved by its officials. It was also shown that the speakers of the association had, at its meetings, used language inciting their hearers to as-

sault policemen and to commit riot and murder. Upon murder resulting from the conspiracy, these written and spoken declarations were held binding upon all members of the association. Evidence in prosecution for homicide in carrying out unlawful conspiracy, 68 L. R. A. 215, note.

⁹¹ *Way v. State* (Ala., 1908), 46 So. 273; *Ferguson v. State*, 141 Ala. 20, 37 So. 448; *People v. Sutherland*, 154 N. Y. 345, 48 N. E. 518. The accused cannot offer evidence to show his "uncommunicated intention" in thus arming himself. *Dean v. State*, 105 Ala. 21, 17 So. 28, 29. Cf. *Gilcrease v. State*, 33 Tex. Cr. 619, 28 S. W. 531.

⁹² *Anderson v. State*, 53 Tex. Cr. 341, 110 S. W. 54; *Garner v. State*, 6 Ga. App. 788, 65 S. E. 842.

⁹³ *Pulpus v. State*, 84 Miss. 49, 36 So. 190.

crime without actual proof of conspiracy.⁹⁴ It would seem that evidence of the purchase or possession of the means of committing the homicide would only be relevant where the homicide was in fact committed by the use of such means, but it has been permitted to be proved that the accused purchased pistol cartridges where the crime was not committed with a pistol.⁹⁵ If the body of the decedent shows incised wounds it is proper to permit the state to show that the accused was the owner of a knife, and had it a short time before the crime, though it is not identified as the weapon with which the crime was committed.⁹⁶ And in one case evidence to show that the accused had access to a weapon with which the crime might have been committed was received.⁹⁷ So it may be proved that the accused was familiar with the use of firearms.⁹⁸ But proof that the accused had in his possession, or attempted to procure a weapon, is not conclusive and in fact does not necessarily create any presumption that he intended to use it for criminal purposes. He may always show that the deceased had threatened him and other circumstances which would justify a plea of self-defense.⁹⁹ The presence of the accused in the locality of the crime, immediately prior to its commission, may be shown. But this fact possesses little value as evidence, unless coupled with a suspicious circumstance, as his being disguised, or armed, or his uttering threats against the deceased.¹⁰⁰

§ 337. **Footprints.**—A comparison of footprints proved to have been made by the prisoner with other tracks or footprints found near the scene of the homicide is relevant, if a doubt arises on the evidence which was the slayer.¹ But the opinion of a witness

⁹⁴ State v. Thraillkill, 71 S. Car. 136, 50 S. E. 551.

⁹⁵ Hocker v. Commonwealth (Ky.), 111 S. W. 676, 33 Ky. L. 944.

⁹⁶ Jones v. State, 137 Ala. 12, 34 So. 681.

⁹⁷ Lillie v. State, 72 Neb. 228, 100 N. W. 316.

⁹⁸ Lillie v. State, 72 Neb. 228, 100 N. W. 316.

⁹⁹ State v. Hough, 138 N. Car. 663, 50 S. E. 709.

¹⁰⁰ Rodriguez v. State, 32 Tex. Cr. 259, 22 S. W. 978; State v. Craemer, 12 Wash. 217, 40 Pac. 944.

¹ Bouldin v. State, 8 Tex. App. 332; Campbell v. State, 23 Ala. 44; People v. McCurdy, 68 Cal. 576; Stokes v. State, 5 Baxt. (Tenn.) 619, 30 Am. 72; Dunn v. People, 158 Ill. 586, 42 N. E. 47; Dillin v. People, 8 Mich. 357; Murphy v. People, 63 N. Y. 590, 595, 596; State v. Sanders, 75 S. Car. 409, 56 S. E. 35; Krens v. State, 75

that footprints near the scene of the crime were those of the accused not based on a comparison is not admissible.² But the accused, by virtue of his constitutional immunity against being compelled to testify against himself, cannot be compelled to make an impression of his shoe or foot in some soft substance so that the footprints thus produced may be compared with others which have been discovered in the vicinity of the place of the homicide.³

If the accused voluntarily places his foot in a footprint near the scene of the homicide or permits his shoe to be placed in the track by a third person, the latter may testify to the result of the comparison and, where such testimony was given at the coroner's inquest in the presence of the defendant it may subsequently be proved at the trial.⁴

§ 338. Self-defense—Burden of proof—Malice.—In a murder trial if the homicide is denied, the burden of proving the crime beyond a reasonable doubt in all its constituent elements, *i. e.*, the *corpus delicti* and the malicious intention is upon the state throughout.⁵ If the killing is proved or admitted by the accused, malice may be inferred from the circumstances already proved, and it is then incumbent upon the defendant to prove circumstances that will

Neb. 294, 106 N. W. 27, and § 372, burglary.

² *Du Bose v. State*, 148 Ala. 560, 42 So. 862. Evidence of footprints of accused, 94 Am. St. 342, note; evidence of measurements of footprints, 53 Am. St. 383, note.

³ *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. 72, and see § 372, where this subject is fully discussed.

⁴ *State v. Sanders*, 75 S. Car. 409, 56 S. E. 35.

⁵ *People v. Coughlin*, 65 Mich. 704, 32 N. W. 905, 9 West. 129; *State v. Porter*, 34 Iowa 231; *State v. Wingo*, 66 Mo. 181, 27 Am. 329; *State v. Donahoe*, 78 Iowa 486, 43 N. W. 297; *People v. Riordan*, 7 N. Y. Cr. 7; *State v. Allen*, 48 La. Ann. 1387, 20 So. 1012; *King v. State*, 74 Miss. 576, 21 So. 235; *State v. Williams*, 122

Iowa 115, 97 N. W. 992; *State v. Teachey*, 138 N. Car. 587, 50 S. E. 232; *Commonwealth v. Deitrick*, 221 Pa. 7, 70 Atl. 275. The burden is on the accused to show inability to retreat with safety and all the elements of self-defense. *McBryde v. State*, 156 Ala. 44, 47 So. 302; *State v. Thrailkill*, 71 S. Car. 136, 50 S. E. 551. In the case of *State v. Quick*, 150 N. Car. 820, 64 S. E. 168, it was said that an intentional killing with a deadly weapon creates a presumption of malice and the crime is murder unless the facts subsequently proved either justify the killing or reduce it to manslaughter and that the burden is on the accused to show these facts though proof of such facts may arise out of the evidence against him.

excuse, mitigate or justify the killing, unless (and this exception is extremely important), the proof offered by the state tends to show the defendant was excused or justified.⁶ If circumstances are shown by the state from which, when uncontradicted or proved, a presumption of malice is drawn by the law as for example the intentional use of a deadly weapon, or an inference may be drawn by the jurors, it is considered that the state has satisfied the rule casting the burden upon it, and that the accused, if he wishes to exculpate himself by a plea of self-defense, must prove the facts on which his plea is based,⁷ perhaps by a preponderance of the evidence.⁸

The rule as here stated is perhaps equivalent in meaning to an instruction that the burden of proof is upon the defendant where he relies upon any distinct affirmative fact to exonerate him. Such an instruction has been supported by numerous cases where the fact relied on to obtain an acquittal was the insanity of the accused, or an assertion that the defendant killed the deceased under a reasonable apprehension that his own life was in danger.⁹ But the qualification may always be safely added that the defendant need not himself offer positive and affirmative evidence to sustain this burden. He should receive the benefit of all the evidence in the case, whether offered by him or by the state. If any fact proved against him by the prosecution satis-

⁶ *State v. Cephus* (Del.), 67 Atl. 150; *State v. Peterson*, 149 N. Car. 533, 63 S. E. 87; *State v. Walker*, 145 N. Car. 567, 59 S. E. 878; *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998; *Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. 96; *State v. Yates*, 132 Iowa 475, 109 N. W. 1005; *Lawson v. State*, 171 Ind. 431, 84 N. E. 974. Compare *Nail v. State*, 125 Ga. 234, 54 S. E. 145.

⁷ *Sawyer v. People*, 91 N. Y. 667; *State v. Skidmore*, 87 N. Car. 509; *State v. Kibler*, 79 S. Car. 170, 60 S. E. 438; *Lewis v. State*, 120 Ala. 339, 25 So. 43; *State v. Byrd*, 121 N. Car. 684, 28 S. E. 353; *Robinson v. State*, 155 Ala. 67, 45 So. 916; *Coolman v. State*, 163 Ind. 503, 72 N. E. 568;

State v. Dillard, 59 W. Va. 197, 53 S. E. 117; *State v. Skinner* (Nev., 1909), 104 Pac. 223.

⁸ *State v. Jones*, 20 W. Va. 764; *Henson v. State*, 112 Ala. 41, 21 So. 79; *State v. Ballou*, 20 R. I. 607, 40 Atl. 861; *State v. Moss*, 77 S. Car. 391, 57 S. E. 1098; *Commonwealth v. Palmer*, 222 Pa. 299, 71 Atl. 100, 128 Am. St. 809, 19 L. R. A. (N. S.) 483n; *Hoffman v. Commonwealth* (Ky., 1909), 121 S. W. 690; *State v. Strother* (S. Car.), 66 S. E. 877.

⁹ Burden of proof as to insanity or self-defense, *Elliott Evidence*, §§ 3022, 3023, 3041, 3041a; self-defense, burden of proof of freedom from fault, 45 L. R. A. 687, note.

fies the jury that the killing was excusable or justifiable, the jury should acquit him.¹⁰ Any instruction, whatever its language, which in effect imposes an obligation upon the defendant of proving affirmatively that no crime was committed, constitutes reversible error, as it clearly deprives him of the benefit of the reasonable doubt which may arise on all the evidence.¹¹

§ 338a. **The alibi of the alleged victim.**—Not only must the state prove the death of *some* human being, but it must also prove that the identical human being named in the indictment as having been killed is dead as the result of some act of the accused. The fact that such a person is actually dead may, in the large majority of cases, be readily proved by the direct evidence of those who were his friends and acquaintances in life, and who have seen his corpse. In some exceptional cases such proof is impossible. The state in proving the *corpus delicti* and the identity of the deceased will then have to rely upon circumstantial evidence alone. Such proof is all that is available and necessary wherever the killing was procured or was accompanied by methods which resulted in a more or less complete destruction, by fire or otherwise, of the body of the alleged deceased;¹² so that all that remains for purposes of identification is a handful of bones or a charred or decapitated corpse.

Where this happens the accused, while denying, and, perhaps, attempting to disprove the identity of the remains, also frequently alleges, directly or by inference, that the alleged victim of the homicide is alive.

That a man has disappeared suddenly from his accustomed haunts without having prepared for, or informed his associates of, his intended departure is by no means proof that he is dead. But evidence of a sudden and unexplained disappearance is always admissible and may be considered by the jury. If, however,

¹⁰ State v. Castle, 133 N. Car. 769, 46 S. E. 1.

¹¹ Chrisman v. State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. 44; People v. Downs, 123 N. Y. 558, 25 N. E. 988; Tweedy v. State, 5 Iowa 433; Gravely v. State, 38 Neb. 871, 874, 57 N. W. 751; Linehan v. State, 113 Ala. 70, 21

So. 497; State v. Hatch, 57 Kan. 420, 46 Pac. 708, 57 Am. St. 337; State v. Crea, 10 Idaho 88, 76 Pac. 1013; State v. Pressler, 16 Wyo. 214, 92 Pac. 806; State v. Dillard, 59 W. Va. 197, 53 S. E. 117.

¹² See *ante*, § 7.

the state offers such evidence in connection with proof of the finding of the alleged remains of the deceased in such a condition as to render their identity in the least doubtful, it is competent for the accused to prove that the alleged deceased was not killed.

The production of the person in court, provided he is properly identified, would, of course, be conclusive. This, however, is seldom attempted. Witnesses are usually introduced who testify that they are acquainted with the deceased, and that they have seen him alive at a date subsequent to the alleged killing. While there is nothing *per se* suspicious in such testimony, experience teaches us that such evidence can be readily fabricated without much danger of detection or punishment. But if, by such testimony, the accused shall succeed in raising a reasonable doubt of the death of the deceased he ought to be acquitted.¹²

¹² *Ausmus v. People* (Colo., 1910), 107 Pac. 204. Two curious and important cases recently pending in the courts of New York and Illinois illustrate the principles set forth in the text. In the case of the *People v. Luetgert* (tried in the city of Chicago) the accused was charged with killing his wife and with subsequently attempting to destroy her body by immersing it in powerful chemicals in a vat in a factory of which he was proprietor. The only proof of the *corpus delicti* offered by the state was a few bones, or portions of bones, and evidence that the woman had unexpectedly and unaccountably disappeared. The accused, to account for his wife's disappearance, endeavored to show that he and she had disagreed and that she had deserted him for the purpose of procuring a divorce. He also produced witnesses who swore, with

great positiveness, that they had seen a woman, whom they then identified as the missing wife, alive since the commission of the crime charged. In the New York case a woman, named Nack, was jointly indicted with her paramour, one Thorn, for the murder of Goldensuppe, her discarded lover. The woman, it was alleged, lured the deceased to a vacant house in a lonely and quiet suburb of New York city, where he was shot by Thorn and his body cut into three pieces. The severed portions of the trunk were carefully wrapped in oil cloth and cast into the river, where they were subsequently found and positively identified by the associates of the deceased. The head has never been found. In this case the defense was that Goldensuppe was still alive.

Proof of alibi under a charge of conspiracy to kill, 68 L. R. A. 222, note.

CHAPTER XXV.

CRIMES AGAINST THE PERSON.

- § 339. Abduction—Proving the taking away or enticement—Corroboration of the prosecutrix.
- 340. Abduction of a minor—Proof of the non-consent of the mother or other guardian.
- 341. Chastity of the female—Presumption of chastity.
- 342. Evidence to show the age of prosecutrix.
- 343. Abduction for purposes of prostitution or concubinage.
- 344. Abortion at common law and by statute distinguished.
- 345. Intention to produce an abortion—Evidence of other crimes.
- 346. Victim of abortion is not an accomplice — Corroboration, when required.
- 347. Necessity for the operation—Burden of proof.
- 348. Declarations of present pain and suffering and dying declarations of the victim.
- 349. Evidence of the woman's physical condition and illness—Direct and circumstantial evidence.
- 350. Expert testimony of physician—Evidence afforded by the *post-mortem*.
- 351. Exception to rule regulating privileged communications to physicians.
- 352. Assault and battery—Definition.
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- 356a. Declarations constituting a part of the *res gestæ*.
- 357. Evidence of threats and previous hostility.
- 358. Robbery—Intention present and force employed.
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- 360. Sodomy.
- 361. Criminal libel defined.
- 362. The publication of the libel.
- 363. The meaning of the language used.
- 364. Malicious intention in publishing.
- 365. Evidence of the truth as a defense.

§ 339. Abduction—Proving the taking away or enticement—Corroboration of the prosecutrix.—In criminal law, the act of taking away a woman against her will, or, if she is a minor, against the

will of her parents or some other person having lawful control over her, is an abduction. Whether abduction is a crime in the absence of statute is doubtful. But this is now an unimportant question, as the subject is almost universally regulated by statute. The taking away or enticement must be proved.¹ It need not be proved that the taking was by force or fraud. It is enough that persuasion or enticement was employed.² But evidence that force or fraud was employed in taking the female is always relevant. A direct proposal or express enticement need not be proved. Either may be inferred by the jury from circumstances, such as the association of the prosecutrix and the prisoner, and from the fact that a meeting was arranged for them by some third person.³ Proof of a taking away for any period or distance, however short, is enough.⁴

Sometimes, as in seduction,⁵ it is enacted that a conviction cannot be had upon the uncorroborated testimony of the female. If corroborated evidence is required, it need not be direct or

¹ *Slocum v. People*, 90 Ill. 274, 279. Evidence that the accused merely harbored a female, though for immoral purposes, but in ignorance of whom she was or whence she came, will not sustain a conviction of abduction. *People v. Plath*, 100 N. Y. 590, 594-597, 3 N. E. 790, 53 Am. 236.

Proof in prosecution for kidnapping, *Elliott Evidence*, § 2736; common law rule changed, § 2737. Proof of intent in abduction, § 2738; in kidnapping, § 2744. Proof of taking away or detention, *Elliott Evidence*, §§ 2742, 2743, 2747. Proof of physical force not required, *Elliott Evidence*, § 2741.

² *People v. Marshall*, 59 Cal. 386, 388; *People v. Demousset*, 71 Cal. 611, 613, 12 Pac. 788; *State v. Johnson*, 115 Mo. 480, 22 S. W. 463; *State v. Stone*, 106 Mo. 1, 16 S. W. 890; *State v. Keith*, 47 Minn. 559, 561, 50 N. W. 691; *State v. Jamison*, 38 Minn. 21, 23, 35 N. W. 712; *Wallace v. State*,

147 Ind. 621, 47 N. E. 13; *Beyer v. People*, 86 N. Y. 369; *People v. Seely*, 37 Hun (N. Y.) 190. Amatory letters, written by the defendant, though without date, unsigned by him, and not proved to have been in the possession of the girl abducted, may be proved against him as his admissions. *State v. Overstreet*, 43 Kan. 299, 23 Pac. 572.

³ *People v. Carrier*, 46 Mich. 442, 447, 9 N. W. 487; *People v. Wah Lee Mon*, 59 Hun (N. Y.) 626, 13 N. Y. S. 767; *Huff v. Commonwealth* (Ky.), 37 S. W. 1046, 18 Ky. L. 752.

⁴ *Slocum v. People*, 90 Ill. 274, 276; *State v. Stone*, 106 Mo. 1, 16 S. W. 890; *Reg. v. Baillie*, 8 Cox C. C. 238. Any representation, or suggestion made to influence the female, will, if it induces her to go away, bring the case within the statute, though no direct solicitation be used. *People v. Carrier*, 46 Mich. 442, 9 N. W. 487.

⁵ See §§ 389, 390.

positive, or sufficient alone to convict.⁶ Circumstantial evidence will suffice. But the corroboration should extend to every material fact essential to constitute the crime (among which the taking away is most important), and the criminal intent and identity of the abductor.⁷

§ 340. Abduction of a minor—Proof of the non-consent of the mother or other guardian.—If the female abducted is a minor, the burden is on the state to prove the non-consent of the parent or guardian.⁸ The latter may testify that the taking was without his or her consent,⁹ and perhaps on this point he is an indispensable witness.¹⁰ It is no defense to prove that the taking was without force, and with the consent of the minor.¹¹ As tending to show the lack of the consent of the parents it may be shown that neither of them knew where the child was and that the mother sent the father out to look for her.¹²

§ 341. Chastity of the female—Presumption of chastity.—Where the statute provides a punishment for the abduction of any or every female, evidence of her chastity, or the reverse, is irrele-

⁶ *State v. Keith*, 47 Minn. 559, 562, 50 N. W. 691; Minn. Penal Code, § 241; *Elliott Evidence*, § 2757.

⁷ *People v. Plath*, 100 N. Y. 590, 593, 594, 3 N. E. 790, 53 Am. 236; 1 Cent. 772; *State v. Keith*, 47 Minn. 559, 562, 50 N. W. 691; *People v. Brandt*, 14 N. Y. St. 419, whether the taking or enticement is corroborated is for the jury. *People v. Brown*, 71 Hun (N. Y.) 601, 24 N. Y. S. 1111. See, also, cases cited in §§ 389, 390, *post*. In the absence of statute, corroboration is unnecessary. *State v. Stone*, 106 Mo. 1, 16 S. W. 890.

⁸ But *State v. Burnett*, 142 N. Car. 577, 55 S. E. 72, places the burden of proving the parents' consent on the accused. See, also, *State v. Chisenhall*, 106 N. Car. 676, 11 S. E. 518.

⁹ *Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1074; *State v. Stone*, 106 Mo.

1, 7, 16 S. W. 890; *State v. Baldwin*, 214 Mo. 290, 113 S. W. 1123.

¹⁰ It would seem by analogy that the evidence of the person whose consent was not given is primary evidence of non-consent, as in larceny, where the owner of the goods must, if possible, be called to prove non-consent.

Taking against will of person abducted, *Elliott Evidence*, § 2751.

¹¹ *State v. Stone*, 106 Mo. 1, 7, 16 S. W. 890; *State v. Bobbst*, 131 Mo. 328, 32 S. W. 1149. Proof of age and consent in prosecution for kidnapping, *Elliott Evidence*, § 2739; abduction from house without consent of parent or guardian, *Elliott Evidence*, § 2748; taking from residence or custody, § 2749; taking from parent without consent, § 2750.

¹² *State v. Chisenhall*, 106 N. Car. 676, 11 S. E. 518.

vant.¹⁸ It is otherwise if the statute refers to the taking away of a female of chaste repute or character,¹⁴ and then a single act of illicit intercourse with another man than accused may be proved.¹⁵

Upon the question whether the previous chastity of the prosecutrix will be presumed, or whether the state will have to prove it, as an essential element of its case, the authorities are divided. Some of the cases, basing their reasoning upon the almost universal prevalence of female chastity admitted to exist in modern civilized society, maintain that it is a presumption of law that she is chaste,¹⁶ and cast the burden of proving her lack of chastity on the accused.

It has also been held that no presumption exists either way, but that, in view of the presumed innocence of the accused, the state must, in the first instance, introduce some evidence of chastity.¹⁷ It is competent on the one hand to show that the girl abducted was reputed to be a prostitute¹⁸ and that she had lived in a disreputable house and associated generally with disreputable persons, or, to show her chastity, that she had before the abduction attended Sunday school and church and had been welcomed in good society.¹⁹ The evidence of the unchastity of the prosecutrix must be confined to her conduct, or reputation, prior to the abduction by which she has been corrupted.²⁰ But evidence that after the taking away she had sexual intercourse with the accused

¹⁸ *People v. Demousset*, 71 Cal. 611, 612, 614, 12 Pac. 788; *State v. Johnson*, 115 Mo. 480, 492, 22 S. W. 463; *State v. Gibson*, 111 Mo. 92, 19 S. W. 980; *Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1074; *State v. Bobbst*, 131 Mo. 328, 32 S. W. 1149, 1150.

¹⁴ *Brown v. State*, 72 Md. 468, 476, 20 Atl. 186; *People v. Roderigas*, 49 Cal. 9. Proof of previous unchastity as a defense, *Elliott Evidence*, § 2756.

¹⁵ *Lyons v. State*, 52 Ind. 426, 427.

¹⁶ *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 708n; *State v. Higdon*, 32 Iowa 262; *People v. Brewer*, 27 Mich. 134; *Bradshaw v. People*, 153 Ill. 156,

38 N. E. 652; *Slocum v. People*, 90 Ill. 274; *Elliott Evidence*, § 2755.

Previous chaste character, *Elliott Evidence*, §§ 2753, 2754; character of victim of crime, 14 L. R. A. (N. S.) 725, note.

¹⁷ *Kerr v. United States*, 7 Ind. Terr. 486, 104 S. W. 809; *Commonwealth v. Whittaker*, 131 Mass. 224, 225. See, also, §§ 392, 393.

¹⁸ *Brown v. State*, 72 Md. 468, 20 Atl. 186.

¹⁹ *Bradshaw v. People*, 153 Ill. 156, 38 N. E. 652.

²⁰ *Scruggs v. State*, 90 Tenn. 81, 85, 15 S. W. 1074; *Slocum v. People*, 90

is receivable to show his intent.²¹ Evidence that the mother, or other female relatives of the prosecutrix, had been addicted to lewdness,²² or that the accused had, when a child, lived with a prostitute,²³ is inadmissible as being too remote.

§ 342. Evidence to show age of prosecutrix.—The age of a prosecuting witness alleged to be under the age of consent may be proved by her own testimony,²⁴ though her parents are present and testify to her age.²⁵ A parent may testify to a child's age if he knows the age independently of the record though he had written the date in the family Bible.²⁶ Her evidence is primary and original, though her knowledge is based solely on what her parents have told her,²⁷ and though the fact is also recorded. A non-expert witness may testify to the age of a person seen out of court. He should be asked to describe the person's dress and appearance, and he may then state his opinion as to his or her age.²⁸ He may then be asked, as a test, to give his opinion of the age of a bystander, the latter being called to state his own age in rebuttal.²⁹ In some states in criminal trials, family reputation as to age has been held inadmissible as being hearsay.³⁰ Whether

Ill. 274, 281; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487.

²¹ *Henderson v. People*, 124 Ill. 607, 614, 17 N. E. 68, 7 Am. St. 391; *State v. Johnson*, 115 Mo. 480, 495, 22 S. W. 463; *People v. Brown*, 71 Hun (N. Y.) 601, 24 N. Y. S. 1111.

²² *Scruggs v. State*, 90 Tenn. 81, 86, 15 S. W. 1074.

²³ *Brown v. State*, 72 Md. 468, 480, 20 Atl. 186.

²⁴ *Bain v. State*, 61 Ala. 75; *Commonwealth v. Stevenson*, 142 Mass. 466, 468, 8 N. E. 341; *Mason v. State*, 29 Tex. App. 24, 14 S. W. 71; *Curry v. State*, 50 Tex. Cr. 158, 94 S. W. 1058; *People v. Bernor*, 115 Mich. 692, 74 N. W. 184; *Loose v. State*, 120 Wis. 115, 97 N. W. 526; *Renfro v. State*, 84 Ark. 16, 104 S. W. 542; *State v. Scroggs*, 123 Iowa 649, 96 N. W. 723; *Commonwealth v. Hollis*, 170

Mass. 433, 49 N. E. 632; *Elliott Evidence*, § 2752.

²⁵ *State v. Miller*, 71 Kan. 200, 80 Pac. 51.

²⁶ *Bynum v. State*, 46 Fla. 142, 35 So. 65.

²⁷ *Cherry v. State*, 68 Ala. 29, 31; *State v. Trusty*, 122 Iowa 82, 97 N. W. 989; *Underhill on Ev.*, p. 74.

²⁸ *Commonwealth v. O'Brien*, 134 Mass. 198, 200; *Carr v. State*, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. 905; *State v. Douglass*, 48 Mo. App. 39, 41; *Marshall v. State*, 49 Ala. 21; *Underhill on Ev.*, p. 269; *State v. Romero*, 117 La. 1003, 42 So. 482; *Simpson v. State*, 45 Tex. Cr. 320, 77 S. W. 819.

²⁹ *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

³⁰ *Rex v. Wedge*, 5 Car. & P. 298; *Clark v. Commonwealth (Ky.)*, 92 S. W. 573, 29 Ky. L. 154; *People v. Colbath*, 141 Mich. 189, 104 N. W. 633.

the age of a witness can be determined by the jury solely from his personal appearance has been variously decided. Some cases hold that his personal appearance, aside from direct oral or written proof, is competent to go to the jury,³¹ while others support the contrary proposition.³² But evidence is not admissible to show that the defendant was ignorant of the age of the female, or that he believed or had good reason to believe that she was over the age of consent.³³ A family Bible in which the girl's parents entered the birth of the child within a year after the birth and which has ever since been in his possession is competent.³⁴ This is also true of a piece of paper kept as a record of births in a family when the entries were made by strangers at the request of the parents who were unable to write and the person who made the entry could not be found.³⁵ For a Bible or other family record is not the best proof of birth or age where the person who made the record is alive, competent to testify and can be reached by a subpoena.³⁶

§ 343. Abduction for purposes of prostitution or concubinage.—

When a statute provides that the taking must have been for purposes of prostitution, the evidence must show beyond a reasonable doubt that the accused intended to cause the female to enter upon a life of indiscriminate sexual intercourse.³⁷ It is not

³¹ *Commonwealth v. Emmons*, 98 Mass. 6; *People v. Special Sessions*, 10 Hun (N. Y.) 224.

³² *Stephenson v. State*, 28 Ind. 272; *State v. Arnold*, 13 Ired. (N. Car.) 184; *Bird v. State*, 104 Ind. 384, 3 N. E. 827. See "Inspection," *Underhill on Ev.*, pp. 492-495.

³³ *People v. Dolan*, 96 Cal. 315, 31 Pac. 107; *State v. Johnson*, 115 Mo. 480, 494, 22 S. W. 463; *Riley v. State* (Miss., 1896), 18 So. 117; but *cf. contra*, *Mason v. State*, 29 Tex. App. 24, 14 S. W. 71, and *State v. Houx*, 109 Mo. 654, 19 S. W. 35, 32 Am. St. 686; *Lawrence v. Commonwealth*, 30 Gratt. (Va.) 845; *State v. Newton*, 44 Iowa 45.

³⁴ *Simpson v. State*, 45 Tex. Cr. 320, 77 S. W. 819.

³⁵ *State v. Neasby*, 188 Mo. 467, 87 S. W. 468.

³⁶ *Loose v. State*, 120 Wis. 115, 97 N. W. 526.

³⁷ *Osborn v. State*, 52 Ind. 526. The intention to have sexual intercourse may be inferred from the making of a proposition to procure it, or from an attempt to procure it by force. *Huff v. Commonwealth* (Ky.), 37 S. W. 1046, 18 Ky. L. 752. It is not material to prove or allege the actual accomplishment of the purpose of the accused in this respect. *State v. Bobbst*, 131 Mo. 328, 32 S. W. 1149, 1151; *State v. Knost*, 207 Mo. 18, 105 S. W. 616; *Elliott Evidence*, §§ 2745, 2746; *State v. Fleetwood* (Mo., 1909), 122 S. W. 696.

enough to show that he,³⁸ or some third person, intended to have intercourse with her occasionally.³⁹ Direct evidence that the accused intended to devote his victim to purposes of prostitution is not required. This intent may be inferred from evidence that the woman was taken from her home by a prostitute and her companion directly to a house of prostitution,⁴⁰ and from evidence that, prior to the abduction, illicit relations had existed between the parties.⁴¹

Some statutes provide for the punishment of abduction for purposes of concubinage as well as prostitution. Concubinage may be defined as the informal and illicit cohabitation of a man and woman as husband and wife without being such. Proof of a single act of sexual intercourse is enough when the other material elements of the crime are proved.⁴² No length of time or long continuance of illicit intercourse is necessary. The concubinage exists as soon as the single woman consents to unlawfully cohabit with a man generally, as though the marriage relation existed between them, without any limit as to the duration of such intercourse and actually commences such cohabitation.⁴³ Under an indictment for abducting a chaste woman for the purpose of prostitution specifying only one house of prostitution to which she was taken⁴⁴ it may be proved that she was taken to

³⁸ *State v. Gibson*, 111 Mo. 92, 19 S. W. 980, 982; *Commonwealth v. Cook*, 12 Met. (Mass.) 93; *State v. Brow*, 64 N. H. 577, 15 Atl. 216; *Osborn v. State*, 52 Ind. 526, 528; *State v. Stoyell*, 54 Me. 24, 27, 89 Am. Dec. 716; *State v. Ruhl*, 8 Iowa 447; *United States v. Zes Cloya*, 35 Fed. 493; *State v. Jamison*, 38 Minn. 21, 23, 35 N. W. 712; *Haygood v. State*, 98 Ala. 61, 13 So. 325; *Henderson v. People*, 124 Ill. 607, 612, 17 N. E. 68, 7 Am. St. 391; *State v. Wilkinson*, 121 Mo. 485, 486, 26 S. W. 366. The principal element is the taking away and the purpose of the taking and subsequent cohabitation or sexual intercourse is not essential to be proved, but are merely evidence of intent. *State v. Tucker*, 72 Kan. 481, 84 Pac. 126.

³⁹ *People v. Marshall*, 59 Cal. 386, 388; *State v. McCrum*, 38 Minn. 154, 155, 36 N. W. 102.

⁴⁰ *People v. Carrier*, 46 Mich. 442, 447, 9 N. W. 487, or subsequently, *State v. Johnson*, 115 Mo. 480, 495, 22 S. W. 463; *People v. Claudius*, 8 Cal. App. 597, 97 Pac. 687.

⁴¹ *State v. Gibson*, 111 Mo. 92, 19 S. W. 980, 982; *State v. Gibson*, 108 Mo. 575, 18 S. W. 1109, 1110; *State v. Overstreet*, 43 Kan. 299, 23 Pac. 572; *People v. Spriggs*, 119 App. Div. (N. Y.) 236, 104 N. Y. S. 539.

⁴² *Henderson v. People*, 124 Ill. 607, 17 N. E. 68, 7 Am. St. 391.

⁴³ 3 Inst. 50, 1 Hale P. C. 433.

⁴⁴ *State v. Savant*, 115 La. 226, 38 So. 974.

other houses as showing the purpose of the accused in the abduction.

§ 344. Abortion at common law and by statute distinguished.—It was not a crime at common law to operate upon a pregnant woman for the purpose of procuring an abortion unless she were actually quick with child.^{44a} But if this were the case an abortion was a misdemeanor at common law.⁴⁵ So, anciently, if a woman quick with child killed it herself, or was beaten so that she was delivered of a dead child, it was not murder.⁴⁶ The same principle applied when the acts with an intention to produce an abortion were by another. Even when the mother died as a result of an attempt to procure an abortion, the killing was not regarded as murder, for the death was collateral, and aside from the principal design and the procurement of the abortion was not a felony.⁴⁷ These rules are now generally changed by statute. It is now equally criminal to produce abortion before and after quickening, and if the statute, as is usually the case, makes an abortion a felony, then the death of the woman as a result of the subordinate crime is murder.⁴⁸

§ 345. Intention to produce an abortion—Evidence of other crimes.—An abortifacient intent must be proved.⁴⁹ Evidence of an as-

^{44a} *Commonwealth v. Parker*, 9 Met. (Mass.) 263, 43 Am. Dec. 396; *People v. McDowell*, 63 Mich. 229, 30 N. W. 68; *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248, and compare *contra*, *State v. Fitzgerald*, 49 Iowa 260, 31 Am. 148n; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *Commonwealth v. Wood*, 11 Gray (Mass.) 85.

⁴⁵ *State v. Slagle*, 82 N. Car. 653; *Commonwealth v. Demain*, 6 Pa. L. J. 29, 3 Clark (Pa.) 487.

⁴⁶ *Smith v. State*, 33 Me. 48, 53-60, 54 Am. Dec. 607. See this case for a thorough discussion of the meaning of miscarriage. See, also, *State v. Cooper*, 22 N. J. L. 52-58, 51 Am. Dec. 248; *Mitchell v. Commonwealth*, 78 Ky. 204-210, 39 Am. 227; *Com-*

monwealth v. Surles, 165 Mass. 59, 42 N. E. 502.

⁴⁷ But see *State v. Dickinson*, 41 Wis. 299.

⁴⁸ *Slattery v. People*, 76 Ill. 217, 220. Proof of motive, *Elliott Evidence*, § 2762; advising or administering, sufficiency of proof, § 2763; effect on woman, consent, § 2764; proof of nature of means used, § 2765; proof of pregnancy, § 2766; proof of opportunities and facilities, § 2767; proof of similar acts, § 2768; corroborative proof, § 2769; testimony of accomplice, 98 Am. St. 179; evidence of other crimes, 62 L. R. A. 229, note.

⁴⁹ *Elliott Evidence*, §§ 2760, 2761; 62 L. R. A. 229, note.

sault or beating alone is not enough, though a miscarriage actually should ensue as a result thereof.⁵⁰ If an intention to produce an abortion is shown, it is immaterial that the means employed did not and could not have produced the result intended,⁵¹ and even though it conclusively appear that the abortion resulted from other means.⁵² Evidence that the accused prior,⁵³ or subsequently, to the act alleged, had attempted to procure an abortion on the same woman,⁵⁴ using the same or different means, or that on other occasions he had operated on other women,⁵⁵ or held himself out as being able and willing to commit an abortion,⁵⁶ is always admissible to show his purpose and intention in connection with the act charged.⁵⁷

§ 346. Victim of abortion is not an accomplice—Corroboration when required.—The woman on whom an abortion is performed is not an accomplice,⁵⁸ as she cannot be indicted for the same offense as the accused. But the fact that, from a moral point of view, she is implicated in the crime may be considered by the jury as bearing on her credibility.⁵⁹ A person is not an accomplice

⁵⁰ *State v. Fitzgerald*, 49 Iowa 260, 262, 31 Am. 148n.

⁵¹ *Commonwealth v. Corkin*, 136 Mass. 429, 430; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. 326; *State v. Gedicke*, 43 N. J. L. 86; *State v. Hollenbeck*, 36 Iowa 112; *State v. Fitzgerald*, 49 Iowa 260, 31 Am. 148.

⁵² *State v. Morrow*, 40 S. Car. 221, 18 S. E. 853.

⁵³ *Commonwealth v. Brown*, 14 Gray (Mass.) 419, 432.

⁵⁴ *Scott v. People*, 141 Ill. 195, 30 N. E. 329; *Commonwealth v. Corkin*, 136 Mass. 429.

⁵⁵ *Lamb v. State*, 66 Md. 285, 287, 7 Atl. 399, 67 Md. 524, 10 Atl. 208, 298; *Scott v. People*, 141 Ill. 195, 213, 30 N. E. 329; *State v. Crofford*, 121 Iowa 395, 96 N. W. 889; *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370. See, also, *Underhill on Ev.*, §§ 9, 10.

⁵⁶ *Clark v. People*, 224 Ill. 554, 79 N. E. 941.

⁵⁷ *State v. Smith*, 99 Iowa 26, 68 N. W. 428, 61 Am. St. 219; *Commonwealth v. Wood*, 11 Gray (Mass.) 85, 93; *Commonwealth v. Boynton*, 116 Mass. 343, 345; *Commonwealth v. Follansbee*, 155 Mass. 274, 277, 29 N. E. 471; *Dunn v. People*, 29 N. Y. 523, 527, 86 Am. Dec. 319n; *State v. Vedder*, 98 N. Y. 630, 632; *People v. Hodge*, 141 Mich. 312, 104 N. W. 599; *Clark v. People*, 224 Ill. 554, 79 N. E. 941.

⁵⁸ *Rex v. Hargrave*, 5 Car. & P. 170; *Thompson v. United States*, 30 App. D. C. 352; *State v. Carey*, 76 Conn. 342, 56 Atl. 632; *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586.

⁵⁹ *Commonwealth v. Wood*, 11 Gray (Mass.) 85; *Watson v. State*, 9 Tex. App. 237, 245; *State v. Carey*, 76 Conn. 342, 56 Atl. 632.

who procures an anæsthetic which is administered to the victim, if it is not shown that he knew the purpose for which it was used.⁶⁰ Nor is a woman an accomplice, who, being an intimate friend and confidant of the deceased, knew of her pregnancy and her desire for relief, and accompanied her to the defendant's house, when she did not aid or advise the defendant, and was not present when the crime was committed.⁶¹ Because of the confidential and secret character of the relations existing between physicians and their female patients, and, also, on account of the great danger to which physicians would be exposed if an accusation of the crime of abortion committed on a patient could be sustained by the uncorroborated statement of the latter, it has been enacted by statute that a physician shall not be arrested, indicted or convicted of abortion on the testimony of the woman alone. Her testimony must be corroborated in respect to some material facts which constitute a necessary element in the crime, as, for example, the use of an instrument and the intent.⁶² Very frequently several defendants are jointly indicted for the abortion. In such a case the criminal liability is several as well as joint, and one defendant may be convicted and the other acquitted. Hence, criminatory evidence may be received against either, though the state shall fail to connect the other with it.⁶³

§ 347. Necessity for the operation—Burden of proof.—Whether the abortion was necessary to save life is a question for the jury to determine, principally upon the facts involved in the victim's illness. The opinion evidence of physicians to its necessity, though desirable, is not indispensable.⁶⁴ The burden of establishing that the abortion was actually necessary,⁶⁵ or that the

⁶⁰ Commonwealth v. Follansbee, 155 Mass. 274, 29 N. E. 471.

⁶¹ People v. McGonegal, 42 N. Y. St. 307, 314, 17 N. Y. S. 147, 62 Hun (N. Y.) 622, aff'd without opinion, 136 N. Y. 62, 76, 32 N. E. 616. *Contra*, People v. Spier, 120 App. Div. (N. Y.) 786, 105 N. Y. S. 741.

⁶² People v. Josselyn, 39 Cal. 393, 398.

⁶³ Baker v. People, 105 Ill. 452, 456.

⁶⁴ Hatchard v. State, 79 Wis. 357, 361, 48 N. W. 380.

⁶⁵ People v. McGonegal, 42 N. Y. St. 307, 313, 17 N. Y. S. 147, 62 Hun (N. Y.) 622, without opinion; Bradford v. People, 20 Hun (N. Y.) 309; Elliott Evidence, § 2771, but cf. *contra*, State v. Clements, 15 Ore. 237, 246-249, 14 Pac. 410, citing 1 Greenl., § 78, and State v. Wells (Utah, 1909), 100 Pac. 681, is also *contra*.

accused was advised⁶⁶ it was necessary, is on him as facts peculiarly within his own knowledge.⁶⁷ He need not establish its necessity beyond a reasonable doubt.⁶⁸

§ 348. **Declarations of present pain and suffering and dying declarations by the victim.**—The declarations of the victim are not generally admissible unless they are so far contemporaneous with and explanatory of an act or transaction already in evidence that they may be received as a part of the *res gestæ*,⁶⁹ or unless they consist of exclamations or ejaculations of present suffering uttered during the lying-in.⁷⁰ If the woman not only consents to the operation, but actually seeks and adopts means in furtherance of it, her declarations may be admitted against the accused as the declarations of a fellow-conspirator made to promote the common design.⁷¹ They should be admitted in his favor where

⁶⁶ *Hatchard v. State*, 79 Wis. 357, 48 N. W. 380.

⁶⁷ That the accused *thought* the operation was necessary is irrelevant. *Hatchard v. State*, *supra*.

⁶⁸ *State v. Stevenson*, 68 Vt. 529, 35 Atl. 470; *State v. McCoy*, 15 Utah 136, 49 Pac. 420; *State v. Lee*, 69 Conn. 186, 37 Atl. 75. As to the necessity of the operation see, also, *State v. Watson*, 30 Kan. 281, 1 Pac. 770; *State v. Glass*, 5 Ore. 73.

⁶⁹ *Scott v. People*, 141 Ill. 195, 214, 30 N. E. 329; *State v. Gedicke*, 43 N. J. L. 86, 89; *Commonwealth v. Leach*, 156 Mass. 99, 101, 30 N. E. 163; *Clarke v. People*, 224 Ill. 554, 79 N. E. 241, holding that statements of the victim of a murder resulting from an abortion to a physician in a prior illness as to how such prior illness was the result of an abortion are hearsay.

⁷⁰ *People v. Aikin*, 66 Mich. 460, 475, 33 N. W. 821, 11 Am. St. 512; *Rhodes v. State*, 128 Ind. 189, 191, 27 N. E. 866, 25 Am. St. 429. "These declarations were made by her to the physician at the time he was called upon

as an expert to determine the state of her health, and were statements of her bodily feelings, and the symptoms of her supposed pregnancy. This evidence was admissible * * * from the necessity of learning from the patient herself facts within her own knowledge, which the physician should know to form an intelligent and accurate opinion of her present health and situation. The usual symptoms of pregnancy in its early stage must be obtained from the patient herself, such as the obstruction of the usual course of nature, morning sickness, head-ache, nervousness and other indications hidden from the observation of others." *State v. Gedicke*, 43 N. J. L. 86, 89; *People v. Aikin*, 66 Mich. 460, 475, 33 N. W. 821, 11 Am. St. 512; *Hays v. State*, 40 Md. 633, 651; *Weightnovel v. State*, 46 Fla. 1, 35 So. 856. (Declaration by deceased that she was going to stay at defendant's house for an operation.)

⁷¹ *Solander v. People*, 2 Colo. 48, 62-64.

he alleges that when he first met her as a physician she was suffering from a miscarriage and that he operated on her in good faith in company with another physician.⁷² The fact that the victim is dead does not admit her declarations. They will not be received as dying declarations, though possessing all the characteristics which would admit them in a trial for homicide.⁷³

§ 349. Evidence of the woman's physical condition and illness—Direct and circumstantial evidence.—The evidence will be permitted to take a wide range. Facts elicited by a *post mortem* are always admissible to prove the *corpus delicti*. But evidence of the victim's pregnancy, her medical treatment,⁷⁴ the appearance of her bed and clothing,⁷⁵ and her physical condition,⁷⁶ her health and spirits,⁷⁷ and her relations, including acts of sexual intercourse⁷⁸ with the defendant or with one accused of being an accessory.⁷⁹

⁷² *State v. Fuller* (Ore., 1908), 96 Pac. 456.

⁷³ *Underhill on Ev.*, p. 141. See also, § 106; *Maine v. People*, 9 Hun (N. Y.) 13; *State v. Harper*, 35 Ohio St. 78, 35 Am. 596; *Railing v. Commonwealth*, 110 Pa. St. 100, 1 Atl. 314. In Massachusetts, by St. 1889, c. 100, dying declarations are admissible. *Commonwealth v. Homer*, 153 Mass. 343, 344, 26 N. E. 872. And other declarations are received to show that the former were made under a sense of impending death. *Commonwealth v. Cooper*, 5 Allen (Mass.) 495, 497, 81 Am. Dec. 762; *Commonwealth v. Trefethen*, 157 Mass. 180, 184-188, 31 N. E. 961, 24 L. R. A. 235; *Commonwealth v. Thompson*, 159 Mass. 56, 59, 33 N. E. 1111. In Maryland a statement by the woman accusing the accused of having committed the abortion was received as a dying declaration. *Hawkins v. State*, 98 Md. 355, 57 Atl. 27. The rule is that dying declarations are not admissible unless the

death of the woman is by statute an indispensable element of the crime charged against the accused. *State v. Fuller*, 52 Ore. 42, 96 Pac. 456. See also, *Elliott Evidence*, § 2770: 86 Am. St. 666, note; 63 L. R. A. 916, note.

⁷⁴ *People v. Aikin*, 66 Mich. 460, 474, 33 N. W. 821, 11 Am. St. 512. It is proper to permit the state to prove the previous condition of the woman, that she had never been pregnant before and had never been operated on. *Thomas v. State*, 156 Ala. 166, 47 So. 257.

⁷⁵ *People v. Olmstead*, 30 Mich. 431.

⁷⁶ *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N. E. 471.

⁷⁷ *Commonwealth v. Wood*, 11 Gray (Mass.) 85, 91; *Hays v. State*, 40 Md. 633; *State v. Fletcher* (N. J. L.), 72 Atl. 33.

⁷⁸ *Scott v. People*, 141 Ill. 195, 211, 30 N. E. 329.

⁷⁹ *State v. Carey*, 76 Conn. 342, 56 Atl. 632, to show motive for employment of principal.

subsequent to the date of the alleged abortion, is always admissible.⁸⁰

It need not be shown that the defendant knew the woman was pregnant. If the intent to produce a miscarriage is present, it is enough that the defendant may only have had a mere suspicion that pregnancy existed.⁸¹ But evidence that the defendant had or had not a knowledge of the woman's pregnancy is relevant to support or to rebut a presumption of an abortifacient intention.⁸² Evidence that the defendant advertised he would procure abortions,⁸³ that several months prior to the alleged offense he had articles in his possession which he knew were calculated to produce an abortion,⁸⁴ that he supplied the woman with the means of producing an abortion and gave her minute directions how those means were to be employed,⁸⁵ is admissible. Direct evidence that the defendant committed the crime is not demanded. He may be convicted on circumstantial evidence alone,⁸⁶ if it is sufficient to convince the jury beyond a reasonable doubt that the woman was pregnant,⁸⁷ and that drugs or instruments were used on her by the defendant with a criminal intent.⁸⁸ But a conviction of having in one's possession instruments intended to cause

⁸⁰ *Commonwealth v. Follansbee*, 155 Mass. 274, 277, 29 N. E. 471. In *People v. Aikin*, 66 Mich. 460, 33 N. W. 821, 11 Am. St. 512, it is said, "a history of her illness from the very beginning to the end, in detail, was most proper, and perfectly legitimate to prove the *corpus delicti*, and what the respondent did and said in connection with such illness while in the house attending upon the sick girl was properly a part and parcel of such history."

⁸¹ *Powe v. State*, 48 N. J. L. 34, 36, 2 Atl. 662.

⁸² *Scott v. People*, 141 Ill. 195, 211, 30 N. E. 329; *State v. McLeod*, 136 Mo. 109, 37 S. W. 828; *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370.

⁸³ *Weed v. People*, 3 Thomp. & C. (N. Y.) 50; *People v. Sessions*, 58 Mich. 594, 26 N. W. 291; *People v.*

Hagenow, 236 Ill. 514, 86 N. E. 370. As to proof of venue, *State v. Hogan*, 123 Mo. App. 319, 100 S. W. 528.

⁸⁴ *Commonwealth v. Blair*, 126 Mass. 40, 42; *People v. Vedder*, 98 N. Y. 630; *Commonwealth v. Brown*, 121 Mass. 69.

⁸⁵ *Jones v. State*, 70 Md. 326, 327, 17 Atl. 89, 14 Am. St. 362.

⁸⁶ See § 5.

⁸⁷ *State v. Stewart*, 52 Iowa 284, 286, 3 N. W. 99; *State v. Rogers*, 135 Mo. App. 695, 116 S. W. 469.

⁸⁸ *Commonwealth v. Leach*, 156 Mass. 99, 102, 30 N. E. 163; *Clarke v. People*, 16 Colo. 511, 27 Pac. 724; *State v. Stewart*, 52 Iowa 284, 3 N. W. 99; *Commonwealth v. Adams*, 127 Mass. 15, 19; *Dougherty v. People*, 1 Colo. 514; *Earl v. People*, 99 Ill. 123.

an abortion cannot be sustained by proof of the possession of an instrument which, though often used for that purpose, was made and designed for a different one.⁸⁰

§ 350. **Expert testimony of physicians—Evidence afforded by the post-mortem.**—A physician, if properly qualified, may, it seems, testify to the result of his examination of the person of the woman,⁹⁰ testify to the time required to produce an abortion,⁹¹ that in his opinion an abortion had been procured,⁹² and that death had resulted therefrom,⁹³ that traces of an abortion would remain if one had been committed or attempted,⁹⁴ as to the kind of instrument and the mode of using it which would produce the condition in which the woman was found,⁹⁵ and that certain drugs,^{96a} or instruments,⁹⁶ which the jury may be permitted to inspect, were popularly supposed⁹⁷ to be calculated to produce an abortion. While a physician who made a *post mortem* examination is undoubtedly a competent witness to any of the above matters,⁹⁸ his is not the best nor only proper evidence and any competent medical man may testify. The expert may testify that it is impossible for any woman unaided to have produced an abortion upon herself by the use of a certain instrument. Then

⁸⁰ *State v. Forsythe*, 78 Iowa 595, 597, 43 N. W. 548. Evidence that articles adapted to procure an abortion were found in the abode of the defendant is admissible. *Commonwealth v. Tibbetts*, 157 Mass. 519, 521, 32 N. E. 910. It is not necessary to prove that the defendant used all the instruments alleged in the indictment. It is enough to prove that one of them was used. *Scott v. People*, 141 Ill. 195, 210, 30 N. E. 329; *Rex v. Phillips*, 3 Camp. 73; *Rex v. Coe*, 6 Car. & P. 403; *Moore v. State*, 37 Tex. Cr. 552, 40 S. W. 287.

⁹⁰ *Thomas v. State*, 156 Ala. 166, 47 So. 257.

⁹¹ *People v. McGonegal*, 136 N. Y. 62, 75, 32 N. E. 616.

⁹² *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *Common-*

wealth v. Thompson, 159 Mass. 56, 33 N. E. 1111; *State v. Wood*, 53 N. H. 484; *Stevens v. People*, 215 Ill. 593, 74 N. E. 786.

⁹³ *Commonwealth v. Thompson*, 159 Mass. 56, 59, 33 N. E. 1111; *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370.

⁹⁴ *Bathrick v. Detroit & Co.*, 50 Mich. 629, 16 N. W. 172, 45 Am. 63.

⁹⁵ *Commonwealth v. Sinclair*, 195 Mass. 100, 80 N. E. 799.

^{96a} *Williams v. State* (Tex., 1892), 19 S. W. 897; *Carter v. State*, 2 Ind. 617.

⁹⁶ *Commonwealth v. Brown*, 121 Mass. 69, 81.

⁹⁷ *Carter v. State*, 2 Ind. 617, 618, 624, 625.

⁹⁸ *People v. Sessions*, 58 Mich. 594, 26 N. W. 291.

under the rule that where an opinion has been given that, in the nature of things, a certain thing is impossible, a woman may testify that she has used such an article upon herself for a legitimate purpose.⁹⁹ To explain and emphasize his evidence the physician who made the *post mortem* may exhibit parts of the body preserved in spirits to the jury.¹⁰⁰

§ 351. **Exception to rule regulating privileged communications to physician.**—The question may arise are communications made to a physician by the victim of an abortion privileged so that the physician may decline to disclose them? It is well settled that the statutory privilege cannot be invoked for the sole purpose of shielding a criminal. And though the accused, being a physician, may refuse to testify at all, yet, if he go on the stand, he cannot claim the professional privilege. A distinction is made by the cases as regards the testimony of a physician who has treated the woman after the commission of the alleged crime. If she is living the law forbids the physician to disclose any fact that he may have learned while attending her professionally, for the reason that his statement inevitably tends to convict her of a crime and to discredit and disgrace her.¹ If, however, the woman is dead this evidence cannot incriminate her, though it may disgrace her memory, and on this account the physician may speak.² And, generally, a physician who was consulted as to the best mode of procuring an abortion may state what was said by him and the person who consulted him and what was done by him if anything.³

⁹⁹ *Commonwealth v. Leach*, 156 Mass. 99, 102-107, 30 N. E. 163, Knowlton, J., dissenting. The expert should be interrogated upon hypothetical questions containing facts proved or which may be assumed to be proved. He cannot be asked if he has read or heard the testimony, and to give his opinion thereon. *People v. Aikin*, 66 Mich. 460, 476, 33 N. W. 821, 11 Am. St. 512.

¹⁰⁰ *Commonwealth v. Brown*, 14 Gray (Mass.) 419, 431.

¹ *People v. Murphy*, 101 N. Y. 126, 129, 4 N. E. 326, 54 Am. 661. In this case the public prosecutor sent a physician to make an examination of the woman, to which she voluntarily submitted.

² *Pierson v. People*, 79 N. Y. 424, 35 Am. 524.

³ *Babcock v. People*, 15 Hun (N. Y.) 347, 354. See, *ante*, § 174.

§ 352. Assault and battery—Definition.—An assault has been defined as “any attempt or offer, with force or violence, to do a corporal hurt to another, whether wantonly or with a malicious intention, with such circumstances as denote an intention to do it at the time, coupled with a present ability to carry that intention into execution.”⁴ An assault is involved in the procurement of an abortion, a rape, a robbery and all crimes against the person. But usually the word assault is employed in connection with the word battery. The battery is merely the successful termination of the assault. The assault is the beginning of a crime the motive of which is the infliction of some corporal hurt upon another without that person’s consent, as for example an assault with intent to commit rape. As soon as the person assaulted is touched, no matter how trifling the hurt of touch may be, the battery has been committed.⁵

§ 353. Evidence to show present ability of assailant to put his attempt in action.—Evidence that the accused did not, at the instant of the assault, possess the ability to carry out his attempt to injure, is always relevant to excuse him. If he can show that he

⁴ Roscoe Cr. Ev., p. 304; Tarver v. State, 43 Ala. 354, 356; State v. Di-Guglielmo, 4 Penn. (Del.) 336, 55 Atl. 350; Wilson v. State (Tex. Cr.), 74 S. W. 315; State v. Harrigan, 4 Penn. (Del.) 129, 55 Atl. 5; State v. Mitchell, 139 Iowa 455, 116 N. W. 808 (holding a threat of injury to be an assault). In United States v. Hand, 2 Wash. C. C. (U. S.) 435, 437, 26 Fed. Cas. 15297, the court says: “It is as if one person strike at another with his hands, or with a stick, and misses him; for, if the other be stricken, it is a battery, which is an offense of a higher grade. Or if he shake his fist at another, or present a gun or other weapon, within such distance as that a hurt might be given; or drawing a sword, and brandishing it in a menacing manner.” People v. Carlson (Mich., 1910), 125 N. W. 361, 17 Det. Leg. N. 120; Cox v. State (Fla., 1909), 50 So. 875; Dickinson v. State (Okla. Cr. App. 1909), 104 Pac. 923.

⁵ Alston v. State, 109 Ala. 51, 20 So. 81; Lawson v. State, 30 Ala. 14, 15; Hill v. State, 37 Tex. Cr. 279, 38 S. W. 987, 39 S. W. 666, 66 Am. St. 803; State v. Harrigan, 4 Penn. (Del.) 129, 55 Atl. 5; Combs v. State (Tex. Cr.), 116 S. W. 595. Attempt or offer to strike, Elliott Evidence, § 2824; assault by striking at variance, § 2825; assault and menace, § 2827; drawing firearm, § 2829; pointing firearms, § 2830; drawing unloaded gun, §§ 2831, 2832, 2833; drawing gun—burden of proof, § 2834; time of striking not necessary, § 2737; assault and battery on child by parent, §§ 2843, 2845; assault and battery on pupil by teacher, § 2834; self-defense, §§ 2846, 2847, 2849, 2855; defense of family, § 2850; defense of possession, § 2851; defense of property, § 2852; degree of force,

was not able to do the violent or injurious act which he was threatening, there is no assault.⁶ Accordingly, evidence is relevant to show that the accused was at such a distance that an immediate contact was impossible, as when he threatened one with an ax, at a distance of twenty-five feet,⁷ or pointed a gun at a person who was not in carrying distance,⁸ or pointed an unloaded gun or pistol at a person.⁹ Some cases, however, hold that the physical ability of the accused to carry out his threats or menacing motions is irrelevant.¹⁰ In such cases it will generally appear that the menacing gesture was well calculated to affect, and did in fact affect, the mind and purpose of the person threatened; and that he was led to act against his will, because he believed his assailant had the power to execute his threats. In other words, if the menacing conduct, though not amounting to a battery, actually puts a person in fear of bodily harm, it is not relevant to prove that the accused did not possess the ability to carry his threats into execution.¹¹

§§ 2853, 2854; retaking property, justification, §§ 2856, 2857.

* *Klein v. State*, 9 Ind. App. 365, 368; *People v. Yslas*, 27 Cal. 630, 635; *Thomas v. State*, 99 Ga. 38, 26 S. E. 748; *Smith v. State*, 39 Miss. 521; *Mullen v. State*, 45 Ala. 43, 45, 6 Am. St. 691; *Elliott Evidence*, §§ 2822, 2823, 2826. Proof of mere threats uttered by the defendant, without an attempt at actual violence and the ability to inflict an injury, will not sustain a conviction of assault. *Smith v. State*, 39 Miss. 521, 529; *Williams v. State*, 99 Ga. 203, 25 S. E. 681; *State v. Davis*, 1 Ired. (N. Car.) 125, 35 Am. Dec. 735; *State v. Napper*, 6 Nev. 113; *People v. Lilley*, 43 Mich. 521, 5 N. W. 982; *People v. Jacobs*, 29 Cal. 579; *State v. Martin*, 30 Wis. 216, 225, 11 Am. 567; *Reg. v. James*, 1 Car. & K. (47 Eng. C. L.) 530, 1 Cox C. C. 78; *Chapman v. State*, 78 Ala. 463, 465, 56 Am. 42; *State v. Church*, 63 N. Car. 15, 16; *Robinson v. State*, 31 Tex. 170, 3 Greenl. on Ev. 61. "These authori-

ties clearly show that to constitute an assault there must be an intentional attempt to do injury to the person of another by violence, and that such attempt must be coupled with a present ability to do the injury attempted." *State v. Godfrey*, 17 Ore. 300, 305, 20 Pac. 625, 11 Am. St. 830.

⁷ *Thomas v. State*, *supra*; *State v. Blackwell*, 9 Ala. 79.

⁸ *People v. McKenzie*, 6 App. Div. (N. Y.) 199, 39 N. Y. S. 951; *State v. Yancey*, 74 N. Car. 244; *Tarver v. State*, 43 Ala. 354. What is carrying distance is a question for the jury to determine. *Clark v. State*, 84 Ga. 577, 579, 10 S. E. 1094.

⁹ *Chapman v. State*, 78 Ala. 463, 465, 56 Am. 42.

¹⁰ *Brooke v. State*, 155 Ala. 78, 46 So. 491.

¹¹ *State v. Marsteller*, 84 N. Car. 726, 728; *Crumbley v. State*, 61 Ga. 582, 584; *United States v. Ortega*, 4 Wash. C. C. (U. S.) 531, 27 Fed. Cas. 15971; *State v. Taylor*, 20 Kan.

§ 354. **Intention to do bodily harm—Circumstances which are relevant.**—A present intention to do some bodily harm to the person assaulted by means of the force employed must be proved beyond a reasonable doubt.¹² The gist of assault with intention to do great bodily injury is the intention. The same rule holds with relation to the crime of assault with intent to murder. Hence not only must the assault be proved but the particular intent must also be proved.¹³ Thus, as a general rule, the force or violence which was employed must be proved to have been intentional, or to have been conceived in such a spirit of wantonness as to supply a malicious intention. The accused may always testify to his own intention.¹⁴ Where he alleges the assault was committed in self-defense he should be permitted to testify that he carried, or that he drew a revolver in self-defense, though he should not be permitted to testify that he carried or attempted to use a revolver for any other purpose.¹⁵ The intention to do great bodily harm, to murder or to commit any other crime by means of an assault may be inferred from the circumstances. Circumstantial evidence is usually the only available evidence of intention aside from the declarations of the accused. The intention may be inferred from the force or direction, or from the natural or contemplated result of the violence employed,¹⁶ from the weapon or implement used by the accused,¹⁷ from his threats or prior con-

643, 645; *Thomas v. State*, 99 Ga. 38, 26 S. E. 748; *People v. Morehouse*, 53 Hun (N. Y.) 638, 6 N. Y. S. 763; *State v. Lightsey*, 43 S. Car. 114, 20 S. E. 975.

¹² *State v. Morgan*, 3 Ired. (N. Car.) 186, 38 Am. Dec. 714; *Crawford v. State*, 21 Tex. App. 454, 1 S. W. 446; *Smith v. State*, 39 Miss. 521; *Johnson v. State*, 35 Ala. 363; *State v. Church*, 63 N. Car. 15; *State v. King*, 86 N. Car. 603; *Cowley v. State*, 10 Lea (Tenn.) 282; *People v. Yslas*, 27 Cal. 630; *Commonwealth v. Adams*, 114 Mass. 323, 324, 19 Am. 362; *State v. Davis*, 1 Ired. (N. Car.) 125, 35 Am. Dec. 735; *Keefe v. State*, 19 Ark. 190; *State v. Sears*, 86 Mo. 169, 174; *State v. Carver*, 89 Me. 74, Broadbent, 19 Mont. 467, 48 Pac. 775.

35 Atl. 1030; *Elliott Evidence*, §§ 2818, 2828, 2838.

¹³ *State v. Mills*, 6 Penn. (Del.) 497, 69 Atl. 841; *State v. Mitchell*, 139 Iowa 455, 116 N. W. 808.

¹⁴ *Berry v. State*, 30 Tex. App. 423, 424, 17 S. W. 1080.

¹⁵ *Ryan v. Territory* (Ariz., 1909), 100 Pac. 770.

¹⁶ *People v. Conley*, 106 Mich. 424, 64 N. W. 325; *People v. Miller*, 91 Mich. 639, 643, 52 N. W. 65; *Hill v. State*, 37 Tex. Cr. 279, 38 S. W. 987, 39 S. W. 666, 66 Am. St. 803.

¹⁷ *State v. Dickerson*, 98 N. Car. 708, 3 S. E. 687; *People v. Smith*, 106 Mich. 431, 64 N. W. 200; *Dean v. State*, 89 Ala. 46, 8 So. 38; *State v.*

duct towards the person assaulted and generally from the extent and effect of the injury inflicted,¹⁸ or from any deliberate action which is naturally attempted and usually results in danger to the life of another.¹⁹ Hence it follows that the language of the accused at the time of the commission of the assault and his acts and conduct are relevant to prove his intent.²⁰ The evidence of the condition of the person injured, showing the character of his wounds and the manner in which they were treated by a physician and evidence to show how long he was confined in a hospital is always relevant on a prosecution for assault with intent to murder to show the grievous nature of the injuries inflicted from which injury the court may infer that the accused intended to kill the person assaulted.²¹ Where an assault is claimed to have been committed by one having lawful authority to punish by that method there is a presumption that it was done in the exercising of such authority and the burden of proof is on the prosecution to show otherwise.^{21a} Thus where a question arose as to whether a teacher who had punished a scholar was guilty of an assault, it was held that his intention was to be measured, not alone by the character of the punishment inflicted, but that all the circumstances attendant should be considered by the jury and that all such circumstances were relevant.²²

A specific intent to cause the very injury, and that only which ensued, need not be proved. If bodily harm was intended, proof of any injury will suffice.²³

Intent may be inferred from circumstances, Elliott Evidence, § 2841.

¹⁸ State v. Remington, 50 Ore. 99, 91 Pac. 473.

¹⁹ Conn v. People, 116 Ill. 458, 464, 6 N. E. 463; Cowley v. State, 10 Lea (Tenn.) 282, 284; Commonwealth v. Randall, 4 Gray (Mass.) 36; State v. Aleck, 41 La. Ann. 83, 5 So. 639; People v. Miller, 91 Mich. 639, 644, 52 N. W. 65; Ullman v. State, 124 Wis. 602, 103 N. W. 6; Combs v. State, 55 Tex. Cr. 332, 116 S. W. 595.

²⁰ State v. Mills, 6 Penn. (Del.) 497, 69 Atl. 841.

²¹ Wright v. State, 148 Ala. 596, 42 So. 745.

^{21a} Elliott Evidence, § 2844. Assault and battery by parent on child, Elliott Evidence, §§ 2843, 2845.

²² Greer v. State (Tex., 1907), 106 S. W. 359. See also, Elliott Evidence, § 2840. Intent is not always necessary, Elliott Evidence, §§ 2820, 2839. Assault with intent to ravish character of victim, 14 L. R. A. (N. S.) 724, note.

²³ People v. Marseiler (Cal., 1886), 11 Pac. 503; Cowley v. State, 10 Lea (Tenn.) 282, 284; Tarver v. State, 43

§ 355. **Evidence of other assaults.**—It is not permissible to prove assaults by the defendant upon other persons or upon the same person at other times and places, unless there is some connection between them. But where the specific intent present in making the assault is in question, evidence of other assaults is relevant. Thus where an assault with intent to kill is alleged, the previous relations of the parties, whether friendly or otherwise, are relevant,²⁴ and it may then be shown that, at some prior time and other place, the defendant assaulted the same person.²⁵

§ 356. **Assault with deadly weapons—Evidence to show character of weapon used.**—The expression “deadly weapon,” synonymous with dangerous weapon, occurs very often in statutes defining the character of assaults, and in the common law of homicide. Some weapons are so clearly deadly when used under particular circumstances that the court may declare them so as a matter of law. So it has been held that a club,²⁶ a large stone,²⁷ a chisel,²⁸ a loaded gun or pistol,²⁹ or one unloaded and used as a club,³⁰ a knife, when used in striking distance,³¹ is a deadly weapon *per*

Ala. 354; Reg. v. Fretwell, 9 Cox C. C. 471, 10 L. T. (N. S.) 428, 12 Wkly. Rep. 751; People v. Miller, 91 Mich. 639, 52 N. W. 65; Elliott Evidence, §§ 2819, 2821. Thus, pointing a pistol alone may, if nothing else is proved, justify an inference of an intent to harm. But this inference may be rebutted by a declaration by the accused that he does not intend to shoot, leaving it a question for the jury to find the intent on all the facts. The circumstances may show that his statement was untrue and employed to put the person off his guard. Richels v. State, 1 Sneed (Tenn.) 606, 608.

²⁴ State v. Forsythe, 89 Mo. 667, 1 S. W. 834; State v. Sanders, 106 Mo. 188, 17 S. W. 223; State v. Montgomery, 65 Iowa 483, 22 N. W. 639; Nelson v. State (Tex. Cr. App.), 20 S. W. 766. Evidence of other crimes

in prosecution for assault, see 62 L. R. A. 193, extensive note.

²⁵ Pontius v. People, 82 N. Y. 339; State v. Kline, 54 Iowa 183, 6 N. W. 184; State v. Patrick, 107 Mo. 147, 17 S. W. 666; State v. Place, 5 Wash. 773, 32 Pac. 736; Owen v. State (Tex. Cr. App. 1910), 125 S. W. 405.

²⁶ State v. Phillips, 104 N. Car. 786, 10 S. E. 463.

²⁷ Regan v. State, 46 Wis. 256, 50 N. W. 287.

²⁸ Commonwealth v. Branham, 8 Bush (Ky.) 387.

²⁹ State v. Painter, 67 Mo. 84; Wilson v. State, 37 Tex. Cr. 156, 38 S. W. 1013; Henningburg v. State, 153 Ala. 13, 45 So. 246.

³⁰ Riggs v. Commonwealth (Ky.), 33 S. W. 413, 17 Ky. L. 1015; Allen v. People, 82 Ill. 610.

³¹ Walters v. State, 37 Tex. Cr. 388, 35 S. W. 652; Ferguson v. State, 6 Tex. App. 504; Brown v. State, 1:2

se, and proof of an assault with any of these will sustain a conviction of an assault with a deadly weapon.

If the evidence as to the character of the weapon or the mode in which it was used is at all conflicting, the determination of the question whether a weapon is deadly is exclusively for the jurors, to decide upon all the facts.³² The size, shape, character and weight of the weapon or implement used, its manner of use, the strength and physical condition of the defendant and of the person attacked, are all relevant.³³

§ 356a. Declarations constituting a part of the *res gestae*.—The declarations and acts of all participating in the assault, if constituting a part of the *res gestae* are admitted against any one of the defendants.³⁴ In a case where there is a positive contradiction as to which party is the aggressor, but the accused admits that he struck the prosecuting witness, the statements of third parties which show or tend to show that a conspiracy had been formed to mob the accused, are admissible though the accused had not knowledge of it.³⁵ The exclamations of the person assaulted strictly contemporaneous with the assault are relevant. But those which are uttered thereafter are usually rejected upon the ground that they are not *res gestae*.³⁶

§ 357. Evidence of threats and previous hostility.—The prior

Ala. 287, 38 So. 268; State v. Spough, 199 Mo. 147, 97 S. W. 901.

³² Smallwood v. Commonwealth (Ky.), 33 S. W. 822, 17 Ky. L. 1134; People v. Leyba, 74 Cal. 407, 16 Pac. 200.

³³ State v. Godfrey, 17 Ore. 300, 307, 20 Pac. 625, 11 Am. St. 830; Skidmore v. State, 43 Tex. 93; State v. McDonald, 67 Mo. 13; Kouns v. State, 3 Tex. App. 13; Berry v. Commonwealth, 10 Bush (Ky.) 15. "Some weapons are *per se* deadly; others, owing to the manner in which they are used, become deadly. A gun, a pistol, or a dirk-knife, is of itself deadly; a small pocket knife, walk-

ing cane, a switch of the size of a woman's finger, if strong and tough, may be made a deadly weapon if the aggressor shall use such instrument with great or furious violence, and especially, if the party assailed should have comparatively less power than the assailant, or be helpless and feeble." State v. Huntley, 91 N. Car. 617.

³⁴ Blount v. State, 49 Ala. 381; Colquitt v. State, 34 Tex. 550.

³⁵ Tompkins v. State, 17 Ga. 356.

³⁶ People v. Hicks, 98 Mich. 86, 56 N. W. 1102; State v. Noeninger, 108 Mo. 166, 18 S. W. 990; Veal v. State, 8 Tex. App. 474.

threats of the accused are always relevant to illustrate his mental attitude towards the prosecuting witness at the time of the assault,³⁷ unless subsequent to the making of the threats the parties have become friends.³⁸ If the accused claims that he acted in self-defense, he may prove the prior general hostility of the injured party to him, including threats made to others and communicated to him,³⁹ as well as the fact that the person had assaulted others, and had a reputation for quarrelsomeness.⁴⁰ The reputation of the prosecuting witness for peaceableness is then relevant.⁴¹

The burden of proving justification for an assault is upon the accused,⁴² and inasmuch as mere words, however abusive or vexatious, will never justify an assault or battery, the accused will not be permitted to prove bad language on the part of the person assaulted.⁴³

But where the assault is alleged to have grown out of writings or letters written by the prosecuting witness to the accused and containing abusive language, the writings are admissible to show the condition of affairs existing between the parties though they may not supply justification.⁴⁴

If the accused is shown to have been acquainted with the person assaulted, and to have known his disposition either by reputation or actual acquaintance, it is proper to permit him to prove that the prosecuting witness was reputed to have a quarrelsome disposition.⁴⁵

³⁷ *State v. Henn*, 39 Minn. 476, 40 N. W. 572, and *ante*, § 326.

³⁸ *People v. Deitz*, 86 Mich. 419, 49 N. W. 296; *Sharp v. People*, 29 Ill. 464.

³⁹ *Bolton v. State* (Tex. Cr., 1897), 39 S. W. 672; *Rauk v. State*, 110 Ind. 384, 11 N. E. 450; *Martin v. State*, 5 Ind. App. 453, 456; *Read v. State*, 2 Ind. 438. But not uncommunicated threats. *Guy v. State*, 37 Ind. App. 691, 77 N. E. 855.

⁴⁰ *People v. Frindel*, 58 Hun (N. Y.) 482, 12 N. Y. S. 498. See *ante*, § 324.

⁴¹ *Bowlus v. State*, 130 Ind. 227, 230, 28 N. E. 1115.

⁴² *Badger v. State*, 5 Ga. App. 477, 63 S. E. 532.

⁴³ *State v. Harrigan*, 4 Penn. (Del.) 129, 55 Atl. 5; *Sutton v. State*, 2 Ga. App. 659, 58 S. E. 1108; *State v. Kimbrell* (N. C. 1909), 66 S. E. 208.

⁴⁴ *De Silva v. State*, 91 Miss. 776, 45 So. 611; *Brooke v. State*, 155 Ala. 78, 46 So. 491, under Cr. Code 1896, § 4345, admitting proof of opprobrious words.

⁴⁵ *People v. Kirk*, 151 Mich. 253, 114 N. W. 1023, 14 Detroit Leg. N. 927.

§ 358. **Robbery**—Intention present and force employed.—Robbery is the felonious and forcible taking of goods or money from the person of another by violence or by putting him in fear and against his will.⁴⁶ To constitute the crime of robbery there must be violence or intimidation of such a character as that the injured party is put in fear of such a nature as in reason and common experience is likely to induce a person to part with his property against his will and for the time being suspend the power of exercising his will.⁴⁷ Stated in a few words the taking of property must be accomplished by force or by fear, and the force or the fear must precede the taking.⁴⁸ Thus snatching a watch from the person of the owner or snatching money from his hand constitutes robbery though the force used is very slight.⁴⁹

The elements in the crime of robbery which have been just described distinguish it from larceny, for if money or goods are obtained by trick or contrivance, rather than by force or fear, the crime is larceny and not robbery.⁵⁰

If there be force employed to secure the possession of the property its degree is immaterial if it was sufficient to compel the owner to part with his property.⁵¹ Usually if the jury have a reasonable doubt as to the exercise of force or violence, they may convict of larceny where that crime is alleged in the indictment.⁵² It is no variance to prove that the crime was accomplished

⁴⁶ *State v. McAllister*, 65 W. Va. 97, 63 S. E. 758; *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936; *Brown v. Commonwealth* (Ky., 1909), 117 S. W. 281. It was an infamous crime at the common law. *United States v. Evans*, 28 App. D. C. 264.

⁴⁷ *Steward v. People*, 224 Ill. 434, 79 N. E. 636.

⁴⁸ *Jones v. Commonwealth*, 115 Ky. 592, 74 S. W. 263, 24 Ky. L. 2481, 103 Am. St. 340.

⁴⁹ *Perry v. Commonwealth* (Ky.), 85 S. W. 732, 27 Ky. L. 512; *Stockton v. Commonwealth*, 125 Ky. 268, 101 S. W. 298, 30 Ky. L. 1302; *Brown v. Commonwealth* (Ky., 1909), 117 S. W. 281.

⁵⁰ *Routt v. State*, 61 Ark. 594, 34 S. W. 262; *People v. Church*, 116 Cal. 300, 48 Pac. 125; *Johnson v. State*, 35 Tex. Cr. 140, 32 S. W. 537; *Pickrel v. Commonwealth* (Ky.), 30 S. W. 617, 17 Ky. L. 120; *Huber v. State*, 57 Ind. 341, 26 Am. 57; *Doyle v. State*, 77 Ga. 513; *McCloskey v. People*, 5 Park. Cr. (N. Y.) 299; *People v. McGinty*, 24 Hun (N. Y.) 62; *Dawson v. Commonwealth* (Ky.), 74 S. W. 701, 25 Ky. L. 5; *State v. Duffy*, 124 Iowa 705, 100 N. W. 796.

⁵¹ *State v. Parsons*, 44 Wash. 299, 87 Pac. 349, 120 Am. St. 1003.

⁵² *State v. Taylor*, 140 Iowa 470, 118 N. W. 747.

by both force and fear where it is alleged that the taking of the property was accomplished by force only.^{52a}

"Putting in fear" is equivalent to the use of force. Facts sufficient to imply the greatest degree of terror or fright need not be proved. It is usually enough that the facts proved show such an employment of force alone or with threatening language or gestures as will result in the person robbed surrendering his property without or against his consent.⁵³ The party who was robbed may testify that he was in fear of violence at the hands of the accused, and may state his oral threats and violent gestures,⁵⁴ as, for example, that the accused pointed a pistol at him and ordered him to throw up his hands.⁵⁵ The fact that force was employed may usually be proved by the testimony of the person robbed.⁵⁶ He may testify that he did not consent⁵⁷ and may show the nature and extent of the violence inflicted.⁵⁸ In case he is contradicted on this point, evidence of all circumstances, such as the strength and physical condition of the parties and the place where the crime was committed may be received.⁵⁹

It may also be presumed by the jury, upon whom is the exclusive determination of the question, that the person robbed was

^{52a} State v. Sanders, 14 N. Dak. 203, 103 N. W. 419.

⁵³ United States v. Jones, 3 Wash. C. C. (U. S.) 209, 216, 26 Fed. Cas. 15494; Ashworth v. State, 31 Tex. Cr. 419, 20 S. W. 982; Tones v. State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. 759, 1 L. R. A. (N. S.) 1024n; State v. Sanders, 14 N. Dak. 203, 103 N. W. 419; State v. Vaughan, 199 Mo. 108, 97 S. W. 879; Fannin v. State, 51 Tex. Cr. 41, 100 S. W. 916, 123 Am. St. 874, 10 L. R. A. (N. S.) 744n; Grant v. State, 125 Ga. 259, 54 S. E. 191. As to proof of identity of accused, see Elliott Evidence, § 3133; evidence of value, § 3135; evidence of good character of defendant, 103 Am. St. 901, note; testimony of accomplice, 98 Am. St. 172, note; circumstantial evidence, Elliott Evidence, §§ 3138, 3139; defenses, § 3140.

⁵⁴ Dill v. State, 6 Tex. App. 113; Long v. State, 12 Ga. 293.

⁵⁵ State v. Sanders, 14 N. Dak. 203, 103 N. W. 419.

⁵⁶ Tones v. State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. 759, 1 L. R. A. (N. S.) 1024n.

⁵⁷ Davis v. State, 159 Ala. 104, 48 So. 694.

⁵⁸ Brown v. State, 120 Ala. 342, 25 So. 182.

⁵⁹ People v. McElroy, 14 N. Y. S. 203, 60 Hun (N. Y.) 577, without opinion. The physical condition of the person robbed, after the crime, may be proved by the testimony of a physician who had examined him. Commonwealth v. Flynn, 165 Mass. 153, 42 N. E. 562. His declarations and exclamation, "I have been robbed," may be received as *res geste* if contemporaneous. Walling v. State, 55 Tex. Cr. 254, 116 S. W. 813.

put in fear from acts of violence on the part of the accused.⁶⁰ Actual fear of life or bodily injury on the part of the victim need not be strictly and precisely proved as the law will presume the existence of fear where there appears to be just ground for it.⁶¹ The *animus furandi* must be proved. It must be shown that the accused took the property without the consent of the owner, intending to deprive him of it and to convert it to another use.⁶² This intent may be inferred from the same description of facts and circumstances which would justify a similar inference in a charge of larceny.⁶³ Thus, the intent may be inferred from the circumstances attendant upon the taking of the property; necessarily the taking implies that the person robbed must have been in possession of the thing taken which must usually be of some value.⁶⁴

The accused may always show any facts tending to prove that he took the property in good faith; he may show that he was an officer of the law, that he had arrested the prosecuting witness, and that he had searched him and had taken his personal property from him in order that it might be safely kept during his imprisonment. If, however, in doing this he uses force which is sufficient to overcome his resistance, and does this with the intent

⁶⁰ State v. Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. 575; McNamara v. People, 24 Colo. 61, 48 Pac. 541; State v. Lamb, 141 Mo. 298, 42 S. W. 827; Tones v. State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. 759, 1 L. R. A. (N. S.) 1024n.

⁶¹ McNamara v. People, 24 Colo. 61, 48 Pac. 541; State v. Lawler, 130 Mo. 366, 32 S. W. 979; State v. Lamb, 141 Mo. 298, 42 S. W. 827; Jones v. State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. 759, 1 L. R. A. (N. S.) 1024n; Elliott Evidence, § 3131.

⁶² Sledge v. State, 99 Ga. 684, 26 S. E. 756; State v. Smith, 174 Mo. 586, 74 S. W. 624; Triplett v. Commonwealth, 122 Ky. 35, 91 S. W. 281, 28 Ky. L. 974; Jones v. State (Miss., 1909), 48 So. 407; State v. Spray, 174

Mo. 569, 74 S. W. 846; State v. McCoy, 63 W. Va. 69, 59 S. E. 758; State v. Carroll, 14 Mo. 392, 113 S. W. 1051, 21 L. R. A. (N. S.) 311n.

⁶³ State v. Woodward, 131 Mo. 369, 33 S. W. 14; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. 242; Jordan v. Commonwealth, 25 Gratt. (Va.) 943; People v. Hughes, 11 Utah 100, 39 Pac. 492; Long v. State, 12 Ga. 293; State v. Deal, 64 N. Car. 270; Tones v. State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. 759, 1 L. R. A. (N. S.) 1024n; Triplett v. Commonwealth, 122 Ky. 35, 91 S. W. 281, 28 Ky. L. 974; Elliott Evidence, § 3132. See, also, §§ 292, 293.

⁶⁴ Tones v. State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. 759, 1 L. R. A. (N. S.) 1024n.

of taking his property or money from him, the right of search is not a defense, but the jury must determine the intent of the officer in taking the property upon all the circumstances.⁶⁵

Where the accused alleges that at the time of committing the crime or robbery, he was incapable of entertaining any intent, because of his intoxication, the question of intent is for the jury on all the circumstances.⁶⁶ It may be proved that the thief was disguised. So, too, in robbery as in larceny, the possession of the stolen property by the accused, if recent and unexplained, may justify an inference that he was implicated in it.⁶⁷ But the accused must always be allowed to explain his possession of the property, and on the whole, the possession of the property, while a circumstance to be considered in any case, is by no means conclusive of the guilt of the accused.⁶⁸

And it has also been held that it was proper to permit the state to show that articles taken from the person robbed were found in the possession of a woman with whom the accused had been very intimate where the possession was recent.⁶⁹ The ownership of the money may be inferred as being in the person robbed from the fact that it was taken from his possession.⁷⁰ Evidence that the defendant owns property is inadmissible.⁷¹ So it has been held that evidence to show that the accused for a long time prior to the date of the crime, had a large sum of money in his

⁶⁵ *State v. McAllister*, 65 W. Va. 97, 63 S. E. 758; *Wynn v. Commonwealth* (Ky., 1909), 122 S. W. 516.

⁶⁶ *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. 403.

⁶⁷ *State v. Harris*, 97 Iowa 407, 66 N. W. 728; *State v. Wyatt*, 124 Mo. 537, 27 S. W. 1096; *Bradley v. State*, 103 Ala. 29, 15 So. 640; *State v. Balch*, 136 Mo. 103, 37 S. W. 808; *People v. Mackinder*, 80 Hun (N. Y.) 40, 29 N. Y. S. 842; *State v. Moore*, 106 Mo. 480, 17 S. W. 658; *Tabor v. State*, 52 Tex. Cr. 387, 107 S. W. 1116; *Elliott Evidence*, § 3136. Evidence tending to show that the taking was under claim of title is admissible to show that there was not

felonious intention. *Brown v. State*, 28 Ark. 126; *State v. Hollyway*, 41 Iowa 200, 20 Am. 586; *Carr v. State*, 55 Tex. Cr. 352, 116 S. W. 591.

⁶⁸ *People v. Hallam*, 6 Cal. App. 331, 92 Pac. 190.

⁶⁹ *Clay v. State*, 122 Ga. 136, 50 S. E. 56.

⁷⁰ *Bow v. People*, 160 Ill. 438, 43 N. E. 593; *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *Riggs v. State*, 104 Ind. 261, 3 N. E. 886; *People v. McDonald* (Cal., 1896), 45 Pac. 1005; *State v. Adams*, 58 Kan. 365, 49 Pac. 81; *State v. Howard*, 30 Mont. 518, 77 Pac. 50; *Elliott Evidence*, § 3130.

⁷¹ *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31.

house is inadmissible.⁷² But on the other hand it may be proved that the accused on the day before the robbery was without money, and wore shabby clothing and, that on the day after the robbery he appeared in a new suit of clothes and exhibited or boasted of having large sums of money in his possession.⁷³ The person robbed may always testify that he had the money or other property which is alleged to have been stolen in his possession. These facts may be proved by other persons. Indeed, it may be shown that shortly before the robbery he was seen to have been spending money and that he exhibited money, had it in his possession, and particularly that he exhibited or spoke of having money in the presence of the accused.⁷⁴ Evidence of other robberies or of attempts to commit other robberies at or about the same time as the one for which the accused is being tried and with which the accused is connected may be shown to identify the accused or to show his intention.⁷⁵ Anything the person robbed may have said during the assault which preceded or accompanied the robbery, if a part of the *res gestæ*, is admissible.⁷⁶

§ 359. The crime of mayhem.—The facts which must be proved to sustain an allegation of mayhem at common law are: First, the injury; second, malice,⁷⁷ and third, an intent to maim and disfigure.⁷⁸ Thus a conviction of an attempt to commit mayhem cannot be sustained by proof of the throwing of red pepper into

⁷² Craig v. State, 171 Ind. 317, 86 N. E. 397.

⁷³ People v. Sullivan, 144 Cal. 471, 77 Pac. 1000.

⁷⁴ Boyd v. State, 153 Ala. 41, 45 So. 591.

⁷⁵ State v. Howard, 30 Mont. 518, 77 Pac. 50; Wyatt v. State, 55 Tex. Cr. 73, 114 S. W. 812; Tabor v. State, 52 Tex. Cr. 387, 107 S. W. 1116, 62 L. R. A. 193, extensive note; Elliott Evidence, § 3137.

⁷⁶ State v. Ripley, 32 Wash. 182, 72 Pac. 1036; State v. Finn, 199 Mo. 597, 98 S. W. 9; Elliott Evidence, § 3134.

⁷⁷ See Green v. State, 151 Ala. 14, 44 So. 194, 125 Am. St. 17, as to distinction between "malice" and "malice aforethought."

⁷⁸ United States v. Gunther, 5 Dak. 234, 241, 38 N. W. 79; Bowers v. State, 24 Tex. App. 542, 549, 7 S. W. 247, 5 Am. St. 901; Davis v. State, 22 Tex. App. 45, 51, 2 S. W. 630; State v. Johnson, 58 Ohio St. 417, 51 N. E. 40, 65 Am. St. 769n; Carpenter v. People, 31 Colo. 284, 72 Pac. 1072, holding that, under Laws 1895, p. 156, c. 69, a specific intent to maim is not necessary to be proved.

the eye of another where it appears that the substance thrown would not destroy the eye unless allowed to remain an extraordinary time.⁷⁹ Malice,⁸⁰ and the specific intent to injure, disfigure or maim may always be inferred from the circumstances under the rule that a man may be inferred to have intended the natural, probable and reasonable consequences of his acts.⁸¹ Pre-meditation existing prior to the conflict in which the injury was inflicted is not necessary.⁸²

The circumstances attending the injury may be shown to rebut the intent by proving the defendant inflicted the injury under pressure of necessity or while lawfully defending himself, or that it was purely accidental.⁸³ A previous assault upon the defendant is admissible in justification. It must be made to appear that the striking was in self-defense and that the force employed was in proportion to the attack. *Son assault* is a good plea in mayhem, but it must appear that the resistance was in proportion to the nature of the injury offered.⁸⁴

§ 360. **Sodomy.**—This crime may be defined as the carnal copulation of one human being with another in a manner "against nature," or, to be more definite, in any manner than that provided by nature. Bestiality is the carnal copulation of a man or woman with a beast.⁸⁵ Writers upon criminal law have frequently, and with reason, called attention to the ease with which one may be accused of this crime and the extreme difficulty of proving its

⁷⁹ Dahlberg v. People, 225 Ill. 485, 80 N. E. 310.

⁸⁰ State v. Bloedow, 45 Wis. 279; State v. Evans, 1 Hayw. (N. Car.) 281.

⁸¹ State v. Hair, 37 Minn. 351, 354, 34 N. W. 893; State v. Jones, 70 Iowa 505, 30 N. W. 750; Davis v. State, 22 Tex. App. 45, 51, 2 S. W. 630; State v. Abram, 10 Ala. 928, 931; State v. Girkin, 1 Ired. (N. Car.) 121, 122; Ridenour v. State, 38 Ohio St. 272, 274.

⁸² State v. Simmons, 3 Ala. 497, 498; State v. Crawford, 2 Dev. (N. Car.) 425, 427.

⁸³ State v. Hair, 37 Minn. 351, 354, 34 N. W. 893. Compare Green v. State, 151 Ala. 14, 44 So. 194, 125 Am. St. 17.

⁸⁴ Hayden v. State, 4 Blackf. (Ind.) 546, 547; Green v. State, 151 Ala. 14, 44 So. 194, 125 Am. St. 17. A previous threat or attempt by the defendant to assault the prosecuting witness before the final assault is relevant. People v. Demasters, 109 Cal. 607, 42 Pac. 236.

⁸⁵ See Bish. Cr. Law, 1029, 4 Bl Com. 415; Commonwealth v. Thomas, 1 Va. Cas. 307.

commission. If the crime is consummated, both parties consenting thereto, each is an accomplice of the other and neither can be convicted upon the uncorroborated testimony of the other.⁸⁶ And, as the crime is usually committed when no third person is present, corroboration is very difficult, if not impossible to obtain, except so far as it may be found in circumstances which would naturally accompany the commission of such an offense.⁸⁷ When, however, the crime is attempted or committed without or against the consent of the pathic party he is not an accomplice, and a conviction may be had upon his testimony alone. Whether he consented is a question for the jury⁸⁸ in all cases where the evidence is at all doubtful. Evidence to show that he did or did not consent is always relevant,⁸⁹ particularly in the case of a charge of an assault with intent to commit sodomy.^{89a} But a minor under twelve years of age cannot consent so that his submission without resistance does not constitute a defense.⁹⁰

§ 361. Criminal libel defined.—This may be defined as a publication in print or writing without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, ridicule or contempt.⁹¹ The state must prove the following facts: First, the publication by the defendant; second, that the matter published is libelous; third, the intent, and, fourth, when the truth is admissible in defense, the falsity of the assertions made.⁹²

⁸⁶ *Medis v. State*, 27 Tex. App. 194, 11 S. W. 112, 11 Am. St. 192.

⁸⁷ See *Williams v. Commonwealth* (Va., 1895), 22 S. E. 859; *Territory v. Mahaffey*, 3 Mont. 112; *Hodges v. State*, 94 Ga. 593, 19 S. E. 758; *People v. Boyle*, 116 Cal. 658, 48 Pac. 800. The declarations of the person assaulted are not admissible unless said in the presence of the accused, as direct evidence, though perhaps admissible as corroboration. *Foster v. State*, 1 Ohio Cir. Ct. 467, 1 Ohio Cir. Dec. 261; *State v. Gruso*, 28 La. Ann. 952.

⁸⁸ *People v. Hickey*, 109 Cal. 275, 41

Pac. 1027. See *Commonwealth v. Snow*, 111 Mass. 411.

⁸⁹ *State v. Smith*, 137 Mo. 25, 38 S. W. 717.

^{89a} *People v. Hickey*, 109 Cal. 275, 41 Pac. 1027.

⁹⁰ *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. 170.

⁹¹ *People v. Crowell*, 3 Johns. Cas. (N. Y.) 337; *Raker v. State*, 50 Neb. 202, 69 N. W. 749; *People v. Ritchie*, 12 Utah 180, 42 Pac. 209; *Elliott Evidence*, § 3169.

⁹² *Odgers on Libel and Slander* 580. Criminal libel is "malicious defamations, expressed in printing or writ-

§ 362. **The publication of the libel.**—The publication of the libel in language substantially as laid in the indictment must be proved.⁹³ A slight variance between the publication as proved by a copy and the indictment may be disregarded. If the libel is in writing the production of the writing, with sufficient proof that it is in the handwriting of the accused, is enough.⁹⁴ If the libel was printed either in a book or newspaper, the production of a copy with proof that it was purchased within the territorial jurisdiction of the court, will raise a presumption of publication.⁹⁵ Proof that the accused is the editor or publisher of the newspaper in which the alleged libelous article was published is sufficient to connect him with the publication. He cannot prove that he never saw the libel in fact. Nor can it be shown in his favor that he had no actual knowledge of the publication.⁹⁶ To sustain the allegation of publishing in a charge of criminal libel it is not necessary to prove that the matter complained of was actually seen by another person. If it is proved beyond a reasonable doubt that the accused knowingly displayed the libelous matter, or parted with it under circumstances which exposed it to be seen or understood by another than himself, the proof suffices.⁹⁷ It

ing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is living, and thereby to expose him to public hatred, contempt and ridicule." *State v. Shaffner*, 2 Penn. (Del.) 171, 44 Atl. 620.

⁹³ A slight variance between the publication as proved by a copy and the indictment may be disregarded. *Collins v. People*, 115 Ill. App. 280; *Hartford v. State*, 96 Ind. 461, 49 Am. 185; *McArthur v. State*, 41 Tex. Cr. 635, 57 S. W. 847; *Gipson v. State* (Tex.), 1903, 77 S. W. 216.

⁹⁴ *Rex v. Beare*, 1 Ld. Rd. 414.

⁹⁵ *Commonwealth v. Morgan*, 107 Mass. 199, 202. And evidence to show the number of papers containing the libel which were printed or sold, or to prove its general circulation, is always competent. *Boyle v. State*, 6 Ohio Cir. Ct. 163, but never

indispensable. *Baker v. State*, 97 Ga. 452, 25 S. E. 341.

⁹⁶ *Commonwealth v. Morgan*, 107 Mass. 199, 202. Papers signed by the accused as president of the paper publishing the libel are admissible to show his connection with the paper. *Boyle v. State*, 6 Ohio Cir. Ct. 163, 3 Ohio Cir. Dec. 397. Hostile feeling between the accused and the prosecuting witness may be shown. *People v. Ritchie*, 12 Utah 180, 42 Pac. 209. See also, *United States v. Crandell*, 4 Cranch C. C. (U. S.) 683, 25 Fed. Cas. 14885, as to proof of finding other copies of same libel in possession of the accused.

⁹⁷ *Giles v. State*, 6 Ga. 276; *New York Penal Code*, 245. See also, *Haase v. State*, 53 N. J. L. 34, 20 Atl. 751; *State v. Barnes*, 32 Me. 530.

is not usually necessary that the state should prove every part of the libelous article, though it is necessary for it to prove enough of the article to convince the jury that it is libelous. Therefore, all portions of the article, or of the newspaper or pamphlet which contain or relate to the subject-matter of the libel, ought to be introduced in evidence by the state; and, while its failure to do this may not justify an acquittal, yet it is a dangerous practice for the prosecution to omit to prove any portion relating to the libel. On the other hand, any other part of the publication which is upon an entirely different topic, and which in no way qualifies or explains that portion which is alleged to be libelous may be omitted and, indeed, evidence of this character is properly excluded.⁹⁸ While a criminal libel may be sustained by proving the substance of the printed or written language, slander, where it is criminal, is not proved unless the exact language which is alleged to have been used or enough of it to constitute the charge is proved, for it is not enough that the words which are proved to have been uttered are equivalent in their meaning to the words charged.⁹⁹ Several persons may be libeled in an article of which there is but a single publication. The libelous charge against them may be identical, or there may be separate libels against them separately; though each person thus libeled may have a separate civil action against the offender, the state may treat the publication as a single crime where all the libels are contained in one article and may indict the person responsible, though two or more persons have been libeled, and the indictment will be good. Where a statute permits the truth to be pleaded in justification of the libel, the accused may plead and prove the truth as to one of the persons whom he is charged to have libeled, and not as to the other, at least where the statements are capable of being separated. But the whole publication may be admitted in evidence for the purpose of showing the intention of the accused.¹⁰⁰ And finally, though it is customary to allege in the indictment that the libel was published on a particular day, proof of this fact is

⁹⁸ *State v. Williams*, 74 Kan. 180, 85 Pac. 938; *Collins v. People*, 115 Ill. App. 280; *Jones v. State*, 38 Tex. Cr. 364, 43 S. W. 78, 70 Am. St. 751n.

⁹⁹ *State v. Fenn*, 112 Mo. App. 531, 86 S. W. 1098.

¹⁰⁰ *Tracy v. Commonwealth*, 87 Ky. 578, 9 S. W. 822, 10 Ky. L. 611.

not always necessary if it be proved that the publication took place at any time within the statute of limitations.¹

§ 363. The meaning of language used.—Parol evidence is always admissible to explain the meaning of the language used, where it is ambiguous, and to identify the persons, objects and incidents referred to. Thus, where the libelous article does not refer to the prosecuting witness *nominatim*, a witness may testify that from his knowledge of all the facts and circumstances, he understood that he was the person alluded to.² So the meaning of words which are slangy, technical or ambiguous, may be explained by parol evidence.³

§ 364. Malicious intention in publishing.—Malice on the part of the accused must be proved.⁴ But it is not to be understood that it must be shown that the accused was actuated by ill-will or vindictive feeling towards the person who is the object of the libelous allegations. Malice in the legal, not the ordinary sense of the term, is meant, and this may be inferred from the publishing of a charge which is actionable *per se*.⁵ So malice may be inferred

¹ Commonwealth v. Varney, 10 Cush. (Mass.) 402.

² Commonwealth v. Morgan, 107 Mass. 199; State v. Mason, 26 Ore. 273, 38 Pac. 130, 46 Am. St. 629, 26 L. R. A. 779n; Enquirer Co. v. Johnston, 72 Fed. 443, 18 C. C. A. 628; Commonwealth v. Buckingham, Thach. Cr. Cas. (Mass.) 29; People v. Ritchie, 12 Utah 180, 42 Pac. 209; Whitehead v. State, 39 Tex. Cr. 89, 45 S. W. 10. But see *contra*, People v. McDowell, 71 Cal. 194, 11 Pac. 868; Dickson v. State, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. 694n.

³ Dickson v. State, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. 694n; State v. Fitzgerald, 20 Mo. App. 408; State v. Bonine, 85 Mo. App. 462; Haley v. State, 63 Ala. 89. The libelous language, as set forth in

the indictment, must be proved strictly as alleged. Frisby v. State, 26 Tex. App. 180, 9 S. W. 463; Berry v. State, 27 Tex. App. 483, 11 S. W. 521; State v. Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. 361; Neely v. State, 32 Tex. Cr. 370, 23 S. W. 798; Stichtd v. State, 25 Tex. App. 420, 8 S. W. 477, 8 Am. St. 444. So of slanderous words. Barnett v. State, 35 Tex. Cr. 280, 33 S. W. 340.

⁴ Cornelius v. State, 145 Ala. 65, 40 So. 670; State v. Shaffner, 2 Penn. (Del.) 171, 44 Atl. 620; England v. State (Tex. Cr. App.), 49 S. W. 379; State v. Lomack, 130 Iowa 79, 106 N. W. 386.

⁵ State v. Brady, 44 Kan. 435, 24 Pac. 948, 21 Am. St. 296, 9 L. R. A. 606; Fitzpatrick v. Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173.

from the falsity of the accusations and the absence of reasonable grounds for it.⁶

The existence of malice is a question for the jury. Evidence of all facts and circumstances is admissible which may throw any light upon the intention of the defendant, and which will show that he acted honestly, or the reverse, that he was prompted by a desire to stir up strife or to promote the public welfare by his publication.⁷ Evidence of other libelous publications by the accused, directed against the same person or against others, unconnected with the one complained of, is admissible to prove the intention,⁸ if the date of publication is near enough to afford an inference that similar motives prompted the accused in both cases.⁹ The accused should always be permitted to testify to his own intention,¹⁰ and may also prove all the circumstances under which publication was made, the facts on which it was based, and the source of the information which is contained in the statement.¹¹

⁶ *State v. Lomack*, 130 Iowa 79, 106 N. W. 386; *Haley v. State*, 63 Ala. 89; *Pledger v. State*, 77 Ga. 242, 3 S. E. 320; *State v. Clyne*, 53 Kan. 8, 35 Pac. 789; *State v. Brady*, 44 Kan. 435, 24 Pac. 948, 21 Am. St. 296, 9 L. R. A. 606; *Commonwealth v. Blanding*, 3 Pick. (Mass.) 304, 15 Am. Dec. 214n; *State v. Patterson*, 2 N. J. L. J. 218.

⁷ *Smith v. Commonwealth*, 98 Ky. 437, 33 S. W. 419, 17 Ky. L. 1010. Proof of good character of defendant, 103 Am. St. 900, note.

⁸ *Commonwealth v. Harmon*, 2 Gray (Mass.) 289; *Manning v. State*, 37 Tex. Cr. 180, 39 S. W. 118; *State v. Conable*, 81 Iowa 60, 46 N. W. 759; *Grant v. State*, 141 Ala. 96, 37 So. 420; *State v. Heacock*, 106 Iowa 191, 76 N. W. 654; *Manning v. State*, 37 Tex. Cr. 180, 39 S. W. 118; *Riley v. State*, 132 Ala. 13, 31 So. 731; *State v. Riggs*, 39 Conn. 498; *Eldridge v. State*, 27 Fla. 162, 9 So. 448; *Commonwealth v. Damon*, 136 Mass. 441; *State v. Mills*, 116 N. Car. 1051, 21

S. E. 563; *Butler v. State* (Ala., 1909), 50 So. 400; *Cox v. State* (Ala., 1909), 50 So. 398.

⁹ *Eldridge v. State*, 27 Fla. 162, 9 So. 448. See § 88, *et seq.*

¹⁰ *People v. Stark*, 59 Hun (N. Y.) 51, 12 N. Y. S. 688; *State v. Clyne*, 53 Kan. 8, 35 Pac. 789. But only where the language is ambiguous. *State v. Heacock*, 106 Iowa 191, 76 N. W. 654.

¹¹ *Duke v. State*, 19 Tex. App. 14; *People v. Glassman*, 12 Utah 238, 42 Pac. 956; *Commonwealth v. Snelling*, 15 Pick. (Mass.) 337, 339; *Commonwealth v. Bonner*, 9 Met. (Mass.) 410; *Benton v. State*, 59 N. J. L. 551, 36 Atl. 1041; *Commonwealth v. Swallow*, 8 Pa. Super. Ct. 539. But it seems that he cannot prove that he repeated what another had told him to corroborate him where the latter was accused of falsehood and threatened with personal violence. *Shaw v. State*, 28 Tex. App. 236, 12 S. W. 741.

The question of the intention of the accused in publishing the libel is a mixed question of law and fact, to be determined by the jury under the instruction of the court.¹³

¹³ *Benton v. State*, 59 N. J. L. 551, 36 Atl. 1041; *State v. Norton*, 89 Me. 290, 36 Atl. 394; *Baker v. State*, 97 Ga. 452, 25 S. E. 341; *People v. Seeley*, 139 Cal. 118, 72 Pac. 834; *State v. Ford*, 82 Minn. 452, 85 N. W. 217; *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747. Evidence of other crimes to show intent, 62 L. R. A. 230, note. In *Rex v. Woodfall*, 5 Burr. 2661, Lord Mansfield thus expresses himself upon the question of intent: "Where an act, in itself indifferent, if done with a particular intent becomes criminal, there the intent must be proved and found; but where the act is in itself unlawful, as in this case, the proof of justification or excuse lies on the defendant; and in failure thereof the law implies a criminal intent." This is certainly good law where a man publishes matter criminal *per se* and offers no evidence in explanation or exculpation. But usually the evidence as to the intent of the accused is conflicting, and the jury must consider other facts than publication only. The court adds: "There may be cases where the fact proved as a publication may be justified or excused as lawful or innocent. For, no fact which is not criminal, in case the paper be a libel, can amount to a publication of which a defendant ought to be found guilty." In the case of the *King v. The Dean of St. Asaph*, reported 3 T. R. 428, the right of the jury to determine the intent of the defendant in publishing a libel received a thorough discussion. Down to that time the uninterrupted cur-

rent of the decisions undoubtedly confined the jury to determining the fact of publication and the meaning of the words only. The question of intent, whether the publication was or was not libelous, or, in other words, the criminality of the act of publishing, was for the court to determine upon the record after the jury had found that the accused had published it, and the meaning of the language. So far as the jury were forbidden to consider the intention of the accused, the crime of libel constituted, it was admitted, an exception to the rule by which the jury determined the guilty intent of the accused in all cases. The natural consequence of this was that juries, finding that the accused was prevented from offering any evidence to explain the motives of his actions, and that they were shut out from considering them, and that all that remained for them to do was to find the fact of publication, which was usually admitted, very often improperly acquitted those who were in fact guilty in order merely to show their independence of judicial domination. After the decision of the case above mentioned, the Statute 32 Geo. III, c. 60, was passed, which provided as follows: "That on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants

§ 365. **Evidence of the truth as a defense.**—At common law the defendant in a criminal prosecution was not permitted to prove the truth of the statement complained of. Hence arose Lord Mansfield's celebrated dictum, "the greater the truth, the greater the libel;" the supposition being that the greater the appearance of truth in a criminal libel, the more likely would it tend to stir up the victim to revenge himself and lead to a breach of the peace, with possible homicide or bloodshed. But now by statute in England,¹³ and under various constitutional and statutory provisions in the states, the defendant is permitted to prove the truth of his assertions, and that they were published for the public benefit.¹⁴

The accused is permitted to prove the truth of the statements for which he is to be held responsible.¹⁵ But usually the truth alone is not a sufficient excuse if the libel was published in bad faith and with an intent to injure.¹⁶ Where the truth is a sufficient justification, the accused is not compelled to prove it beyond a reasonable doubt.¹⁷ It is enough if upon all the evidence the jury believe his statements are true. And where the evidence for the defendant creates a *prima facie* presumption in the minds of jurors that his statements are true, it is incumbent upon the prosecution to convince them of their falsity beyond all reasonable doubt.¹⁸ It is only necessary to prove the truth of that part of

guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel."

¹³ Lord Campbell's Act, 6 and 7 Vic. (1843), c. 96.

¹⁴ Odger's Libel and Slander, 388-390; Reg. v. O'Brien, 4 Cr. L. Mag. 424.

¹⁵ People v. Seeley, 139 Cal. 118, 72 Pac. 834; State v. Keenan, 111 Iowa 286, 82 N. W. 792; State v. Conable, 81 Iowa 60, 46 N. W. 759; State v. Wait, 44 Kan. 310, 24 Pac. 354; Commonwealth v. Snelling, Thach. Cr. Cas. (Mass.) 318; Boyle v. State, 6 Ohio Cir. Ct. 163, 3 Ohio Cir. Dec. 107; Johnson v. State, 31 Tex. Cr. 569, 21 S. W. 541.

¹⁶ Barthelemy v. People, 2 Hill (N. Y.) 248; State v. Bush, 122 Ind. 42, 23 N. E. 677; State v. Lehre, 2 Brev. (S. Car.) 446, 4 Am. Dec. 596; State v. Lyon, 89 N. Car. 568.

¹⁷ Manning v. State, 37 Tex. Cr. 180, 39 S. W. 118.

¹⁸ State v. Bush, 122 Ind. 42, 23 N. E. 677; McArthur v. State, 59 Ark. 431, 27 S. W. 628; State v. Wait, 44 Kan. 310, 24 Pac. 354; Commonwealth v. Rudy, 5 Pa. Dist. Ct. 270; Smith v. Commonwealth, 98 Ky. 437, 33 S. W. 419, 17 Ky. L. 1010; State v. Grinstead, 10 Kan. App. 90, 61 Pac. 980; Manning v. State, 37 Tex. Cr. 180, 39 S. W. 118.

the publication which is alleged to be libelous.¹⁹ Evidence to prove the truth of the charges made by the accused must come from witnesses who have a competent knowledge of the facts, acquired by their own observation. Hearsay is not admissible. Hence it is not allowable to prove that the matters referred to in the alleged libel were rumored about the neighborhood, and were accepted as the truth by persons who knew the party libeled.²⁰

Where the statute permits the truth of the charges which are alleged to have been libelous to be proved in justification, any evidence which tends to prove their truth is relevant. The test of relevancy is whether the facts would be relevant if the truth or falsity of the charges were directly in issue in some legal proceeding either criminal or civil. For example, if the libel consists in charging the prosecuting witness with a crime, the relevancy of the evidence to prove the truth of the charge on the part of the accused would be determined by the answer to the question, would such evidence be relevant in a criminal prosecution brought against the prosecuting witness based upon the crime charged? Thus, proof of the commission of one crime is not relevant to prove in justification the truth of an allegation charg-

¹⁹ *State v. Wait*, 44 Kan. 310, 24 Pac. 354.

²⁰ *Commonwealth v. Place*, 153 Pa. St. 314, 26 Atl. 620; *People v. Jackman*, 96 Mich. 269, 55 N. W. 809; *State v. Hinson*, 103 N. Car. 374, 9 S. E. 552; *State v. Butman*, 15 La. Ann. 166; *State v. Ford*, 82 Minn. 452, 85 N. W. 217; *State v. White*, 7 Ired. (N. Car.) 180. *Contra*, *Humbard v. State*, 21 Tex. App. 200, 17 S. W. 126. In *Commonwealth v. Snelling*, 15 Pick. (Mass.) 337, 342, the court, by Shaw, C. J., said: "But how is this defense to be made? By proof of the truth of the matter, charged as libelous, not his belief of the truth, not his information, nor the strength of the authority upon which such belief was taken up." The accused will not be permitted to prove the general bad character of

the party libeled to prove the truth of the charge. *People v. Stokes*, 24 N. Y. S. 727, 30 Abb. N. Cas. 200; *State v. Bush*, 122 Ind. 42, 23 N. E. 677; *Commonwealth v. Snelling*, 15 Pick. (Mass.) 337; *State v. Lyons*, 89 N. Car. 568; *McArthur v. State*, 41 Tex. Cr. 635, 57 S. W. 847. *Contra*, by statute in Texas. *Manning v. State*, 37 Tex. Cr. 180, 39 S. W. 118. In Texas, Penal Code, Art. 646; Missouri, Rev. St., § 3858; North Carolina, N. Car. Code, § 1113, and some other states slander, consisting of words, imputing unchastity to a woman, is good ground for an indictment. The mode of proof, except so far as the words uttered are oral and not written, is the same as in criminal libel. *Burnham v. State*, 37 Fla. 327, 20 So. 548.

ing the witness with a distinct offense involving different acts on his part.²¹ After the accused has offered evidence to prove that his charge was true, the state must be permitted to meet this with proof tending to show that the charge was false. Where the libelous charge was that the prosecutor was dishonest, and the accused was permitted to show that he did not pay his debts and that he had to be sued; he was permitted to show his family and his means and other circumstances as explaining his inability to pay his debts and he may also testify how many times and for what reasons he was sued.²²

²¹ State v. Lomack, 130 Iowa 79, 106 N. W. 386.

²² State v. Keenan, 111 Iowa 286, 82 N. W. 792.

CHAPTER XXVI.

OFFENSES AGAINST HUMAN HABITATIONS.

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| <p>§ 366. Arson—At common law and by statute—Evidence to show locality of building.</p> <p>367. Proof of actual burning required—Non-accidental character of fire—Proof of premises burned.</p> <p>368. Threats and declarations by the accused—Remoteness.</p> <p>369. Relevancy of evidence to show the intent—Proof of other similar crimes.</p> <p>370. Evidence of preparation to show that the accused was near the burned premises.</p> <p>371. Burglary defined—Entrance at night time—Preparations to commit.</p> <p>372. Evidence to prove forcible breaking in and entering—The condition of the premises.</p> | <p>373. Proof of constructive breaking—Non-consent of owner—Evidence of ownership and value of property.</p> <p>374. Correspondence of foot-prints with the foot-wear of the accused.</p> <p>374a. Evidence obtained by trailing with bloodhounds.</p> <p>375. Burglariou tools in the possession of the accused.</p> <p>376. Other burglarious acts.</p> <p>377. The felonious intention present in entering.</p> <p>378. Presumption from the possession of stolen property.</p> <p>379. Articles stolen from the premises as evidence.</p> |
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§ 366. Arson—At common law and by statute—Evidence to show locality of building.—The malicious or willful burning of the house or out-house of another, or the burning of any building, so situated as to endanger a dwelling-house, is arson at common law.¹ This crime is sometimes graded by statute according to the degree in which it involves danger to human life. The malicious and intentional burning of one's own house, or of buildings which are not the subject of arson at common law,² is sometimes

¹ 4 Bl. Com. 220; *Kopczynski v. S. E.* 53, 55 Am. St. 806, 32 L. R. A. State, 137 Wis. 358, 118 N. W. 863. 647n.

² *State v. Sarvis*, 45 S. Car. 668, 24

made arson by statute.³ The character of the dwelling or other building must be proved substantially as laid in the indictment.⁴ A charge of burning a building is sustained though the proof shows that the building was not completed.⁵ So it has been held that a charge of burning a "house" is sustained by showing the burning of a gin set up on posts with the lower part thereof used for the engine and the upper part enclosed with walls.⁶ Whether a structure is or is not a building within the statute is a question of fact for the jury.⁷ The title or occupancy of the building need not be proved with the fulness which is necessary in actions involving the title or the right to possession.⁸ Description and proof by street and number, or by its proximity to well-known landmarks, is sufficient to sustain the venue. The ownership of the building need not be strictly proved, unless it is an essential element of the crime, as when one is indicted for setting fire to his own house.⁹ Any evidence tending to prove ownership in a civil action is competent. It has been held that ownership must be proved by the production of the deed, though apparently this is not the general rule.¹⁰ In another case a receipt for rent was received signed by the accused while in jail.¹¹ Under a statute making it arson for one to burn his own property, proof that he

³ *Burger v. State*, 34 Neb. 397, 51 N. W. 1027; *State v. Grimes*, 50 Minn. 123, 52 N. W. 275; *People v. Fairchild*, 48 Mich. 31, 11 N. W. 773; *State v. Harvey*, 131 Mo. 339, 32 S. W. 1110; *Commonwealth v. Uhrig*, 167 Mass. 420, 45 N. E. 1047.

⁴ *State v. Jeter*, 47 S. Car. 2, 24 S. E. 889. See *Elliott Evidence*, § 2816. Presumptions in prosecution for arson, see *Elliott Evidence*, § 2807. Evidence of certain facts concerning the property burned, see *Elliott Evidence*, § 2814. Evidence of good character of defendant in prosecution for arson, see 103 Am. St. 902.

⁵ *Van Immons v. State*, 29 Ohio Cir. Ct. 681.

⁶ *Caddell v. State*, 50 Tex. Cr. 380, 97 S. W. 705.

⁷ *Van Immons v. State*, 29 Ohio Cir. Ct. 681.

⁸ *Morgan v. State*, 120 Ga. 499, 48 S. E. 238.

⁹ *People v. Handley*, 100 Cal. 370, 34 Pac. 853; *People v. Lavery*, 9 Cal. App. 756, 100 Pac. 899; *Heard v. State*, 116 Tenn. 713, 94 S. W. 605. When ownership is relevant, it may be proved by a certified copy of a recorded deed, with oral evidence that the accused had made an oral lease, or had signed as owner. *Commonwealth v. Preece*, 140 Mass. 276, 278, 5 N. E. 494.

¹⁰ *Goldsmith v. State*, 46 Tex. Cr. 556, 81 S. W. 710.

¹¹ *State v. Watson*, 47 Ore. 543, 85 Pac. 336.

had some estate therein is sufficient, though it be not proved that he owned all of it.¹²

§ 367. Proof of actual burning required—Non-accidental character of fire—Proof of premises burned.—In order to prove the *corpus delicti* of arson, it is not sufficient merely to show a burning, which may have been the result of an accident. It must be proved beyond a reasonable doubt that the burning was not accidental, but was willfully and maliciously caused by some person who was morally responsible for his actions.¹³ For in arson the *corpus delicti* consists first in the burning of the premises described in the complaint and second in the fact that the burning was the result of the agency of the accused.¹⁴ If nothing appears in the evidence but the fact that a house was consumed by fire, it will be presumed that the fire was the result of accident, and it is for the state to overcome this presumption and to prove that the fire was willfully caused by the accused.¹⁵ At common law the actual burning of the whole or of some part of the house must be proved, though proof of the actual burning of the smallest part is sufficient. It need not be shown that the wood blazed, but proof that the wood or other inflammable material was charred, *i. e.*, reduced to charcoal, and its identity destroyed, is always required. A mere discoloration or scorching black by smoke or heat is not enough.¹⁶

¹² Jones v. State, 70 Ohio St. 36, 70 N. E. 952.

¹³ Winslow v. State, 76 Ala. 42; Jesse v. State, 28 Miss. 100, 109; Thomas v. State, 41 Tex. 27; Commonwealth v. Phillips (Ky.), 14 S. W. 378, 12 Ky. L. 410; Jenkins v. State, 53 Ga. 33; Brown v. Commonwealth, 87 Va. 215, 12 S. E. 472; Williams v. State, 125 Ga. 741, 54 S. E. 661; State v. Pienick, 46 Wash. 523, 90 Pac. 645, 11 L. R. A. (N. S.) 987; Ragland v. State, 2 Ga. App. 492, 58 S. E. 689. Proof of *corpus delicti*, see 68 L. R. A. 41, note; 16 L. R. A. (N. S.) 285, note. Burden of proof, see Elliott Evidence, § 2808; Burley

v. State, 6 Ga. App. 776, 65 S. E. 816.

¹⁴ West v. State, 6 Ga. App. 105, 64 S. E. 130; Spears v. State, 92 Miss. 613, 46 So. 166.

¹⁵ Williams v. State, 125 Ga. 741, 54 S. E. 661; Ragland v. State, 2 Ga. App. 492, 58 S. E. 689; West v. State, 6 Ga. App. 105, 64 S. E. 130. Admissions and Confessions, see Elliott Evidence, § 2816.

¹⁶ State v. Hall, 93 N. Car. 571; Woolsey v. State, 30 Tex. App. 346, 17 S. W. 546. The opinion of a witness to the effect that he thought a house had been set on fire is not admissible. State v. Nolan, 48 Kan.

§ 368. Threats and declarations by the accused—Remoteness.—

Any statements, utterances or declarations which are connected with the *res gestæ* of the burning are receivable. Under this head may be grouped threats made prior to the fire, and, where it is his own property which is destroyed, the statement of the accused as to the probable cause of the fire, the value of the property which was burned and of the amount of the insurance thereon. So, too, any declarations made by him or in his presence and adopted by him, contemporaneous with and explanatory of the main transaction are admissible.¹⁷

In a prosecution for arson in setting fire to the dwelling or other building owned by another person, a declaration made by the accused that, as he had been put out of the dwelling no one else would ever prosper in that place,¹⁸ or threats of bodily harm made by him and directed against the owner, are always admissible to show malice and ill-will. It is not material that the threats were vague and general in their character, and that they did not point directly to the property which was burned, if they indicated hostility to its owner.¹⁹ So it may be proved that the accused had said to the person whose place of business was burned that, if were not for him, he would not care if the town were in ashes.²⁰

Threats will not be rejected because directed against members

723, 29 Pac. 568, 30 Pac. 486. An allegation of burning a dwelling-house is not sustained by proof of burning a house not a dwelling. *Commonwealth v. Hayden*, 150 Mass. 332, 333, 23 N. E. 51; *Commonwealth v. Wellington*, 7 Allen (Mass.) 299, or a dwelling which is vacant. *People v. Handley*, 93 Mich. 46, 48, 52 N. W. 1032. Cf. *State v. Carter*, 49 S. Car. 265, 27 S. E. 106. Questions of law and fact, see *Elliott Evidence*, § 2809.

¹⁷ *Commonwealth v. Wesley*, 166 Mass. 248, 44 N. E. 228; *People v. Eaton*, 59 Mich. 559, 26 N. W. 702; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *State v. Lockwood* (Del., 1909), 74 Atl. 2.

¹⁸ *People v. Eaton*, 59 Mich. 559, 561, 26 N. W. 702; *State v. Ledford*, 133 N. Car. 714, 45 S. E. 944. Express threats to burn the house of another, with the whole conversation which led up to them, are particularly relevant. *State v. Lytle*, 117 N. Car. 799, 23 S. E. 476; *Prater v. State*, 107 Ala. 26, 18 So. 238. See also, *Elliott Evidence*, § 2811.

¹⁹ *Davis v. State*, 152 Ala. 82, 44 So. 545; *Ford v. State*, 112 Ind. 373, 383, 14 N. E. 241; *State v. Crawford*, 99 Mo. 74, 77-79, 12 S. W. 354; *State v. Barrett*, 151 N. Car. 665, 65 S. E. 894.

²⁰ *Morgan v. State*, 120 Ga. 499, 48 S. E. 238.

of the owner's family generally who did not reside in the building which was burned or because they show a general intention to be revenged, though not by any particular means.²¹ It may be shown that the accused had threatened the owner of a house adjacent to that which was burned,²² or a person who, though not the owner, had goods stored in the building.²³ The length of time which has elapsed between the utterance of the threat and the destruction of the building, though, perhaps, affecting the weight of the threat as evidence, is no objection to its admission.²⁴

§ 369. Relevancy of evidence to show the intent—Proof of other similar crimes—The intent to set fire must be shown, whether the crime alleged is the arson of one's own house or of some other person's. Direct proof of an intent to commit the crime is never required. The criminal intent may be inferred from the circumstances attendant on the burning,²⁵ or from the hostility of the accused to the owner.²⁶ If the accused is charged with the arson of his own house it may always be shown to supply a motive that he was financially embarrassed at the time,²⁷ and that he had overvalued and unduly insured his property.²⁸

But it cannot be proved against the accused, who is charged with having committed arson for the purpose of securing insurance money that he had had fires in buildings other than the one mentioned in the indictment.²⁹ And generally where the accused

²¹ *Johnson v. State*, 89 Ga. 107, 14 S. E. 889; *Clinton v. State* (Fla., 1909), 50 So. 580.

²² *Bond v. Commonwealth*, 83 Va. 581, 3 S. E. 149.

²³ *State v. Emery*, 59 Vt. 84, 7 Atl. 129.

²⁴ *Commonwealth v. Quinn*, 150 Mass. 401, 23 N. E. 54; *Clinton v. State*, 56 Fla. 57, 47 So. 389. A threat, directed against a building specified, is not excluded as evidence, by a subsequent change in the ownership of the building. *State v. Fenlason*, 78 Me. 495, 7 Atl. 385; *Commonwealth v. Crowe*, 165 Mass. 139, 42 N. E. 563.

²⁵ *Commonwealth v. Goldstein*, 114 Mass. 272; *State v. England*, 78 N. Car. 552; *State v. Lytle*, 117 N. Car. 799, 23 S. E. 476; *Luke v. State*, 49 Ala. 30, 20 Am. 269.

²⁶ See *ante*, § 368.

²⁷ *State v. Hull*, 83 Iowa 112, 48 N. W. 917. See *Elliott Evidence*, § 2810.

²⁸ *Stitz v. State*, 104 Ind. 359, 4 N. E. 145; *Commonwealth v. Hudson*, 97 Mass. 565; *People v. Sevine* (Cal.), 22 Pac. 969; *State v. Cohn*, 9 Nev. 179; *People v. Kelly*, 11 App. Div. (N. Y.) 495, 42 N. Y. S. 756; *State v. Brand* (N. J. L.), 72 Atl. 131; *Hooker v. State*, 98 Md. 145, 56 Atl. 390.

is charged with arson for the purpose of securing insurance money evidence showing or tending to show that he was interested in preserving the building that has been burned is competent.³⁰

The amount of the loss,³¹ the value of the whole property,³² and the fact that the defendant consented to a settlement of the loss at one-half of the adjusted amount of the same,³³ are always relevant in evidence. The written proof of loss sworn to by one who is indicted for arson of his own buildings, where it describes them and their contents, is admissible against him,³⁴ though he should be permitted to show that other property of his was destroyed by the fire which is not mentioned in the writing.³⁵ But evidence of a demand upon the accused, to allow an examination of the personal property destroyed; and his refusal should be rejected as not tending to show his guilt.³⁶ If the accused refuses to produce his insurance policy, its contents, execution and delivery may be proved by parol evidence.³⁷ Except, perhaps, to show that burning was intentional, evidence of the burning of other property belonging to the accused is not received. Thus, when it is charged that the accused has set his own house on fire, it may be shown that at some previous time the same or other buildings belonging to him had burned, or that he had endeavored to induce some one to set fire to his buildings.³⁸ Evidence that the accused

³⁰ *Dunlap v. State*, 50 Tex. Cr. 504, 98 S. W. 845.

³¹ *People v. Sevine* (Cal.), 22 Pac. 969.

³² *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *State v. Harvey*, 130 Iowa 394, 106 N. W. 938.

³³ *State v. Brand* (N. J. L., 1909), 72 A. 131.

³⁴ *People v. Mix*, 149 Mich. 260, 112 N. W. 907.

³⁵ *People v. Mix*, 149 Mich. 260, 112 N. W. 907.

³⁶ *People v. Brown*, 110 App. Div. (N. Y.) 490, 96 N. Y. S. 957.

³⁷ *Knights v. State*, 58 Neb. 225, 78 N. W. 508, 76 Am. St. 78n.

³⁸ *Commonwealth v. Bradford*, 126 Mass. 42; *People v. Lattimore*, 86

Cal. 403, 24 Pac. 1091; *Meister v. People*, 31 Mich. 99; *People v. Fournier* (Cal., 1897), 47 Pac. 1014; *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *Smith v. State*, 52 Tex. Cr. 80, 105 S. W. 501; *Knights v. State*, 58 Neb. 225, 78 N. W. 508, 76 Am. St. 78n. Evidence of other fires was held to have been improperly admitted in *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846, reversing 20 App. Div. (N. Y.) 139, 46 N. Y. S. 1020. Evidence of other offenses in prosecution for arson, see 62 L. R. A. 193, note; 105 Am. St. 996, note; *Elliott Evidence*, § 2813. Evidence of previous attempts, see *Elliott Evidence*, § 2812.

forbade the removal of property from the house of which he was the owner while it was burning is admissible to prove that he started the fire.³⁹ If the accused is charged with setting fire to the house of another, evidence to show his familiarity with the premises,⁴⁰ and that goods which were in the house when it was burned were subsequently found in a trunk in his possession, is always admissible.⁴¹ So it may be shown that a few days before the fire one who is charged with burning a building owned by himself disposed of personal property, taken from the building in such a way as to exempt them from all possibility of being destroyed by the fire.⁴²

The opinions of fire insurance experts, based on an examination of the debris, are admissible as to the quantity of goods which have been burned,⁴³ and perhaps as to the origin of the fire.⁴⁴ The location and occupation of buildings near that which was burned may be shown by maps, photographs or otherwise, to enable the jury to understand the evidence more clearly.⁴⁵ A photograph of the burned premises, if it is properly verified as correct, is not inadmissible merely because it shows other premises which were owned by the accused and which had been destroyed by a previous fire if the court instructs the jury that no inference was to be drawn from it that the accused was guilty of setting fire to the other building.⁴⁶

§ 370. Evidence of preparation to show that the accused was near the burned premises.—Evidence tending to show that the defendant made preparations to commit the crime is always admissible. So it may be proved where and how he procured gunpowder with

³⁹ *Bluman v. State*, 33 Tex. Cr. 43, 21 S. W. 1027, 26 S. W. 75.

⁴⁰ *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138.

⁴¹ *State v. Vatter*, 71 Iowa 557.

⁴² *State v. Mann*, 39 Wash. 144, 81 Pac. 561.

⁴³ *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804, 9 Am. St. 598.

⁴⁴ *Cook v. Johnston*, 58 Mich. 437, 25 N. W. 388, 55 Am. 703.

⁴⁵ *People v. Cassidy*, 133 N. Y. 612, 30 N. E. 1003. If it appears that the defendant had removed goods from the burned building prior to the fire he must be permitted to explain the removal. *People v. Fournier* (Cal. 1897), 47 Pac. 1014.

⁴⁶ *Commonwealth v. Fielding*, 184 Mass. 484, 69 N. E. 216. Use of photographs in criminal cases, see 75 Am. St. 477, note; 114 Am. St. 427, note.

which the fire was started,⁴⁷ even where this involves proving another crime; and that he was seen in the building after business hours or observed skulking near by.⁴⁸

The testimony of a prosecuting witness, that he took extraordinary precautions against fire because of other fires, is relevant to show the incendiary origin of the fire in question; but evidence that other buildings in the vicinity were burned about the same time as the building in question is always irrelevant, in the absence of evidence connecting the defendant therewith.^{48a} It is always relevant, particularly in the case of the crime of arson, which is usually committed at night and with the greatest secrecy, to show that the accused was seen in the vicinity of the burned building about the time of the fire, whether before or after it occurred.⁴⁹

Evidence to show that the accused was in the crowd which surrounded the building at the time of the fire is competent, and, where the fire took place in the night time, it is also competent to show that the condition of the dress or person of the accused when he was seen, was such that it might readily be inferred that he had not slept in the building that night.⁵⁰ His presence near the scene of the fire may also be shown by evidence of footprints which on comparison with shoes worn by him appeared to be of the same size. The weight of such evidence is always for the jury.⁵¹

It may always be shown, where the footprints and the shoes of the defendant do not correspond, that he changed his shoes after he was arrested and while in jail.⁵²

⁴⁷ *State v. Roberts*, 15 Ore. 187, 13 Pac. 896.

⁴⁸ *State v. Crawford*, 99 Mo. 74, 12 S. W. 354.

^{48a} *State v. McMahon*, 17 Nev. 365, 374, 376, 30 Pac. 1000.

⁴⁹ *Commonwealth v. Gauvin*, 143 Mass. 134, 8 N. E. 895.

⁵⁰ In *State v. Ward*, 61 Vt. 153, 17 Atl. 483, after evidence tending to connect the accused with the fire had been introduced, and it also appeared that the incendiary had driven a sleigh over a certain route, which left peculiar tracks, the state was permit-

ted to show the accused had used such a sleigh on the night of the fire; and that, on the same night, he had hired a horse, which, when driven without guidance, within four days thereafter voluntarily chose the route taken by the person who fired the house. *Heidelbaugh v. State*, 79 Neb. 499, 113 N. W. 145.

⁵¹ *State v. Harvey*, 130 Iowa 394, 106 N. W. 938.

⁵² *Davis v. State*, 152 Ala. 82, 44 So. 545.

⁵³ *Moore v. State*, 51 Tex. Cr. 468, 103 S. W. 188.

Where an incendiary fire was proved to have been kindled with kerosene, it may be shown that, about the same date, the accused had kerosene stains upon his clothing,⁵³ or that two or three days after the fire a witness smelled the earth under the building and that it smelled of kerosene,⁵⁴ and that the accused was seen leaving the building burned with an oil can in his hands.⁵⁵

It may be shown that the accused, when arrested, soon after the fire, had poisoned meat in his possession, prepared in a peculiar manner, where a dog belonging to the owner of the burned property was poisoned on the night of the fire and a *post-mortem* examination show poisoned meat in the animal's stomach similarly prepared.⁵⁶ If the accused is charged with the arson of his own building it may be relevant to show that he accused another of this crime, but such evidence is not admissible where the building is owned by a person other than the accused.⁵⁷

§ 371. Burglary defined—Entrance at night-time—Preparations to commit.—Burglary is the breaking in and entering the house of another in the night-time with the intent to commit a felony (usually larceny, but often rape or murder), and whether the felony is actually committed or not.⁵⁸ The elements to be proved at common law are: First, a felonious breaking and entering; second, that it was a dwelling-house; third, that it occurred in the night-time; fourth, an intention to commit some felony in the house. The intent to commit a felony is always for the jury to determine. In doing so they may consider all the facts and circumstances as disclosed by the evidence.⁵⁹ For it is a well-settled proposition that burglary may be proved by circumstantial evidence.⁶⁰

At common law it must always be shown beyond all reasonable

⁵³ State v. Kingsbury, 58 Me. 238.

⁵⁴ State v. Watson, 47 Ore. 543, 85 Pac. 336.

⁵⁵ People v. Burrige, 99 Mich. 343, 58 N. W. 319. Cf. Thomas v. State, 107 Ala. 13, 18 So. 229; Gawn v. State, 7 Ohio Cir. Dec. 19.

⁵⁶ Halleck v. State, 65 Wis. 147, 26 N. W. 572.

⁵⁷ State v. McLain, 43 Wash. 267, 86 Pac. 390.

⁵⁸ 2 Russ. on Crimes (9th Am. Ed.). p. 1; State v. Beeman, 51 Wash. 557, 99 Pac. 756; People v. Finer (Cal. App. 1909), 105 Pac. 780.

⁵⁹ State v. Teeter, 69 Iowa 717, 27 N. W. 485; People v. Soto, 53 Cal. 415.

⁶⁰ Dupree v. State, 148 Ala. 620, 42 So. 1004; State v. Perry, 124 La. 931, 50 So. 799.

doubt that the breaking in and entering occurred in the night-time,⁶¹ *i. e.*, the period intervening between the total disappearance of daylight in the evening and its reappearance at the earliest dawn of the next day, during which a person's features are not discernible. Evidence that features were discernible by artificial light, or by moon light, is not admissible.⁶² Proof of a breaking in one night and an entrance the following night will sustain a conviction.⁶³ If the evidence leaves the exact time in doubt, and it cannot be positively ascertained whether the breaking in was in the night-time or not, the prisoner should have the benefit of the doubt.⁶⁴

Evidence to show the condition of the house, when the owner or any other witness arrived there on the morning after the burglary is competent.⁶⁵ It may be inferred that the crime was committed during the night from proof that at half-past five in the morning, when the occupant awoke, he found that the house had been broken open while he slept and articles were missing.⁶⁷

Evidence that the accused had prepared to commit a burglary; that he had endeavored to induce the custodian of the premises which were broken into to absent himself, or had procured burglar's tools, is competent.^{67a} It may be proved that tools were found in the building entered which had been taken by breaking and entering another building near by on the same night.⁶⁸ Evidence that he had been seen lurking about the premises,⁶⁹ or had made inquiries as to property which was in the house,⁷⁰ or as to

⁶¹ *Ashford v. State*, 36 Neb. 38, 40, 53 N. W. 1036; *State v. Seymour*, 36 Me. 225, 227; *State v. Leaden*, 35 Conn. 515; *Guynes v. State*, 25 Tex. App. 584, 8 S. W. 667; *Waters v. State*, 53 Ga. 567; *People v. Taggart*, 43 Cal. 81, 87; *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 477n; *Commonwealth v. Glover*, 111 Mass. 395, 402; *Keeler v. State*, 73 Neb. 441, 103 N. W. 64.

⁶² *State v. Morris*, 47 Conn. 179; *State v. McKnight*, 111 N. Car. 690, 692, 16 S. E. 319; *Commonwealth v. Kaas*, 3 Brewst. (Pa.) 422; *State v.*

Bancroft, 10 N. H. 105, 107, 2 East P. C. 509, 1 Hale P. C. 550.

⁶³ *Rex v. Smith, Russ. & Ry.* 417.

⁶⁴ *Waters v. State*, 53 Ga. 567.

⁶⁵ *Herndon v. State*, 50 Tex. Cr. 552, 99 S. W. 558.

⁶⁶ *People v. Lowrie*, 4 Cal. App. 137, 87 Pac. 253.

⁶⁷ *People v. Calvert*, 22 N. Y. S. 220, 67 Hun (N. Y.) without opinion.

⁶⁸ *State v. Arthur*, 135 Iowa 48, 109 N. W. 1083.

⁶⁹ *State v. Turner*, 106 Mo. 272, 17 S. W. 304; *People v. Ranier*, 127 App. Div. (N. Y.) 47, 111 N. Y. S. 112.

⁷⁰ *Gilmore v. State*, 99 Ala. 154, 13 So. 536.

the character, financial circumstances and habits of its inmates, is always admissible.⁷¹

So it may also be shown where the accused resided, with what people he associated,⁷² and that property taken from the premises was found in his possession after the crime.⁷³

Evidence that the accused was found in the premises which were broken into is always competent, provided his presence there is not too remote from the time of the breaking in, but the accused should be permitted to show his reasons for being there; and, if he went there to obtain property belonging to him, he may be permitted to prove that he obtained the property, and also show what he did with it.⁷⁴

§ 372. Evidence to prove forcible breaking in and entering—Condition of the premises.—The gist of the crime is the forcible and malicious breaking in. Hence the condition of the premises before and after the offense may always be shown. It may be shown that foot-prints were observed on a road leading to or in the grounds around the house,⁷⁵ that shoes of the size worn by the accused,⁷⁶ or articles of wearing apparel belonging to him, were found near by, and that, from appearances, and in the opinion of witnesses (but based on their own observation only), force had been used to effect an entrance,⁷⁷ that being a question upon which any man of common understanding is qualified to express an opinion.⁷⁸

⁷¹ State v. Ward, 103 N. Car. 419, 423, 8 S. E. 814. Proof that the value of the property in the house was small does not admit evidence that the accused is a man of large means and in good circumstances. Coates v. State, 31 Tex. Cr. 257, 261, 20 S. W. 585.

⁷² Osborn v. State, 50 Tex. Cr. 46, 94 S. W. 900.

⁷³ Delmont v. State, 15 Wyo. 271, 88 Pac. 623.

⁷⁴ Mason v. State, 153 Ala. 46, 45 So. 472.

⁷⁵ See §§ 303, 337, 374. Proof of the *corpus delicti*, see 68 L. R. A. 41, note. Evidence that the crime was committed in the night time, see 2

Am. St. 396, note; declarations of accused, 2 Am. St. 396. Evidence of breaking and entering, see Elliott Evidence, § 2912.

⁷⁶ England v. State, 89 Ala. 76, 78, 8 So. 146; Field v. State, 126 Ga. 571, 55 S. E. 502.

⁷⁷ Fort v. State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. 163; People v. Block, 15 N. Y. S. 229, 60 Hun (N. Y.) 583, without opinion. The question, "How did the accused get in?" is not leading. Vallereal v. State (Tex., 1892), 20 S. W. 557; State v. Moore, 117 Mo. 395, 401, 22 S. W. 1086.

⁷⁸ As to opinion evidence in burglary, see 2 Am. St. 397, note.

A view of the premises by the jurors in a trial for burglary will undoubtedly aid them materially in determining the means employed in breaking in, and whether or not an entrance was gained by force. As the rules and principles which regulate and govern the taking of a view are elsewhere fully elucidated no extended discussion of them is necessary in this place.⁷⁹

It has been held competent to prove that burglars' instruments and implements and tools which might be used for breaking into the premises were found in or near the premises after the alleged crime, even though it may not appear that they were owned by the accused.⁸⁰ The condition of the premises or of a safe or other article of furniture contained in them is relevant.⁸¹

§ 373. Proof of constructive breaking—Non-consent of owner—Ownership and value of property.—The breaking must be proved. Proof of drawing a bolt,⁸² lifting a latch,⁸³ or a window sash,⁸⁴ pushing open a closed door,⁸⁵ or a window or transom which was fastened,⁸⁶ or breaking in an inner door,⁸⁷ or opening it with a

⁷⁹ See §§ 229-232.

⁸⁰ Russell v. State (Ala., 1905), 38 So. 291.

⁸¹ Russell v. State (Ala., 1905), 38 So. 291.

⁸² Kent v. State, 84 Ga. 438, 11 S. E. 355, 20 Am. St. 376.

⁸³ State v. O'Brien, 81 Iowa 93, 95, 46 N. W. 861; State v. Groning, 33 Kan. 18, 21, 5 Pac. 446; Carter v. State, 68 Ala. 96, 97; McCourt v. People, 64 N. Y. 583; Gonzales v. State (Tex. Cr. App., 1899) 50 S. W. 1018.

⁸⁴ Frank v. State, 39 Miss. 705, 715.

⁸⁵ People v. Nolan, 22 Mich. 229, 235; State v. Reid, 20 Iowa 413, 421, 422; Mason v. People, 26 N. Y. 200; State v. Conners, 95 Iowa 485, 64 N. W. 295; Price v. Commonwealth (Ky.), 112 S. W. 855; People v. Gartland, 30 App. Div. (N. Y.) 534, 52 N. Y. S. 352. The opening of a window or of a door which is closed

with no greater force than is generally necessary for that purpose is a breaking into the house. Scott v. State, 122 Ga. 138, 50 S. E. 49.

⁸⁶ Sims v. State, 136 Ind. 358, 360, 36 N. E. 278; State v. Moore, 117 Mo. 395, 22 S. W. 1086; Holland v. State, 47 Tex. Cr. 623, 85 S. W. 798. The raising of a window which has been left partly open is a breaking into the house. People v. White, 153 Mich. 617, 117 N. W. 161, 15 Det. Leg. N. 554, 17 L. R. A. (N. S.) 1102n. Any person may testify to the size of a pane of glass that was broken in a window, Welch v. State, 156 Ala. 112, 46 So. 856; or on the question whether a lock was broken from the inside or the outside of the door, Dupree v. State, 148 Ala. 620, 42 So. 1004.

⁸⁷ Daniels v. State, 78 Ga. 98, 6 Am. St. 238n.

key,⁸⁸ will sustain an allegation of breaking in. But evidence that an entrance was made (even in the night-time)⁸⁹ through an open door,⁹⁰ or transom,⁹¹ or through any opening already existing, and not forcibly made, will not sustain an allegation of breaking. Proof of the actual use of force in breaking in and entering is not always necessary. A verdict will stand, though it be not shown affirmatively that the premises were locked during the period in which the breaking in must have occurred, and the only proof is that property was missed from a building, such as a stable, in which horses were confined, which would have escaped had not the door been locked.⁹² If there is no evidence tending to show that the entering was in the night-time the accused is entitled to an instruction that he should be acquitted if the jury believe that he entered in the day-time.⁹³

Where a building was left apparently unoccupied, no presumption obtains that a person found in it, attempting to commit a felony, had not broken, but had secreted himself therein.⁹⁴ The entrance must have been without the owner's consent to constitute a burglary.^{95a} Non-consent need not be proved by direct evidence, but may be inferred from the circumstances.⁹⁶ If the ac-

⁸⁸ 1 Hale P. C. 553; *State v. Scripture*, 42 N. H. 485; *Lowder v. State*, 63 Ala. 143, 146.

⁸⁹ *Williams v. State* (Tex. App., 1890), 13 S. W. 609.

⁹⁰ *Costello v. State* (Tex. Cr. App.), 21 S. W. 360; *Newman v. State*, 55 Tex. Cr. 273, 116 S. W. 577; *Lockhart v. State*, 3 Ga. App. 480, 60 S. E. 215; *Carroll v. State*, 48 Tex. Cr. 155, 86 S. W. 1012; *Pinson v. State* (Ark., 1909), 121 S. W. 751. If the door of a storehouse is open when the accused enters and he picks up the property for the purpose of returning it to the owner and not for the purpose of stealing it he is not guilty of burglary. *Fields v. State* (Tex. Cr. App., 1903), 74 S. W. 309.

⁹¹ *McGrath v. State*, 25 Neb. 780, 41 N. W. 780.

⁹² *State v. Warford*, 106 Mo. 55, 60, 61, 16 S. W. 886, 27 Am. St. 322;

Hays v. State, 51 Tex. Cr. 111, 100 S. W. 926.

⁹³ *Henderson v. State*, 50 Tex. Cr. 620, 99 S. W. 1001.

⁹⁴ *United States v. Lantry*, 30 Fed. 232.

⁹⁵ *Van Walker v. State*, 33 Tex. Cr. 359, 26 S. W. 507; *State v. Hayes*, 105 Mo. 76, 84, 16 S. W. 514, 24 Am. St. 360. A detective employed to discover persons suspected of burglary, ingratiated himself into the confidence of the defendants, loaned them money and finally suggested that they should engage in burglary. He then arranged with the owner of the building that marked money should be placed in a safe, and having made the defendants drunk he took them to the building, opened the safe and taking out the money handed it to them, and it was divided among the

cused was rightfully on the premises, having entered by the permission or command of the owner, or of some person who had the right to permit,⁹⁵ or command him, and stole while there, his offense is larceny only.⁹⁶

Hence, any evidence is relevant which tends to prove or disprove the fact that the entrance was made with the owner's consent. The ownership of the property stolen,⁹⁷ its value,⁹⁸ the number of articles taken,⁹⁹ the ownership of the building broken into,¹⁰⁰ or the date of the burglary,¹ is not an essential element of the crime. These facts, therefore, need not be proved precisely as alleged. The ownership of the building broken into may be properly inferred from proof that the party alleged to be the owner was in possession,² but the allegation of possession must be sustained by evidence of actual occupancy and not merely by a constructive possession.³ An allegation of possession by a corporation does not require proof of the incorporation unless this fact is expressly denied by a special plea.⁴

§ 374. Correspondence of foot-prints with foot-wear of accused.—

The presence of recently made and unaccounted for footprints of

party. As the entrance was with the owner's consent, it was held that a conviction of burglary could not be sustained. *Love v. People*, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139.

⁹⁵ *People v. McCord*, 76 Mich. 200, 42 N. W. 1106.

⁹⁶ *Colbert v. State*, 91 Ga. 705, 17 S. E. 840. *Contra*, *People v. Barry*, 94 Cal. 481, 483, 29 Pac. 1026.

⁹⁷ *State v. Tyrrell*, 98 Mo. 354, 11 S. W. 734; *Brown v. State*, 72 Miss. 990, 18 So. 431; *People v. Edwards*, 59 Cal. 359; *State v. Hutchinson*, 111 Mo. 257, 263, 20 S. W. 34; *Calloway v. State*, 50 Tex. Cr. App. 72, 94 S. W. 902. See *Elliott Evidence*, § 2913.

⁹⁸ *Farley v. State*, 127 Ind. 419, 26 N. E. 898; *Mason v. State* (Tex. Cr. App., 1906), 98 S. W. 854; *Boyd v. State*, 4 Ga. App. 273, 61 S. E. 134.

⁹⁹ *Johnson v. Commonwealth*, 87 Ky. 189, 7 S. W. 927, 10 Ky. L. 100.

¹⁰⁰ *State v. Lee*, 95 Iowa 427, 64 N. W. 284; *State v. Porter*, 97 Iowa 450, 66 N. W. 745; *State v. Horned*, 178 Mo. 59, 76 S. W. 953; *Boyd v. State*, 4 Ga. App. 273, 61 S. E. 134; *Scoville v. State* (Tex. Cr. App., 1904), 81 S. W. 117.

Evidence as to time of offense, see *Elliott Evidence*, § 2914. Testimony of accomplice, 98 Am. St. 172.

¹ *State v. Dawkins*, 32 S. Car. 17, 10 S. E. 772; *State v. Daniels*, 122 La. 261, 47 So. 599.

² *State v. McGuire*, 193 Mo. 215, 91 S. W. 939; *Hall v. State* (Ga. App., 1909), 66 S. E. 390.

³ *Daggett v. State*, 39 Tex. Cr. 5, 44 S. W. 148, 842.

⁴ *Burrow v. State*, 147 Ala. 114, 41 So. 987; *State v. Sowell* (S. Car., 1910), 67 S. E. 316.

man,⁵ or beast,⁶ or of wagon tracks,⁷ in the curtilage of a house which has been entered, or on a road leading to it, may always be considered in determining whether a burglary has been committed. As the accused must not be compelled to furnish evidence incriminating himself, or to testify against himself, he can not be compelled to submit to a comparison of footprints in open court.⁸ Nor can the accused be compelled to place his foot in a shoe-track found in the vicinity of the crime.⁹ His refusal to do so can neither be proved against him nor commented on by counsel,¹⁰ while, generally, if he is forcibly compelled to do so, a witness, who was present at the comparison, cannot testify to the results.¹¹ But it may always be proved that the accused voluntarily went to the *locus in quo* and placed his foot in footprints found there and that his foot fitted the footprints perfectly.¹²

A distinction, however, was made where the officer having charge of the prisoner took off his shoes without his consent, or took shoes found in the house of the accused and compared them with the tracks. The officer was allowed to testify to the results, the court basing its ruling on the admitted right of police officials

⁵ England v. State, 89 Ala. 76, 8 So. 146; Moss v. State, 152 Ala. 30, 44 So. 598; State v. Daniels, 134 N. Car. 641, 46 S. E. 743; State v. Freeman, 146 N. Car. 615, 60 S. E. 986; Leonard v. State, 150 Ala. 89, 43 So. 214; State v. Arthur, 135 Iowa 48, 109 N. W. 1083; Doss v. State, 50 Tex. Cr. 48, 95 S. W. 1040; State v. Fuller, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762n; Davis v. State, 152 Ala. 82, 44 So. 545 (arson). *Contra*, Kinnan v. State (Neb., 1910), 125 N. W. 594.

⁶ Miller v. State, 91 Ga. 186, 16 S. E. 985; Doss v. State, 50 Tex. Cr. 48, 95 S. W. 1040, where it was proved accused had been riding a horse near the scene of the crime.

⁷ Bryan v. State, 74 Ga. 393, 394.

⁸ In Stokes v. State, 5 Baxt. (Tenn.) 619, 621, 30 Am. 72, the conviction was reversed because the state was permitted to bring a pan

of mud in court and to request defendant to place his foot in it. The court said: "In the presence of the jury the prisoner is asked to make evidence against himself. The court should not have permitted the pan of mud to have been brought before the jury, and the defendant asked to put his foot in it. We are satisfied the jury was improperly influenced thereby. And it is no sufficient answer that the judge afterwards told the jury that the refusal to put his foot in the mud was not to be taken as evidence against him." Cf. Walker v. State, 7 Tex. App. 245, 32 Am. 595.

⁹ See Dunwoody v. State, 118 Ga. 308, 45 S. E. 412.

¹⁰ See, *ante*, §§ 303, 337, 372.

¹¹ Day v. State, 63 Ga. 667.

¹² State v. Graham, 116 La. 779, 41 So. 90.

to search the clothing of prisoners and to testify to what they find.¹³

The reception of such evidence does not deprive the accused of his constitutional right to refuse to testify against himself in any criminal proceeding.¹⁴

The accused may waive his rights and submit to a voluntary comparison,¹⁵ by putting his foot in tracks found in the neighborhood of the crime.¹⁶ His offer to place his foot or shoe in the footprints may be proved in his favor,¹⁷ but if he does so he cannot object to evidence that it seemed to fit.¹⁸ A witness who has measured the tracks of man or beast and compared his measurements with the footwear of the accused, worn about the time of the crime, or of a horse owned by him, may testify to the results and may state that in his opinion a correspondence exists in size and shape.¹⁹

A witness cannot testify that he thought when he first saw the

¹³ *State v. Graham*, 74 N. Car. 646, 649, 21 Am. 493; *Myers v. State*, 97 Ga. 76, 25 S. E. 252; *Krens v. State*, 75 Neb. 294, 106 N. W. 27; *Hargrove v. State*, 147 Ala. 97, 41 So. 972, 119 Am. St. 60; *Guerrero v. State*, 46 Tex. Cr. 445, 80 S. W. 1001; *State v. Williams*, 120 La. 175, 45 So. 94. The court declined to decide whether the policeman could compel a prisoner to place his foot in the track.

¹⁴ *State v. Fuller*, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762n.

¹⁵ *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *State v. Sexton*, 147 Mo. 89, 48 S. W. 452.

¹⁶ *Burks v. State*, 92 Ga. 461, 17 S. E. 619.

¹⁷ *Bouldin v. State*, 8 Tex. App. 332, 335. *Contra*, *Potter v. State*, 92 Ala. 37, 40, 9 So. 402. Compare *Hargrove v. State*, 147 Ala. 97, 41 So. 972, 119 Am. St. 60, where shoes that the accused admitted he wore about the time of the burglary were taken from his house and compared

with tracks near the scene of the crime.

¹⁸ *Potter v. State*, 92 Ala. 37, 40, 9 So. 402.

¹⁹ *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614; *People v. Wolcott*, 51 Mich. 612, 615, 17 N. W. 78; *Commonwealth v. Pope*, 103 Mass. 440; *Harris v. State*, 84 Ga. 269, 10 S. E. 742; *State v. Reitz*, 83 N. Car. 634, 636; *Cooper v. State*, 88 Ala. 107, 110, 7 So. 47; *Miller v. State*, 91 Ga. 186, 16 S. E. 985; *Porch v. State*, 50 Tex. Cr. 335, 99 S. W. 102; *Thompson v. State*, 45 Tex. Cr. 397, 77 S. W. 449; *Johnson v. State*, 55 Fla. 46, 46 So. 154; *Alford v. State*, 47 Fla. 1, 36 So. 436; *Parker v. State*, 46 Tex. Cr. 461, 80 S. W. 1008, 108 Am. St. 1021; *Smith v. State*, 45 Tex. Cr. 405, 77 S. W. 453; *Weaver v. State*, 46 Tex. Cr. 607, 81 S. W. 39; *State v. Arthur*, 135 Iowa 48, 109 N. W. 1083; *State v. Langford*, 74 S. Car. 460, 55 S. E. 120; *Moore v. State*, 51 Tex. Cr. 468, 103 S. W. 188; *State v. Norman*, 135 Iowa 483, 113 N. W. 340.

tracks, and still believes, they were made by the defendant, or that they were like those of the defendant. This is only an expression of an opinion upon a question properly to be determined by the jury.²⁰ But a witness may testify that the ground in a highway near the scene of the crime and the residence of the accused was so hard that no track could be made.²¹ The accused may introduce any evidence tending to show that it is physically impossible that he made the tracks,²² or that he had never worn or possessed a shoe that would fit them.

§ 374a. Evidence obtained by trailing with bloodhounds.—The well-known instinct possessed by certain breeds of dogs, commonly known as bloodhounds, which enables them to track persons or objects wholly by their sense of smell, has caused them to be employed in tracking persons accused of crime and fugitives from justice from the earliest times. The exceptional keenness of scent, sagacity and capacity for training of these animals, their perseverance and intelligence in following the fugitive are well known. And, however we may doubt the humanity of employing animals whose nature is, or may upon occasion be, so ferocious to detect and apprehend criminals, there can be no doubt that the results often obtained can be usually relied upon. Thus it has been held that testimony that bloodhounds of pure blood, and experienced in tracking human beings, were put upon the trail at the scene of a crime such as arson, homicide, rape or burglary, and followed the trail to the home or other abiding place of the accused is admissible.²³ The evidence of a witness to these facts, if.

²⁰ *State v. Green*, 40 S. Car. 328, 18 S. E. 933, 42 Am. St. 872; *Collins v. Commonwealth* (Ky.), 25 S. W. 743, 745, 15 Ky. L. 691; *State v. Senn*, 32 S. Car. 392, 400, 11 S. E. 292; *Heidelberg v. State*, 79 Neb. 499, 113 N. W. 145; *Terry v. State*, 118 Ala. 79, 23 So. 776. The witness must state the facts showing identity. The same rule applies to horse tracks. *State v. Wideman*, 68 S. Car. 119, 46 S. E. 769.

²¹ *State v. Sanders*, 75 S. Car. 409, 56 S. E. 35.

²² *State v. Melick*, 65 Iowa 614, 615, 22 N. W. 895.

²³ *Spears v. State*, 92 Miss. 613, 40 So. 166; *State v. Hunter*, 143 N. Car. 607, 56 S. E. 547, 118 Am. St. 830; *Davis v. State*, 46 Fla. 137, 35 So. 76; *Parker v. State*, 46 Tex. Cr. 461, 80 S. W. 1008, 108 Am. St. 1021; *Hargrove v. State*, 147 Ala. 97, 41 So. 972, 119 Am. St. 60; *State v. Freeman*, 146 N. Car. 615, 60 S. E. 986; *State v. Peebles*, 178 Mo. 475, 77 S. W. 518; *Simpson v. State*, 111 Ala. 6, 20 So. 572; *State v. Spivey* (N.

at the same time, he was acquainted with the dogs and knew them to be trained and experienced, though not substantive proof of guilt which will alone and uncorroborated sustain a conviction, is admissible as corroboration of other evidence as to the identity of the accused.²⁴ In order that such evidence may be received there must be preliminary proof, usually coming from a witness who accompanied the bloodhounds, that they are animals of pure blood, previously trained to trail human beings, that they have been tested by trailing other men and found reliable, and that they were laid on the track at such a time and under such circumstances as tended to show the track or trail was actually where the accused had been.²⁵ In a case of arson the testimony showed the dog was put on the trail on the afternoon after the fire.²⁶ On the other hand, if the evidence of the prior training of the dogs is unconvincing, so that the court is not convinced that they are acute of sense or trained in the tracking of human beings this evidence must be rejected. It ought to be rejected where the preliminary proof shows that no care was taken to prevent the hounds from following the tracks of other persons who since the time of the crime had frequented the scene of it. And where, with these circumstances, it also appears that no opportunity was given to the hounds to obtain the scent of any article of wearing apparel belonging to the supposed criminal, and the dogs were on the trail accompanied by a large and noisy crowd, whose cries urging them on confused them, and also that it was from time to time necessary to urge them on, it would be reversible error to admit proof of the fact that they finally trailed the defendant to his place of residence.²⁷ The accused should always be permitted, through counsel, to cross-examine the witness who testifies to the training and experience of the dogs to bring out any circumstances to show that they were unreliable and unskilled. He may cross-examine as to the circumstances of the trailing to show that its result are

Car., 1909), 65 S. E. 995. Evidence of trailing by bloodhounds, see 42 L. R. A. 432, note.

²⁴ State v. Hunter, 143 N. Car. 607, 56 S. E. 547, 118 Am. St. 830.

²⁵ State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969, 122 Am. St. 479, 13

L. R. A. (N. S.) 341; State v. Hunter, 143 N. Car. 607, 56 S. E. 547, 118 Am. St. 830.

²⁶ Davis v. State, 46 Fla. 137, 35 So. 76.

²⁷ Sprouse v. Commonwealth (Ky., 1909), 116 S. W. 344.

not to be depended upon because of the fact that the dogs were not acquainted with the scent or were confused by the crowds, or to show any other relevant fact.²⁸

§ 375. Burglarious tools in possession of the accused.—It may usually be shown that burglars' tools were found on the person of the accused,²⁹ in his dwelling, in a trunk shown to be his, or in his constructive possession and control at or about the time of his arrest, particularly where it is shown that such tools were used in the perpetration of the crime.³⁰ But evidence that after the commission of the crime the room occupied by the accused was searched and no burglars' tools or implements, files or keys is not admissible to prove innocence.³¹ All the details of the finding, including the declarations of the accused, may be proved, and it is immaterial that the tools found were not adapted to the burglarious act alleged.³² It may also be shown that burglars' tools similar to others found in the defendant's possession were discovered in the premises which had been burglariously entered.³³ The purpose and object of the possession of articles or tools which, though usually employed for lawful purposes, may be used by burglars, are always for the jury.³⁴ It may be shown that chloroform was found in the possession of the accused, or in his house after the crime where chloroform was used in the commission of the crime, and the occupant of the house may testify that he smelled chloroform when he was aroused, though he is not an expert.³⁵

§ 376. Other burglarious acts.—Evidence that the defendant had

²⁸ Richardson v. State, 145 Ala. 46, 41 So. 82.

²⁹ McCoy v. State, 48 Tex. Cr. 30, 85 S. W. 1072 (skeleton keys); State v. Clark (S. Car., 1910), 67 S. E. 300.

³⁰ People v. Winters, 29 Cal. 658; People v. Hope, 62 Cal. 291; People v. Wilson, 7 App. Div. (N. Y.) 326, 40 N. Y. S. 107; 2 Am. St. 397, note. See also, Elliott Evidence, § 2916; Russell v. State (Ala., 1905), 38 So. 291.

³¹ People v. Lowrie, 4 Cal. App. 137, 87 Pac. 253.

³² Bish. Cr. Proc., § 151; Commonwealth v. Tivnon, 8 Gray (Mass.) 375, 69 Am. Dec. 248; Knickerbocker v. People, 43 N. Y. 177; Frank v. State, 39 Miss. 705.

³³ People v. Hope, 62 Cal. 291, 295. ³⁴ Reg. v. Oldham, 2 Den. C. C. 472.

³⁵ Miller v. State (Tex. Cr.), 50 S. W. 704.

committed, or had attempted,^{35a} or had planned to commit,³⁶ similar offenses on the same or on other premises,³⁷ is admissible, when the circumstances of time and place attendant upon both crimes are connected and form a part of one criminal system or transaction.³⁸ Evidence of a separate and distinct burglary is not admissible³⁹ unless introduced solely to prove the defendant's whereabouts⁴⁰ on the night of the crime in issue.

§ 377. The felonious intention present in entering.—The entrance must have been made with a felonious and unlawful intention. The intention of the accused to commit some felony in the premises broken in must be shown,⁴¹ specifically, as alleged in the indictment.⁴² The fact that a felony was actually committed by the accused in the house is strong *prima facie* evidence that he entered

^{35a} Cook v. State, 80 Ark. 495, 97 S. W. 683.

³⁶ Dawson v. State, 32 Tex. Cr. 535, 25 S. W. 21, 40 Am. St. 791.

³⁷ Marshall v. State (Tex., 1893), 22 S. W. 878. A police officer may testify that certain tools and other articles found in the house of the accused were such as burglars ordinarily use, and may testify how they were used. And mendicant cards found in the house at the same time are relevant to show the occupation of the accused. Commonwealth v. Johnson, 199 Mass. 55, 85 N. E. 188.

³⁸ Frazier v. State, 135 Ind. 38, 40, 34 N. E. 817; State v. Robinson, 35 S. Car. 340, 14 S. E. 766; State v. Weldon, 39 S. Car. 318, 17 S. E. 688, 24 L. R. A. 126n; People v. Mead, 50 Mich. 228, 15 N. W. 95; Eley v. State (Tex., 1890), 13 S. W. 998; ante, § 88, *et seq.*

³⁹ People v. McNutt, 64 Cal. 116, 28 Pac. 64; People v. Greenwall, 108 N. Y. 296, 301 (murder), 15 N. E. 404, 2 Am. St. 415; People v. White, 3 N. Y. Cr. 366. Proof of other crimes, see 62 L. R. A. 193, note. See also, Elliott Evidence, § 2917.

⁴⁰ People v. Mead, 50 Mich. 228, 15 N. W. 95; State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 448, 49 Am. St. 766. The loss of articles other than those mentioned in the indictment may be shown. Walker v. State, 5 Ga. App. 430, 63 S. E. 534.

⁴¹ Ashford v. State, 36 Neb. 38, 40, 53 N. W. 1036; State v. Meche, 42 La. Ann. 273, 7 So. 573; Harris v. State, 51 Tex. Cr. 564, 103 S. W. 390; Jones v. State, 48 Tex. Cr. 336, 87 S. W. 1157; Johnson v. State, 52 Tex. Cr. 201, 107 S. W. 52; Moore v. State, 52 Tex. Cr. 364, 107 S. W. 355. Evidence of the intent, see Elliott Evidence, § 2915; 2 Am. St. 396, note.

⁴² Miller v. State, 28 Tex. App. 445, 446, 13 S. W. 646; State v. Taylor, 136 Mo. 66, 37 S. W. 907; Moore v. State (Tex., 1896), 37 S. W. 747. The intent is a question for the jury. Woodward v. State, 54 Ga. 106, 107; Franco v. State, 42 Tex. 276, 281; Clifton v. State, 26 Fla. 523, 525, 7 So. 863; Commonwealth v. Williams, 2 Cush. (Mass.) 582; People v. Hope, 62 Cal. 291, 296; State v. Wright (Del., 1907), 66 Atl. 364; Trevenio

it with a felonious intention. If the entrance and the commission of a felony on the premises are shown, the jury will be justified in inferring a criminal intention in entering.⁴³ The burglarious intention may be inferred from many other circumstances in evidence. So, if it is proved that the accused induced,⁴⁴ or attempted to induce,⁴⁵ the custodian of the premises to absent himself, or entered the building after dark,⁴⁶ and was found there with burglars' tools, or with implements by which it is apparent from the evidence that the breaking into was effected,^{46a} or keys which will open the doors of the building, in his possession,⁴⁷ or was discovered engaged in ransacking a trunk,⁴⁸ or in putting aside articles of value,⁴⁹ and, when discovered, made a hasty and immediate flight⁵⁰ through an open window,⁵¹ or attempted to conceal himself,⁵² or was found running along a neighboring road soon after a burglary had been attempted,⁵³ a criminal intent may be inferred. Hence these circumstances and others of a similar character are relevant, with other evidence, to show a burglarious intent. The accused must be allowed to account for his presence in the house, and his explanation may be considered by the jury in the light afforded by the other evidence.⁵⁴

v. State (Tex. Cr., 1897), 42 S. W. 594. A specific intent to commit larceny may be inferred from proof of a breaking in, and of the presence of valuables in the house. *Steadman v. State*, 81 Ga. 736, 8 S. E. 420.

⁴³ *Stokes v. State*, 84 Ga. 258, 263, 10 S. E. 740; *State v. Wilkes*, 82 S. Car. 163, 63 S. E. 688; *Vance v. Commonwealth (Ky.)*, 115 S. W. 774; *Jenkins v. State (Fla., 1909)*, 50 So. 582.

⁴⁴ *Wright v. Commonwealth*, 82 Va. 183, 187; *Nightengale v. State*, 50 Tex. Cr. 3, 95 S. W. 531; *Gunter v. State*, 79 Ark. 432, 96 S. W. 181, 116 Am. St. 85; *State v. Raphael*, 123 Iowa 452, 99 N. W. 151, 101 Am. St. 334; *People v. Lang*, 142 Cal. 482, 76 Pac. 232; *Kennedy v. State*, 71 Neb. 765, 99 N. W. 645.

⁴⁵ *People v. Calvert*, 22 N. Y. S. 220, 67 Hun 649, without opinion.

⁴⁶ *State v. Fox*, 80 Iowa 312, 45 N. W. 874, 20 Am. St. 425.

^{46a} *Taylor v. State*, 52 Tex. Cr. 190, 107 S. W. 58.

⁴⁷ *People v. Morton*, 4 Utah 407, 408, 11 Pac. 512; *State v. Christmas*, 101 N. Car. 749, 756, 8 S. E. 361.

⁴⁸ *State v. Anderson*, 5 Wash. St. 350, 31 Pac. 969.

⁴⁹ *Clifton v. State*, 26 Fla. 523, 525, 7 So. 863.

⁵⁰ *Hill v. Commonwealth (Ky.)*, 15 S. W. 870, 12 Ky. L. 914.

⁵¹ *Alexander v. State*, 31 Tex. Cr. 359, 362, 20 S. W. 756.

⁵² *People v. Hagan*, 14 N. Y. S. 233, 60 Hun (N. Y.) 577, without opinion.

⁵³ *Steadman v. State*, 81 Ga. 736, 8 S. E. 420.

⁵⁴ *People v. Griffin*, 77 Mich. 585, 587, 43 N. W. 1061; *State v. Perry*, 124 La. 931, 50 So. 799.

§ 378. **Presumption from possession of stolen property.**—It has been held that a person in whose possession money or goods were found, recently taken from premises which had been broken in, would be presumed from possession alone as matter of law, at least in the absence of a valid explanation, guilty not only of larceny, but of the burglary as well.⁵⁶ The large majority of the cases, however, while admitting that recent possession alone may in some circumstances create a presumption of larceny, repudiate this doctrine as regards burglary. The true rule doubtless is that the mere possession of stolen property creates no presumption of law that the person in whose possession it was found committed the burglary in which they were taken. The possession is a circumstance to go to the jury, and its weight is for them. The *corpus delicti* of the burglary, that is, the breaking in and entering, must be proved by independent evidence and can not be presumed from evidence of mere possession.⁵⁶ If it appears that a burglary was in fact committed, the possession by the accused is a circumstance from which, in connection with all the evidence, the jury may presume as a matter of fact that he committed it.⁵⁷

⁵⁶ Commonwealth v. Millard, 1 Mass. 6; State v. Toohey, 203 Mo. 674, 102 S. W. 530; Scott v. State, 122 Ga. 138, 50 S. E. 49. Where property had been stolen by means of a burglary, and recently thereafter the property is found in the possession of another, the latter is presumed to be the thief and to have used all means necessary to have secured access to and possession of such property, and, if he fails to account for his possession in a manner consistent with his innocence, or to overcome the presumption by direct or circumstantial evidence, a verdict of guilty of larceny and burglary is authorized. State v. James, 194 Mo. 268, 92 S. W. 679. See Elliott Evidence, § 2918; 12 L. R. A. (N. S.) 200, note. Burden of proof and presumption in prosecution for burglary, see 2 Am. St. 397, note;

101 Am. St. 482, note; Elliott Evidence, § 2910.

⁵⁷ Lester v. State, 106 Ga. 371, 32 S. E. 335, and see cases in next note.

⁵⁸ King v. State, 99 Ga. 686, 26 S. E. 480; State v. Conway, 56 Kan. 682, 44 Pac. 627; Metz v. State, 46 Neb. 547, 65 N. W. 190; State v. Ham, 98 Iowa 60, 66 N. W. 1038; Porterfield v. Commonwealth, 91 Va. 801, 22 S. E. 352; State v. Blue, 136 Mo. 41, 37 S. W. 796; State v. Wilson, 137 Mo. 592, 39 S. W. 80; State v. Jennings, 79 Iowa 513, 44 N. W. 799; State v. Reid, 20 Iowa 413, 420, 421; State v. Owsley, 111 Mo. 450, 20 S. W. 194; Neubrandt v. State, 53 Wis. 89, 90, 9 N. W. 824; People v. Carroll, 54 Mich. 334, 20 N. W. 66; Dawson v. State, 32 Tex. Cr. 535, 25 S. W. 21; Goldsmith v. State, 32 Tex. Cr. 112, 22 S. W. 405; Threadgill v. State, 32 Tex. Cr. 451,

The relevancy of the possession of articles taken from the premises is to a certain extent due to the fact that the possession shows that the accused has been in the premises. The possession may, and in most cases does, show a criminal intent, *i. e.*, the intent to steal, where proof of this intent is necessary. But even where proof of an intent to steal is not alleged evidence of recent possession after the breaking in is competent to identify the person who did it.⁵⁸ The possession by one of several jointly indicted for burglary is the possession of all, and may be proved against any or all,⁵⁹ and possession by all those jointly charged may be proved on the trial of any one of them.⁶⁰ But in burglary, as in the kindred offense of larceny, the possession of the defendant must be personal and exclusive and unexplained, and must involve a conscious assertion of ownership by him. He should always be permitted to explain how he obtained the property, and if

24 S. W. 511; *People v. Ah Sing*, 59 Cal. 400; *People v. Titherington*, 59 Cal. 598; *People v. Cline*, 74 Cal. 575, 16 Pac. 391; *State v. Frahm*, 73 Iowa 355, 35 N. W. 451; *State v. Rivers*, 68 Iowa 611, 27 N. W. 781; *People v. Wood*, 99 Mich. 620, 58 N. W. 638; *Stuart v. People*, 42 Mich. 255, 3 N. W. 863; *State v. Moore*, 117 Mo. 395, 22 S. W. 1086; *Brooks v. State*, 96 Ga. 353, 23 S. E. 413; *State v. Rights*, 82 N. Car. 675, 678; *Methard v. State*, 19 Ohio St. 363; *Davis v. State*, 76 Ga. 16; *State v. Raymond*, 46 Conn. 345; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *Gravely v. Commonwealth*, 86 Va. 396, 401, 403, 10 S. E. 431; *Wright v. Commonwealth*, 82 Va. 183, 188; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; *Davis v. People*, 1 Park. Cr. (N. Y.) 447, 452; *Sahlinger v. People*, 102 Ill. 241; *Hays v. State*, 51 Tex. Cr. 111, 100 S. W. 926; *State v. Dale*, 141 Mo. 284, 42 S. W. 722, 64 Am. St. 513; *Lynne v. State*, 53 Tex. Cr. 386, 111 S. W. 151; *Johnson v. State*, 52 Tex. Cr. 201, 107 S. W. 52; *Davis v. State*, 45 Tex. Cr. 166, 74 S. W. 919;

Quong Yu v. Territory (Ariz., 1909), 100 Pac. 462; *State v. Vierck* (S. Dak., 1909), 120 N. W. 1098; *People v. King*, 4 Cal. App. 213, 87 Pac. 400; *Davidson v. State*, 104 Ga. 761, 30 S. E. 946; *Richardson v. State* (Tex. Cr., 1897), 42 S. W. 996; *Collier v. State*, 55 Fla. 7, 45 So. 752; *State v. Hullen*, 133 N. Car. 656, 45 S. E. 513; *State v. Peach*, 70 Vt. 283, 40 Atl. 732; *State v. Toohey*, 203 Mo. 674, 102 S. W. 530; *State v. Beeman*, 51 Wash. 557, 99 Pac. 756; *Cuthbert v. State*, 3 Ga. App. 600, 60 S. E. 322; *Collier v. State*, 55 Fla. 7, 45 So. 752; *State v. Brady*, 121 Iowa 561, 97 N. W. 62; *Thompson v. State* (Fla., 1909), 50 So. 507; *People v. Everett*, 242 Ill. 628, 90 N. E. 226; *State v. Short* (Del., 1909), 75 Atl. 787.

⁵⁸ *Walker v. State*, 5 Ga. App. 430, 63 S. E. 534.

⁵⁹ *State v. Toohey*, 203 Mo. 674, 102 S. W. 530; *Herndon v. State*, 50 Tex. Cr. 552, 99 S. W. 558; *State v. Leonard*, 135 Iowa 371, 112 N. W. 784.

⁶⁰ *People v. Wilson*, 133 Mich. 517, 95 N. W. 536, 10 Det. Leg. N. 287.

his explanation is reasonable and probable, he should be acquitted.⁶¹

§ 379. Articles stolen from the premises as evidence.—The non-production in evidence of articles alleged to have been stolen, is not ground for a new trial when the accused does not expressly demand their production and their identity is not disputed.⁶² But articles found in defendant's possession and taken from him by force, which are alleged to have been taken by the burglar, may if identified by the owner,⁶³ or by some other witness, and, it seems, where the evidence of identity is contradictory,⁶⁴ be inspected by the jury.⁶⁵ A witness may testify that merchandise purchased by him from the accused was of the same character as a sample shown him in court on making an examination and comparison.⁶⁶ The jury may compare articles of wearing apparel worn by the defendant when arrested with clothing belonging to

⁶¹ See cases in note 57, also, *Gather v. State* (Tex. Cr., 1904), 81 S. W. 717; *Lovelace v. State*, 45 Tex. Cr. 261, 76 S. W. 756; *Hays v. State*, 30 Tex. App. 472, 17 S. W. 1063; *Morgan v. State*, 25 Tex. App. 513, 8 S. W. 487; *Field v. State*, 24 Tex. App. 422, 6 S. W. 200; *Jackson v. State*, 28 Tex. App. 143, 12 S. W. 701; *State v. Owsley*, 111 Mo. 450, 20 S. W. 194; *Payne v. State*, 21 Tex. App. 184, 17 S. W. 463; *ante*, § 378, *et seq.* Possession of stolen goods, though unexplained and exclusive, has no weight as evidence if not recent or proved after the offense. Whether possession is recent depends on the circumstances of each case and is usually for the jury, though, in exceptional cases, the evidence may so preponderate that the court may decide. *White v. State*, 72 Ala. 195. Where a party charged with breaking and entering a building with intent to steal is found in possession

of goods recently stolen gives a reasonable and credible account of how he came into such possession, or an account which will raise a reasonable doubt, the state must prove that such account is untrue; otherwise he should be acquitted; but, if the account, though reasonable, is not credible, the jury have a right to convict, though the state puts in no proof directly to prove the falsity of the account given. *Collier v. State*, 55 Fla. 7, 45 So. 752.

⁶² *Johnson v. Commonwealth* (Ky.), 15 S. W. 671, 12 Ky. L. 873.

⁶³ *Walker v. State*, 97 Ala. 85, 12 So. 83; *Barnett v. State*, 50 Tex. Cr. 538, 99 S. W. 556.

⁶⁴ *Jackson v. State*, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. 839; *State v. Groning*, 33 Kan. 18, 21, 5 Pac. 446.

⁶⁵ See *ante*, § 47.

⁶⁶ *Stevens v. State* (Tex. Cr., 1906), 95 S. W. 505.

an inmate of the building which was entered, where a striking similarity in style and numbers renders them relevant.⁸⁷

A failure to prove any particular value for the goods may be cured by their production in court and their examination by the jury, who may take judicial notice thereby of the value of the goods.⁸⁸

Property brought from the building entered at the time of the trial is admissible to identify similar property found in the defendant's house.⁸⁹

⁸⁷ Woodruff v. State (Tex., 1891),
20 S. W. 573.

⁸⁸ People v. Van Dam, 107 Mich.
425, 65 N. W. 277.

⁸⁹ State v. Peach, 70 Vt. 283, 40 Atl.
732.

CHAPTER XXVII.

SEXUAL CRIMES.

- § 380. Adultery and fornication—Defined and distinguished.
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- 404. The admissions of the accused as evidence to prove the marriage—Primary evidence of the ceremony—When required.
- 405. Marriage certificates and transcripts of records as evidence—Presumption of validity—Venue.
- 406. Bigamous cohabitation.

§ 380. Adultery and fornication—Defined and distinguished.—Fornication is sexual intercourse between a man, married or single, and an unmarried woman.¹ Adultery is sexual intercourse

¹ State v. Chandler, 96 Ind. 591, 593; State v. Hasty, 121 Iowa 507, 96 N. W. 1115.

between a married person and one of the opposite sex, whether married or single.²

§ 381. Evidence to prove the intercourse—Acts of adultery other than that charged.—Direct evidence of the act of sexual intercourse can seldom be obtained. Proof of opportunity and inclination will support a conviction of adultery. But opportunity means more than mere chance and, as evidence of inclination there must be circumstances reasonably suggestive of an adulterous tendency of each of the parties to the other.³ Hence, evidence of all the circumstances of the parties, their relations to one another, their domestic and social surroundings, their acquaintance, conduct and familiarity, the facts that they went out together and visited each other, and often expressed a desire to be together are relevant.⁴ Improper familiarities and adulterous acts between the same parties prior,⁵ or subsequent to,⁶ the act charged, but not too re-

² *Miner v. People*, 58 Ill. 59; *State v. Fellows*, 50 Wis. 65, 6 N. W. 239; *Hood v. State*, 56 Ind. 263, 271, 274, 26 Am. 21n; *Helfrich v. Commonwealth*, 33 Pa. St. 68, 75 Am. Dec. 579; *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410; *State v. Wilson*, 22 Iowa 364; *State v. Donovan*, 61 Iowa 278, 16 N. W. 130; *State v. Clark*, 54 N. H. 456; *White v. State*, 74 Ala. 31; *State v. Taylor*, 58 N. H. 331; *Walker v. State*, 104 Ala. 56, 16 So. 7; *Banks v. State*, 96 Ala. 78, 11 So. 404; *State v. Anderson* (Iowa, 1908), 118 N. W. 772. As to mistake of fact under which a man marries and cohabits with a woman married to another, see *State v. Andette*, 81 Vt. 400, 70 Atl. 833.

³ *Till v. State*, 132 Wis. 242, 111 N. W. 1109; *State v. Thompson*, 134 Iowa 25, 111 N. W. 328. See also, *Elliott Evidence*, §§ 2790, 2791, 2792, 2793, 2794. Proof not limited as to time and place, see *Elliott Evidence*, § 2796; relation as to single act, § 2797. Proof of *corpus delicti* in adultery, see 68 L. R. A. 44, note.

Evidence of other crimes in prosecution for criminal offenses, see 62 L. R. A. 193, note; 105 Am. St. 1003, note. Evidence of character of husband or wife, see 14 L. R. A. (N. S.) 749, note.

⁴ *State v. Brecht*, 41 Minn. 50, 55, 42 N. W. 602; *People v. Girdler*, 65 Mich. 68, 31 N. W. 624; *Starke v. State*, 97 Ga. 193, 23 S. E. 832; *State v. Ean*, 90 Iowa 534, 58 N. W. 898; *State v. Brink*, 68 Vt. 659, 35 Atl. 492; *Coons v. State*, 49 Tex. Cr. 256, 91 S. W. 1085; *Palmer v. State* (Ala., 1909), 51 So. 358; *State v. Baker* (Iowa, 1910), 125 N. W. 659.

⁵ *Cross v. State*, 78 Ala. 430, 433; *People v. Jenness*, 5 Mich. 305, 322, 324; *Brevaldo v. State*, 21 Fla. 789; *State v. Cannon*, 72 N. J. L. 46, 60 Atl. 177; *Nobles v. State*, 127 Ga. 212, 56 S. E. 125; *Coons v. State*, 49 Tex. Cr. 256, 91 S. W. 1085; *Radford v. State* (Ga. App., 1910), 67 S. E. 707. See also, § 388.

⁶ *State v. Stubbs*, 108 N. Car. 774, 13 S. E. 90; *Coons v. State*, 49 Tex. Cr. 256, 91 S. W. 1085; *Hill v. State*,

mote,⁷ or, if remote, connected with it so as to form a part of a continuous course of conduct, may be shown for the purpose of bringing out the relations and adulterous disposition of the defendant.⁸

§ 382. **Competency of accomplice.**—The party with whom the adultery was committed is always a competent witness,⁹ though, as he or she is an accomplice,¹⁰ a conviction may not be had upon his or her uncorroborated testimony,¹¹ nor is her confession admissible against the accused unless connected with his.¹² Her unchastity is immaterial, but evidence to show her previous bad character, as, for example, that she was a prostitute, has been re-

137 Ala. 66, 34 So. 406; State v. Brown (Iowa, 1909), 121 N. W. 513.

⁷ People v. Hendrickson, 53 Mich. 525, 526, 19 N. W. 169; State v. Eggleston, 45 Ore. 346, 77 Pac. 738.

⁸ State v. Witham, 72 Me. 531; Owens v. State, 94 Ala. 97, 10 So. 669; State v. Henderson, 84 Iowa 161, 50 N. W. 758; State v. Briggs, 68 Iowa 416, 423, 27 N. W. 358; State v. Bridgman, 49 Vt. 202, 24 Am. 124; State v. Marvin, 35 N. H. 22; Bodiford v. State, 86 Ala. 67, 5 So. 559, 11 Am. St. 20; Commonwealth v. Nichols, 114 Mass. 285, 288, 19 Am. 346n; State v. Potter, 52 Vt. 33; Commonwealth v. Merriam, 14 Pick. (Mass.) 518, 520, 25 Am. Dec. 420n; Commonwealth v. Morris, 1 Cush. (Mass.) 391, 394; Commonwealth v. Lahey, 14 Gray (Mass.) 91, 93; Richardson v. State, 37 Tex. 346; Cole v. State, 6 Baxt. (Tenn.) 239; State v. Way, 5 Neb. 283; Searls v. People, 13 Ill. 597. Cf. State v. Donovan, 61 Iowa 278, 282, 16 N. W. 130. In the case of an indictment for such intercourse, previous familiarity, and the general or habitual submission of the female to his sexual embraces, must, in the nature of things, tend to render it more probable that like intercourse took place

on the occasion charged. Such is the force and ungovernable nature of this passion, and so likely is its indulgence to be continued between the same parties, when once yielded to, that the constitution of the human mind must be entirely changed before any man's judgment can resist the force of such an inference to be drawn from previous acts of intercourse. People v. Jenness, 5 Mich. 305, 322.

⁹ State v. Colby, 51 Vt. 291; State v. Crowley, 13 Ala. 172; Garland v. State, 51 Tex. Cr. 643, 104 S. W. 898.

¹⁰ State v. Scott, 28 Ore. 331, 42 Pac. 1; Jackson v. State, 51 Tex. Cr. 220, 101 S. W. 807; Howe v. State, 51 Tex. Cr. 174, 102 S. W. 409, 98 Am. St. 179, note.

¹¹ People v. Hendrickson, 53 Mich. 525, 19 N. W. 169; Jackson v. State, 51 Tex. Cr. 220, 101 S. W. 807; Powell v. State (Tex., 1898), 44 S. W. 504; Palmer v. State (Ala., 1909), 51 So. 358; State v. Brown (Iowa, 1910), 124 N. W. 899; Blue v. State (Neb., 1910), 125 N. W. 136; State v. Walsh (S. D., 1910), 125 N. W. 295. But compare State v. Athey, 133 Iowa 382, 108 N. W. 224.

¹² State v. Mims, 39 S. Car. 557, 17 S. E. 850.

ceived to show the probability of the intercourse.¹³ In the absence of a statute requiring a prosecution to be commenced on the complaint of the husband or wife,¹⁴ this fact need not be shown,¹⁵ nor that an adulterous cohabitation continued during all the period as charged, if it existed during any portion of the period.¹⁶

§ 383. **Character of evidence to prove the fact of marriage.**—It must be proved that one of the parties to the adultery was married at the time.¹⁷ A much stricter degree of proof is required to show marriage in criminal proceedings than will suffice in a civil trial.¹⁸ Often by statute the marriage certificate is made *prima facie* evidence of the marriage. Such a statute does not, by implication alone, exclude other proof,¹⁹ and the introduction of the certificate must always be supplemented by some evidence from which the jury may identify the party named therein as the accused.²⁰

¹³ Commonwealth v. Gray, 129 Mass. 474, 476, 37 Am. 378; United States v. Bredemeyer, 6 Utah 143, 22 Pac. 110; State v. Eggleston, 45 Ore. 346, 77 Pac. 738; Sutton v. State, 124 Ga. 815, 53 S. E. 381.

¹⁴ State v. Stout, 71 Iowa 343, 32 N. W. 372; State v. Andrews, 95 Iowa 451, 64 N. W. 404; State v. Wesie, 17 N. Dak. 567, 118 N. W. 20; State v. Clemenson, 123 Iowa 524, 99 N. W. 139.

¹⁵ State v. Brecht, 41 Minn. 50, 42 N. W. 602; State v. Harmann, 135 Iowa 167, 112 N. W. 632.

¹⁶ Bailey v. State, 36 Neb. 808, 55 N. W. 241.

¹⁷ Banks v. State, 96 Ala. 78, 11 So. 404; Tison v. State, 125 Ga. 7, 53 S. E. 809; Elliott v. State, 125 Ga. 31, 53 S. E. 809, holding that on a failure to prove marriage the verdict must be set aside. See Elliott Evidence, § 2798.

¹⁸ See *post*, §§ 402-405. The burden of proof of marriage is on the prosecution. Zackery v. State, 6 Ga. App. 125, 64 S. E. 281. Method of proving, see Elliott Evidence,

§ 2799; proof by record, § 2800; proof of marriage—*prima facie* case, § 2803.

¹⁹ People v. Stokes, 71 Cal. 263, 12 Pac. 71; Thomas v. State (Tex.), 26 S. W. 724; State v. Clark, 54 N. H. 456, 560.

²⁰ State v. Brink, 68 Vt. 659, 35 Atl. 492; People v. Broughton, 49 Mich. 339, 340, 13 N. W. 621; State v. Brecht, 41 Minn. 50, 53, 42 N. W. 602; Wedgwood's Case, 8 Me. 75; People v. Isham, 109 Mich. 72, 67 N. W. 819. In a prosecution for adultery the husband or wife of the defendant cannot testify for the state as to her marriage to, or cohabitation with, him or her. People v. Isham, 109 Mich. 72, 67 N. W. 819; People v. Imes, 110 Mich. 250, 68 N. W. 157; State v. Russell, 90 Iowa 569, 58 N. W. 915; State v. Volland, 57 Minn. 225, 58 N. W. 878; Commonwealth v. Sparks, 7 Allen (Mass.) 534, 535, 536; State v. Welch, 26 Me. 30, 45 Am. Dec. 94; State v. Gardner, 1 Root (Conn.) 485; State v. Berlin, 42 Mo. 572, 577. See *ante*, § 186.

The certificate should show a ceremony performed by a duly authorized official. He will be presumed to have acted within the scope of his authority.²¹ But the certificate is not conclusive of all facts necessary to constitute a valid marriage. Thus, if it appears that one of the parties was under age, ratification must be shown.²² The certificate is not the best evidence, even when admissible by statute.²³ The ceremony may be proved by the testimony of any one who was present and saw it performed.²⁴ But it is not enough that he shall testify that he saw a ceremony performed by some one. He ought to be able to testify that all the circumstances were such as to apparently constitute a legal marriage ceremony.²⁵ Despite some uncertainty in the early cases, it is now well settled that the marriage of the accused may be proved by his admissions, oral or in writing. But his statement that he is married, to be admissible, must have been made voluntarily and with deliberation.²⁶

A lawful marriage, when proved, will be presumed to continue until the contrary is shown. The fact that the marriage was void, or had been terminated by death, divorce or otherwise, is always relevant in adultery.²⁷

²¹ State v. Clark, 54 N. H. 456, 459.

²² People v. Bennett, 39 Mich. 208, 209.

²³ State v. Marvin, 35 N. H. 22, 27, 2 Greenl. on Ev., § 461, 1 Phil. Ev., 410.

²⁴ State v. Clark, 54 N. H. 456, 560; Owens v. State, 94 Ala. 97, 10 So. 669; Commonwealth v. Littlejohn, 15 Mass. 163; Commonwealth v. Morris, 1 Cush. (Mass.) 391, 394; Chew v. State, 23 Tex. App. 230, 5 S. W. 373. Some of the cases hold that an eye-witness, if living, *must* be produced. Commonwealth v. Norcross, 9 Mass. 492, 493; Wood v. State, 48 Ga. 192, 15 Am. 664; Buchanan v. State, 55 Ala. 154; Elliott Evidence, § 2801.

²⁵ State v. Hodgskins, 19 Me. 155, 157, 36 Am. Dec. 742n.

²⁶ People v. Imes, 110 Mich. 250, 68 N. W. 157; Ham's Case, 11 Me. 391, 396; State v. Hodgskins, 19 Me. 155,

157, 36 Am. Dec. 742n; State v. Libby, 44 Me. 469, 69 Am. Dec. 115; State v. Medbury, 8 R. I. 543; Commonwealth v. Holt, 121 Mass. 61; State v. Still, 68 S. Car. 37, 46 S. E. 524, 102 Am. St. 657; State v. Moore (Utah, 1909), 105 Pac. 293. A photograph of the defendant, with an indorsement in his handwriting "from your dear husband," has been received as an admission. State v. Behrman, 114 N. Car. 797, 19 S. E. 220, 25 L. R. A. 449n. See Elliott Evidence, § 2802.

²⁷ Banks v. State, 96 Ala. 78, 11 So. 404. The burden to show this is upon the defendant. People v. Stokes, 71 Cal. 263, 12 Pac. 71; State v. Weatherby, 43 Me. 258, 263, 69 Am. Dec. 59. The intermarriage of the parties to the adultery will not be presumed. If they are jointly indicted the burden of proving their

§ 384. **Lascivious cohabitation or living in unlawful cohabitation.**

—It must appear that the parties lived together openly and notoriously as though husband and wife. The crime of living in adultery must of necessity be proved by circumstantial evidence. The mere fact that the parties lived together in one house or were guilty of a single act, or even of several acts, of adultery,²⁸ is not enough.²⁹ They must live together, if only for a short time, as for a single day,^{29a} as though the marriage relation existed, and the evidence must be such that a continuance in adultery may be inferred.³⁰ There need not be direct proof of even a single act of adultery. The crime is sufficiently proved by showing circumstances which will raise the presumption of an unlawful intimacy, and the continuance of sexual and adulterous intercourse.³¹ Thus it may be shown that the defendant and the paramour were living together in the same dwelling, that the woman cooked the meals and performed the usual household duties of a wife, that accused paid the living expenses,³² that both ate at the same table and occupied the same room, that their clothing was mingled in

intermarriage is upon them, as it is a fact peculiarly within their own knowledge. *State v. McDuffie*, 107 N. Car. 885, 12 S. E. 83; *State v. Pope*, 109 N. Car. 849, 13 S. E. 700. As it is the sexual intercourse rather than the intent or knowledge with which it is accompanied that constitutes the crime, it is not necessary to prove that the accused did or did not know that the other party was married. *Fox v. State*, 3 Tex. App. 329, 30 Am. 144. Invalid divorce no defense, see *Elliott Evidence*, § 2805.

²⁸ *State v. Cassida*, 67 Kan. 171, 72 Pac. 522.

²⁹ As master and servant not sufficient. *Boswell v. State*, 48 Tex. Cr. 47, 85 S. W. 1076, 122 Am. St. 731.

^{29a} *Alpine v. State*, 117 Ala. 93, 23 So. 130 (intending to continue the relation).

³⁰ *State v. Chandler*, 132 Mo. 155, 33 S. W. 797; *State v. Chandler*, 96 Ind. 591, 593; *Wright v. State*, 108 Ala. 60, 18 So. 941; *State v. Miller*,

42 W. Va. 215, 24 S. E. 882; *Schou-del v. State*, 57 N. J. L. 209, 30 Atl. 598; *State v. Cassida*, 67 Kan. 171, 72 Pac. 522; *Collins v. State*, 46 Tex. Cr. 550, 80 S. W. 372. See *Shaw v. State*, 49 Tex. Cr. 379, 91 S. W. 1087; *State v. Poyner* (Wash., 1910), 107 Pac. 181. See *Elliott Evidence*, § 2795.

³¹ *Brown v. State*, 108 Ala. 18, 18 So. 811; *Searls v. People*, 13 Ill. 597; *Richardson v. State*, 37 Tex. 346; *Pruner v. Commonwealth*, 82 Va. 115, 10 Va. L. J. 520; *Granberry v. State*, 61 Miss. 440; *State v. Chandler*, 96 Ind. 591, 593; *Jackson v. State*, 116 Ind. 464, 465, 19 N. E. 330; *People v. Gates*, 46 Cal. 52; *Van Dolsen v. State*, 1 Ind. App. 108, 110; *Bird v. State*, 27 Tex. App. 635, 11 S. W. 641, 11 Am. St. 214; *Kahn v. State* (Tex., 1897), 38 S. W. 989; *Counts v. State*, 49 Tex. Cr. 329, 94 S. W. 220.

³² *Hill v. State*, 137 Ala. 66, 34 So. 406.

the wardrobe, that there was but one bed in the house, and that each spoke of the other as though the marriage relation existed between them.

§ 385. **Seduction defined.**—Seduction may be defined as the persuading or inducing a woman of previous chaste character to depart from the path of virtue by any species of arts, persuasions or wiles which are calculated to have and do have that effect, and which result in her ultimately submitting to the sexual embrace of the accused.³³

§ 386. **The sexual intercourse—Relevancy of evidence.**—The sexual intercourse must be proved, and, if it is proved, the accused may be convicted of adultery, though a promise be not proved.³⁴ Any evidence admissible to prove adultery may be received. The time the parties were together, the particular places they visited, and their opportunities to indulge in intercourse without detection are all relevant.³⁵ The record of a conviction of bastardy secured by the prosecutrix against the defendant is not admissible on his subsequent trial for seduction. It is in no way *res adjudicata* as to any issue involved.³⁶ But proof of the birth of a child

³³ *People v. Gibbs*, 70 Mich. 425, 430, 38 N. W. 257, 260; *People v. De Fore*, 64 Mich. 693, 699, 31 N. W. 585, 8 Am. St. 863n. "Where consent is given, pending a virtuous engagement, in consequence of a repetition of a promise to marry already made and accepted, the woman yielding in reliance on the plighted faith of her lover, and he intending that she shall trust and be deceived, the case is one of seduction." *Wilson v. State*, 58 Ga. 328, 331.

³⁴ *Dinkey v. Commonwealth*, 17 Pa. St. 126, 129, 55 Am. Dec. 542; *Nicholson v. Commonwealth*, 91 Pa. St. 390, 392; *Hopper v. State*, 54 Ga. 389; *Disharoon v. State*, 95 Ga. 351, 22 S. E. 698.

³⁵ *Bailey v. State*, 36 Tex. Cr. 540, 38 S. W. 185; *ante*, § 381. *Res gesta*

in prosecution for seduction, *Elliott Evidence*, § 3149; circumstantial evidence in prosecution for seduction, § 3153; admission, § 3150; burden of proof, § 3142; question of law and fact, § 3144.

³⁶ *State v. Wenz*, 41 Minn. 196, 197, 42 N. W. 933. It is not proper to permit the prosecution to exhibit a very young infant to the jury, as directly relevant to prove the guilt of the accused, charged with either seduction or rape, or merely to corroborate the prosecutrix, because of a supposed resemblance between the child and accused. *State v. Danforth*, 48 Iowa 43, 30 Am. 387. See also, *Hanawalt v. State*, 64 Wis. 84, 24 N. W. 489, 54 Am. 588; *Risk v. State*, 19 Ind. 152; *Reitz v. State*, 33 Ind. 187; *Barnes v. State*, 37 Tex. Cr. 320, 39

to the prosecutrix is some evidence and may be shown by the evidence of the prosecutrix to corroborate her testimony.³⁷

§ 387. Evidence to prove the promise.—The sexual intercourse is an essential element of the seduction, and must always be proved beyond a reasonable doubt. But mere illicit sexual intercourse alone does not constitute seduction.³⁸ It must appear that it was procured by some artifice, deception or promise, usually an unconditional promise of marriage, and that it was solely because of this promise that the female was induced to surrender her virtue.³⁹ What evidence will justify the jury in finding that the

S. W. 684. But in *State v. Horton*, 100 N. Car. 443, 449, 6 S. E. 238, 6 Am. St. 613, it was held that a child might be exhibited to the jury to prove the sexual intercourse. The exact date of the intercourse is immaterial. *State v. Moore*, 78 Iowa 494, 43 N. W. 273; *State v. McClin-tic*, 73 Iowa 663, 665, 35 N. W. 696; *State v. Deitrick*, 51 Iowa 467, 472, 1 N. W. 732.

³⁷ *State v. Nugent*, 134 Iowa 237, 111 N. W. 927.

³⁸ *People v. Gumaer*, 4 App. Div. (N. Y.) 412, 39 N. Y. S. 326.

³⁹ *State v. Knutson*, 91 Iowa 549, 60 N. W. 129; *State v. Lingle*, 128 Mo. 528, 31 S. W. 20; *State v. Crowell*, 116 N. Car. 1052, 21 S. E. 502; *Smith v. State*, 107 Ala. 139, 18 So. 306; *Anderson v. State*, 104 Ala. 83, 16 So. 108; *Powell v. State* (Miss., 1896), 20 So. 4; *State v. Sharp*, 132 Mo. 165, 33 S. W. 795; *Barnes v. State*, 37 Tex. Cr. 320, 39 S. W. 684; *People v. De Fore*, 64 Mich. 693, 31 N. W. 585, 8 Am. St. 863n; *State v. Fitzgerald*, 63 Iowa 268, 270, 19 N. W. 202; *State v. Hemm*, 82 Iowa 609, 616, 48 N. W. 971; *People v. Clark*, 33 Mich. 112; *State v. Heatherton*, 60 Iowa 175, 14 N. W. 230; *People v. Kane*, 14 Abb.

Pr. (N. Y.) 15; *Carney v. State*, 79 Ala. 14; *Phillips v. State*, 108 Ind. 406, 9 N. E. 345; *Bowers v. State*, 29 Ohio St. 542, 546; *Spenrath v. State* (Tex. Cr., 1898), 48 S. W. 192; *Wal-ton v. State*, 71 Ark. 398, 75 S. W. 1; *State v. Sortviet*, 100 Minn. 12, 110 N. W. 100; *Neary v. People*, 115 Ill. App. 157; *Simmons v. State*, 54 Tex. Cr. 619, 114 S. W. 841; *State v. Atterbury*, 59 Kan. 237, 52 Pac. 451; *Nolan v. State*, 48 Tex. Cr. 436, 88 S. W. 242; *Howe v. State*, 51 Tex. Cr. 174, 102 S. W. 409. The promise of marriage must, according to the majority of the cases, be an unconditional promise, and must be made under such circumstances that the one to whom it was made might reasonably rely on it. *Russell v. State*, 77 Neb. 519, 110 N. W. 380. To establish the charge of seduction it must be made to appear that the intercourse was accomplished by some artifice. Something more than an appeal to lust or passion must be proved. *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202; *Powell v. State* (Miss., 1896), 20 So. 4. See *Elliot-t Evidence*, § 3148. Circumstantial evidence to prove seduction, see *Elliot-t Evidence*, § 3151; presumptions in prosecution for seduction, § 3143.

intercourse was procured by a promise depends on the circumstances of each case.⁴⁰ The evidence to prove the making of a promise or of the employment of an artifice which was the inducement for the sexual intercourse must necessarily take a wide range.⁴¹

The promise to marry need not be proved to have been made in any particular form of words. It is enough if language has been used implying such a promise, intended to convey that meaning, and it is so understood by the woman.⁴² An express promise to marry need not be proved for a conviction will be sustained, if from all the evidence the jury can fairly infer that the seduction was accomplished by reason of the promise, giving the accused the benefit of any reasonable doubt.⁴³ The character and intelligence of the woman must be considered. What might be insufficient to overcome or deceive the mind of a mature and educated woman might succeed in the case of a young and ignorant girl.⁴⁴ The prosecuting witness may be permitted to testify that she submitted her person to the embraces of the accused because of his promise to marry her.⁴⁵

§ 388. Relevancy of the previous conduct of the parties.—The conduct of the parties prior to the alleged seduction, their relations toward one another, the fact that the accused was accustomed to visit the woman as her lover, was welcomed by her mother at her house and was treated well,⁴⁶ or met her clan-

Testimony of accomplice in prosecution for seduction, see 98 Am. St. 179, note. Character of victim of crime, see 14 L. R. A. (N. S.) 727, note.

⁴⁰ *People v. Wallace*, 109 Cal. 611, 42 Pac. 159, and cases in last note. *Knight v. State*, 147 Ala. 93, 41 So. 850, 119 Am. St. 58. It is not material that the promise was made previous to the time of the seduction. *State v. Raynor*, 145 N. Car. 472, 59 S. E. 344.

⁴¹ *State v. Sharp*, 132 Mo. 165, 33 S. W. 795; *People v. Kane*, 14 Abb. Pr. (N. Y.) 15; *Carney v. State*, 79 Ala. 14; *Phillips v. State*, 108 Ind.

406, 9 N. E. 345; *Woodward v. State*, 5 Ga. App. 447, 63 S. E. 573; *State v. Stolley*, 121 Iowa 111, 96 N. W. 707.

⁴² *State v. Brinkhaus*, 34 Minn. 285, 286, 25 N. W. 642.

⁴³ *State v. Ring*, 142 N. Car. 596, 55 S. E. 194, 115 Am. St. 759.

⁴⁴ *State v. Fitzgerald*, 63 Iowa 268, 270, 19 N. W. 202.

⁴⁵ *State v. Bennett*, 137 Iowa 427, 110 N. W. 150; *State v. Raynor*, 145 N. Car. 472, 59 S. E. 344; *State v. Whitley*, 141 N. Car. 823, 53 S. E. 820.

⁴⁶ *Howe v. State*, 51 Tex. Cr. 174, 102 S. W. 409.

destinely, and kept company with her;⁴⁷ that he expressed a preference for her society, and said he intended to have sexual intercourse with her,⁴⁸ or boasted that he had enjoyed sexual favors at her hands,⁴⁹ or that he intended to marry her,⁵⁰ that she expected he would marry her and that the day had been fixed,⁵¹ are always relevant.⁵²

So, to corroborate the woman's evidence, it may be shown that the demeanor of the parties was that of an engaged couple and that it was admitted by them, and currently reported among their friends and acquaintances that they were engaged. The declarations of the accused to the effect that he loved the woman and wanted or intended to marry her are always relevant to corroborate her testimony.⁵³ The fact that the woman had made preparations for the celebration of the marriage is relevant. On the other hand evidence of prior acts of intercourse is admissible to show that the act charged was not under a promise of marriage.⁵⁴

The conduct and relations of the parties after, as well as before, the date of the alleged seduction, may be shown. Such evidence is relevant to show that consent was obtained by promises and inducements and what they consisted of.⁵⁵ So a promise of mar-

⁴⁷ State v. McClintic, 73 Iowa 663, 665, 35 N. W. 696; Faulkner v. State, 53 Tex. Cr. 258, 109 S. W. 199.

⁴⁸ Bailey v. State (Tex.), 30 S. W. 669.

⁴⁹ State v. Hill, 91 Mo. 423, 4 S. W. 121.

⁵⁰ Munkers v. State, 87 Ala. 94, 97, 6 So. 357.

⁵¹ Faulkner v. State, 53 Tex. Cr. 258, 109 S. W. 199.

⁵² The declarations of the prosecuting witness are not receivable to incriminate the defendant unless they are a part of the *res gestæ* or were made in his presence and were not contradicted by him. State v. Sibley, 131 Mo. 519, 33 S. W. 167; State v. Bennett, 137 Iowa 427, 110 N. W. 150; Fine v. State, 45 Tex. Cr. 290, 77 S. W. 806. Compare, *contra*, as

to complaints by the prosecuting witness to her mother. State v. Whitely, 141 N. Car. 823, 53 S. E. 820.

⁵³ Weaver v. State, 142 Ala. 33, 39 So. 341.

⁵⁴ Bowers v. State, 29 Ohio St. 542, 546; State v. Brassfield, 81 Mo. 151, 159, 51 Am. 234.

⁵⁵ State v. Curran, 51 Iowa 112, 49 N. W. 1006; People v. Gibbs, 70 Mich. 425, 38 N. W. 257, 260; People v. Clark, 33 Mich. 112, 114; Bracken v. State, 111 Ala. 68, 20 So. 636, 56 Am. St. 23. The promise may be very properly proved by the written admission of the defendant contained in a letter sent by him to the prosecutrix, expressly mentioning the engagement as existing. Webb v. State (Miss., 1897), 21 So. 133.

riage made subsequently to the alleged crime but at a period when the immoral relations between the parties continued is relevant, and may be considered as a circumstance to prove the prior promise.⁵⁶

§ 389. **The examination, credibility and corroboration of the prosecutrix.**—From the necessity of the case, the making of the promise, and the sexual intercourse are usually provable by the direct evidence of the female only. Her situation as a witness is peculiar. The novelty and embarrassment of her position, the presence around her of a gaping and curious crowd, the confronting with court and jury, the terror produced by the examination and cross-examination, the memory of her shame ever before her, all combine to depress and confuse her. If she is a modest woman her answers are likely to be in monosyllables and to present but a feeble account of the manner of her seduction. Much must of necessity be left to the jurors to gather from her appearance and demeanor as well as from her language. In weighing her testimony the jurors must consider her age and situation, and what they would expect of their own daughters if similarly placed. How many or what kind of seductive arts are necessary to establish the crime cannot be exactly defined. Every case must depend on its own circumstances, considering the condition in life, advantages, age and intelligence of the parties.⁵⁷

⁵⁶ State v. Waterman, 75 Kan. 253, 88 Pac. 1074.

⁵⁷ State v. Higdon, 32 Iowa 262, 264; State v. Fitzgerald, 63 Iowa 268, 19 N. W. 202. The prosecutrix may be asked if she authorized any one to settle the matter for her and to take money to dismiss it. State v. Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. 372. Evidence to show a conspiracy between the complainant and her father and mother to inveigle the defendant into a marriage, and, failing this, to prosecute him, has been received. People v. Clark, 33 Mich. 112, 119. In considering the means used to induce the woman to yield

and surrender her virtue, we must include all acts, artifices, promises, enticements and inducements calculated to accomplish this object. All tests having any tendency to establish any of these should be admitted to prove the criminal conduct. The age, experience, artfulness and blandishments of the offender, and the youthfulness, innocence, guilelessness and confiding nature of the injured party, will be found to enter largely into the causes of the act. The largest latitude, consistent with safety, should be allowed in developing the evidence in the case. People v. Gibbs, 70 Mich. 425, 428, 429, 38 N. W. 257.

§ 390. **Character of corroborative evidence required.**—Where a statute requires that the evidence of the prosecuting witness shall be corroborated, it has been held sufficient if she was corroborated as to some material fact or part of the case, so that the jury were satisfied that her whole evidence was credible.⁵⁸ Some statutes require corroboration only as regards the promise of marriage,⁵⁹ while elsewhere the corroboration must extend to every material fact, including the promise to marry, the seductive arts or deception used, the chastity of the woman, the intercourse, and that the last was the result of the promise.⁶⁰ The circumstances relied on as corroboration of the evidence offered to prove the promise of marriage must be so convincing as to equal the testimony of a disinterested witness. It is absolutely essential that the corroborative evidence should come from some other witness than the woman.⁶¹ On the other hand some cases hold that the corroboration need not be direct or positive, or sufficient in itself to convict.⁶² It may consist of proof of circumstances which customarily

⁵⁸ *Boyce v. People*, 55 N. Y. 644, 647; *People v. Orr*, 92 Hun (N. Y.) 199, 36 N. Y. S. 398; *Wilson v. State*, 73 Ala. 527, 534; *Tedford v. United States*, 7 Ind. Terr. 254, 104 S. W. 608. See, as to corroboration in seduction under California Penal Code, § 1108, *People v. Wade*, 118 Cal. 672, 50 Pac. 841. See *Elliott Evidence*, § 3152.

⁵⁹ *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *State v. Reeves*, 97 Mo. 668, 673, 10 S. W. 841, 10 Am. St. 349; *Spenrath v. State* (Tex. Cr., 1898), 48 S. W. 192.

⁶⁰ *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798; *State v. Bauerkemper*, 95 Iowa 562, 64 N. W. 609; *State v. Timmens*, 4 Minn. 325, 332; *Andre v. State*, 5 Iowa 389, 398, 68 Am. Dec. 708n; *State v. Painter*, 50 Iowa 317; *Zabriskie v. State*, 43 N. J. L. 640, 647, 39 Am. 610; *Woolley v. State*, 50 Tex. Cr. 214, 96 S. W. 27; *Wisdom v. State*, 45 Tex. Cr. 215, 75

S. W. 22; *Burnett v. State*, 76 Ark. 295, 88 S. W. 956; *Hart v. State*, 117 Ala. 183, 23 So. 43.

⁶¹ *Russell v. State*, 77 Neb. 519, 110 N. W. 380.

⁶² *State v. Dolan*, 132 Iowa 196, 109 N. W. 609; *State v. Sortviet*, 100 Minn. 12, 110 N. W. 100; *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904; *State v. Hill*, 91 Mo. 423, 426, 4 S. W. 121; *McCullar v. State*, 36 Tex. Cr. 213, 36 S. W. 585; 61 Am. St. 847; *State v. Reeves*, 97 Mo. 668, 10 S. W. 841; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511, 512; *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863; *Cooper v. State*, 90 Ala. 641, 642, 8 So. 821; *Munkers v. State*, 87 Ala. 94, 97, 6 So. 357; *Barnard v. State* (Tex. Cr.), 76 S. W. 475.

⁶³ *Wright v. State*, 31 Tex. Cr. 354, 20 S. W. 756, 37 Am. St. 822; *State v. Waterman*, 75 Kan. 253, 88 Pac. 1074; *Lasater v. State*, 77 Ark. 468, 94 S. W. 59.

accompany a marriage engagement, such as lover-like attentions, the receipt of love letters and of visits from the defendant, going with him to church and to places of amusement, consultations with the woman's parents and preparations for marriage, together with the fact that she was at that time not receiving attentions from any other man.⁶³ The proof of the admission by the accused that he had promised to marry the prosecuting witness, and that he had subsequently had sexual intercourse with her is sufficient corroboration alone without other circumstances to sustain a verdict of guilty when the statute requires corroboration.⁶⁴ Whether the female can testify that she did or did not voluntarily submit to intercourse with the defendant, or state the reason that she yielded, has been differently decided. It has been held that it is exclusively for the jury to determine whether the intercourse was brought about by the arts or promises of the man, or by the ungovernable passions of the woman.⁶⁵

§ 391. **The marriage of the accused to the seduced female.**—An offer to marry the female seduced does not in the absence of statute exempt the accused from prosecution or punishment.⁶⁶ By statute in many of the states if the accused makes such an offer in open court and the prosecutrix declines to accept it, the charge must be dismissed.⁶⁷ The state cannot be permitted to introduce evidence to show the bad faith of the defendant in making the

⁶³ *State v. Hill*, 91 Mo. 423, 426, 4 S. W. 121; *State v. Brassfield*, 81 Mo. 151, 156, 160, 51 Am. 234; *State v. Timmens*, 4 Minn. 325, 333; *State v. Crawford*, 34 Iowa 40; *State v. Fitzgerald*, 63 Iowa 268, 272, 19 N. W. 202; *State v. Lauderbeck*, 96 Iowa 258, 65 N. W. 158; *State v. Eisenhour*, 132 Mo. 140, 33 S. W. 785; *State v. Ayers*, 8 S. Dak. 517, 67 N. W. 611; *Bailey v. State*, 36 Tex. Cr. 540, 38 S. W. 185; *State v. Waterman*, 75 Kan. 253, 88 Pac. 1074; *Lasater v. State*, 77 Ark. 468, 94 S. W. 59; *Cooper v. State*, 86 Ark. 30, 109 S. W. 1023.

⁶⁴ *State v. Raynor*, 145 N. Car. 472, 59 S. E. 344; *Wilhite v. State*, 84 Ark. 67, 104 S. W. 531.

⁶⁵ *Wilson v. State*, 73 Ala. 527, 532. *Contra*, *Ferguson v. State*, 71 Miss. 805, 15 So. 66, 42 Am. St. 492.

⁶⁶ *State v. Brandenburg*, 118 Mo. 181, 186, 23 S. W. 1080, 40 Am. St. 362; *State v. O'Keefe*, 141 Mo. 271, 42 S. W. 725; *State v. Bauerkemper*, 95 Iowa 562, 64 N. W. 609; *Williams v. State*, 92 Miss. 70, 45 So. 146.

⁶⁷ *Commonwealth v. Wright* (Ky.), 27 S. W. 815; *State v. Otis*, 135 Ind. 267, 270, 34 N. E. 954, 21 L. R. A. 733; *People v. Gould*, 70 Mich. 240, 245, 38 N. W. 232, 14 Am. St. 493n; *Wright v. State*, 31 Tex. Cr. 354, 20 S. W. 756, 37 Am. St. 822; *People v. Frost* (N. Y., 1910), 91 N. E. 376.

offer. It cannot be proved that he had previously declared that he would never live with her, or that he would leave her at the first opportunity.⁶⁸

The state must prove that the woman was unmarried.⁶⁹ This will not be presumed. She may, and perhaps should, testify to the facts, or, if she is silent, it may be inferred from her extreme youth, the fact that she resided in her father's house under her maiden name and received the attentions of the accused and of other men, and the surrounding circumstances and relations of the parties,⁷⁰ all of which are relevant.

§ 392. The chastity of the female—What constitutes chastity and how it may be proved.—Seduction is usually a statutory crime. It is often provided by statute that the female must have been chaste or virtuous, or of chaste character or repute previous to the intercourse with the accused.^{70a} It is for the court to construe the meaning of these words in a statute.⁷¹ As a matter of law, every woman who has never been married and who is a virgin is chaste. The test is usually illicit sexual intercourse.⁷² Whether the female is a virgin is always a question of fact for the jury. The evidence upon this question need not be direct. Positive evidence

⁶⁸ *People v. Gould*, 70 Mich. 240, 245, 38 N. W. 232, 14 Am. St. 493n; *People v. Samonset*, 97 Cal. 448, 32 Pac. 520; *Smith v. State*, 108 Ala. 1, 19 So. 306, 54 Am. St. 140. The offer of marriage ought to be made to the female in person and kept open until the time of the trial. *Lasater v. State*, 77 Ark. 468, 94 S. W. 59.

⁶⁹ *State v. Wheeler*, 108 Mo. 658, 18 S. W. 924, 927; *People v. Krusick*, 93 Cal. 74, 28 Pac. 794; *Mesa v. State*, 17 Tex. App. 395; *State v. Bryan*, 34 Kan. 63, 8 Pac. 260.

⁷⁰ *Lewis v. People*, 37 Mich. 518, 520; *Bailey v. State*, 36 Tex. Cr. 540, 38 S. W. 185; *State v. Waterman*, 75 Kan. 253, 88 Pac. 1074.

^{70a} *Walton v. State*, 71 Ark. 398, 75 S. W. 1.

⁷¹ Where the statute merely requires that the female shall be of "good repute," or "of chaste character," some of the cases hold that proof of actual physical chastity is not necessary. *State v. Sharp*, 132 Mo. 165, 33 S. W. 795; *Kerr v. United States*, 7 Ind. T. 486, 104 S. W. 809; *Woodard v. State*, 5 Ga. App. 447, 63 S. E. 573, in which it was said the test of virtue within the seduction statute is whether the female had ever had at the time of the seduction unlawful sexual intercourse, not purity of mind or heart, but actual physical purity of person. *Contra*, *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863. See *Elliott Evidence*, § 3145.

⁷² *State v. Whitley*, 141 N. Car. 823, 53 S. E. 820.

of an act of sexual intercourse with a man is of course conclusive evidence of unchastity.⁷³ Physical unchastity may also be inferred from proof of indecent familiarities with men, or indecent language and conduct, and, perhaps, from mere indiscretion and improper associations.⁷⁴ All the previous acts, conduct and conversations of the woman are received to prove or disprove her chastity, if actual physical unchastity is not proved.⁷⁵ And where actual chastity of the female is admitted, the moral and mental chastity of the female may be relevant to enable the jury to determine whether the woman, though physically chaste, was seduced, or whether the intercourse was indulged in by her for the purpose of gratifying her lascivious desires.⁷⁶ The facts that the prosecutrix lived with her parents, relatives or guardians,⁷⁷ moved in the society of respectable people, and was reputed to be chaste;⁷⁸ went to church and to social gatherings, are always relevant to prove her actual chastity. To prove that the prosecutrix was unchaste at the time of her alleged seduction her previous reputation as an unchaste woman is admissible. The evidence must be strictly

⁷³ *Simmons v. State*, 54 Tex. Cr. 619, 114 S. W. 841.

⁷⁴ *Wood v. State*, 48 Ga. 192, 289, 299, 15 Am. 664; *O'Neill v. State*, 85 Ga. 383, 408, 11 S. E. 856; *State v. Bell*, 49 Iowa 440, 443; *State v. Wheeler*, 94 Mo. 252, 7 S. W. 103; *Crozier v. State*, 1 Park. Cr. (N. Y.) 453, 457; *Barnes v. State*, 37 Tex. Cr. 320, 39 S. W. 684; *Kenyon v. People*, 26 N. Y. 203, 207, 84 Am. Dec. 177; *People v. Brewer*, 27 Mich. 134, 135; *Powell v. State* (Miss., 1896), 20 So. 4; *People v. Nelson*, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. 592; *Simmons v. State*, 54 Tex. Cr. 619, 114 S. W. 841; *State v. Whitley*, 141 N. Car. 823, 53 S. E. 820. Compare *State v. Hummer*, 128 Iowa 505, 104 N. W. 722.

⁷⁵ *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 708n; *People v. McArdle*, 5 Park. Cr. (N. Y.) 180, 184; *Nolan v. State*, 48 Tex. Cr. 436, 88 S. W.

242; *Jeter v. State*, 52 Tex. Cr. 212, 106 S. W. 371. Specific instances to prove character for chastity, see 14 L. R. A. (N. S.) 727, note.

⁷⁶ *O'Neill v. State*, 85 Ga. 383, 409, 11 S. E. 856; *Smith v. State*, 108 Ala. 1, 19 So. 306, 54 Am. St. 140; *State v. Aker* (Wash., 1909), 103 Pac. 420. There can be no seduction, though the woman be a virgin, unless she has been actually seduced; on that question, her moral qualities, as well as her physical chastity, are relevant.

⁷⁷ *People v. Roderigas*, 49 Cal. 9. The head of a family of which the prosecuting witness was a member for three months may state his opinion as to her previous chaste character based on his acquaintance with her and on what he has seen of her conduct. *People v. Wade*, 118 Cal. 672, 50 Pac. 841.

⁷⁸ *Vandiveer*, In re, 4 Cal. App. 650, 88 Pac. 993, under Penal Code, § 268.

confined to her reputation for morality in sexual relations,⁷⁹ and must also be limited to her reputation for chastity or unchastity before the seduction.⁸⁰ Derogatory rumors are sometimes received, though a witness who has not testified on his direct examination to the reputation for chastity of the prosecutrix cannot be cross-examined as to derogatory reports.⁸¹ It may always be shown that a witness had never heard her reputation for chastity called in question.⁸² The woman may testify to her own chastity,⁸³ and may be cross-examined as to specific unchaste acts and conversations with men other than the defendant,⁸⁴ whose names are given or whose names are unknown. She may refuse to answer where the answer would incriminate her. Actual unchastity, *i. e.* criminal intimacy and lascivious conduct with other men existing after the date of the alleged seduction, is excluded as proof of the fact that prosecutrix was unchaste by the probability that it resulted from it.⁸⁵

Where the evidence shows the actual physical unchastity of the female it may be proved that she had reformed and was leading a chaste life at the date of the seduction.⁸⁶ A presumption of reform may arise where a reasonable time has elapsed since the

⁷⁹ *State v. Hummer*, 128 Iowa 505, 104 N. W. 722. See *Elliott Evidence*, § 3146.

⁸⁰ *People v. Wade*, 118 Cal. 672, 50 Pac. 841.

⁸¹ *State v. Whitley*, 141 N. Car. 823, 53 S. E. 820.

⁸² *Zabriskie v. State*, 43 N. J. L. 640, 644, 39 Am. 610; *State v. Bryan*, 34 Kan. 63, 72, 8 Pac. 260; *State v. Deitrick*, 51 Iowa 467, 469, 1 N. W. 732; *Night v. State*, 147 Ala. 93, 41 So. 850, 119 Am. St. 58. Evidence of reputation for chastity must refer to a time subsequent to the seduction. *People v. Brewer*, 27 Mich. 134, 135.

⁸³ *Kenyon v. People*, 26 N. Y. 203, 209, 84 Am. Dec. 177.

⁸⁴ *State v. Sutherland*, 30 Iowa 570.

⁸⁵ *Bracken v. State*, 111 Ala. 68, 20 So. 636, 56 Am. St. 23; *State v. Wells*, 48 Iowa 671; *Slocum v. People*, 90 Ill. 274; *Mann v. State*, 34 Ga. 1; *Boyce v. People*, 55 N. Y. 644, 646; *Russell v. State*, 77 Neb. 519, 110 N. W. 380; *State v. Atterbury*, 59 Kan. 237, 52 Pac. 451. *Contra*, *Nolan v. State*, 48 Tex. Cr. 436, 88 S. W. 242.

⁸⁶ *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Wilson v. State*, 73 Ala. 527; *State v. Timmens*, 4 Minn. 325; *State v. Dunn*, 53 Iowa 526, 5 N. W. 707; *People v. Clark*, 33 Mich. 112; *State v. Fogg*, 206 Mo. 696, 105 S. W. 618. The burden is on the prosecution. *State v. Bennett*, 137 Iowa 427, 110 N. W. 150. See *Elliott Evidence*, § 3147.

intercourse but when it was frequently repeated at short intervals the burden of proving reformation is on the prosecutrix.⁸⁷

§ 393. **The presumption of chastity.**—Two views are held upon the question whether any presumption of law exists as to the chastity of the female in a trial for seduction. Some of the cases, basing their reasoning upon the presumption of the prisoner's innocence, deny the existence of any presumption of chastity and require the state to produce some evidence that the prosecutrix is chaste.⁸⁸

Other cases hold that as chastity is the general rule in modern society, and a want of it the exception, the prosecutrix starts with a presumption of chastity in her favor.⁸⁹

⁸⁷ *People v. Clark*, 33 Mich. 112, 117; *People v. Millspaugh*, 11 Mich. 278, 282. Where a woman previously unchaste reforms and maintains her personal chastity for such a time that the jury could see that she was actually chaste at the time of the alleged seduction, then if accused obtained carnal knowledge of her person by the false express promise of marriage he should be convicted, and if it appeared that the woman at the time of the seduction was not possessed of actual personal chastity he should be acquitted. *Cooper v. State*, 86 Ark. 30, 109 S. W. 1023. Defenses in seduction, see *Elliott Evidence*, § 3153.

⁸⁸ *People v. Squires*, 49 Mich. 487, 489, 13 N. W. 828; *Zabriskie v. State*, 43 N. J. L. 640, 644, 39 Am. 610; *State v. Wenz*, 41 Minn. 196, 197, 42 N. W. 933; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159; *West v. State*, 1 Wis. 209, 217, 218; *Commonwealth v. Whittaker*, 131 Mass. 224, 225; *Oliver v. Commonwealth*, 101 Pa. St. 215, 218, 47 Am. 704; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *Underhill on Ev.*, 234; *Walton v.*

State, 71 Ark. 398, 75 S. W. 1. On a trial for seduction, the previous want of chastity of the prosecutrix is defensive matter, and accused has the burden of proving it by a preponderance of the evidence, and where there is a reasonable doubt of his guilt on the whole case he is entitled to the benefit of it, but it is not proper to charge that the jury must be convinced beyond a reasonable doubt of the previous chastity of the prosecutrix to warrant a conviction. *Wilhite v. State*, 84 Ark. 67, 104 S. W. 531.

⁸⁹ *Tedford v. United States*, 7 Ind. Terr. 254, 104 S. W. 608; *Woodard v. State*, 5 Ga. App. 447, 63 S. E. 573; *Weaver v. State*, 142 Ala. 33, 39 So. 341; *Kerr v. United States*, 7 Ind. Terr. 486, 104 S. W. 809; *Norton v. State*, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. 538; *State v. Bauerkemper*, 95 Iowa 562, 64 N. W. 609; *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863; *Crozier v. People*, 1 Park. Cr. (N. Y.) 453, 457; *Slocum v. People*, 90 Ill. 274, 281; *State v. Higdon*, 32 Iowa 262, 264; *Wilson v. State*, 73 Ala. 527, 533, 535; *Fer-*

§ 394. **Defilement of female ward or servant.**—A statute which provides punishment for any guardian of a female under the age of eighteen years, or any person to whose care or protection such female shall have been confided, who shall defile her while in his care, custody or employment is sustained by proof that a person in whose family the female was employed as a servant had defiled her when the evidence showed that he had promised the girl's father to watch over and care for her.⁹⁰ It is not necessary to prove an express agreement confiding the girl to the defendant's care.⁹¹ The character of the woman is immaterial. Hence her acts of illicit sexual intercourse with others cannot be shown,⁹² but the continuation of the intercourse with the defendant after the termination of the employment is always relevant.⁹³

§ 395. **Incest defined.**—"Incest, where statutes have not modified its meaning, is sexual commerce, either habitual or in a single

guson v. State, 71 Miss. 805, 808, 15 So. 66, 42 Am. St. 492. "The question is not 'Are the majority of women chaste?' but rather was this woman chaste who admits she consented to illicit intercourse and who carries with her the bastard which is the result and evidence of her shame? The presumption of chastity in such a case not only encounters the presumption of the prisoner's innocence, but, as it must be universally applicable, raises the future presumption that all women who bear illegitimate children, and seek the punishment of their seducers, were absolutely chaste and pure before their seduction. This is manifestly untrue and absurd." *Zabriskie v. State*, 43 N. J. L. 640, 644, 39 Am. 610; *State v. McClintic*, 73 Iowa 663, 667, 35 N. W. 696; *State v. Hemm*, 82 Iowa 609, 612, 48 N. W. 971; *People v. Brewer*, 27 Mich. 134, 138; *State v. Gates*, 27 Minn. 52, 6 N. W. 404; *Carpenter v. People*, 8 Barb. (N. Y.) 603; *State v. Shean*, 32 Iowa 88, 90, 91; *State v. Carron*,

18 Iowa 372, 375, 87 Am. Dec. 401n; *Andre v. State*, 5 Iowa 389, 398, 68 Am. Dec. 708n; *People v. Clark*, 33 Mich. 112; *State v. Sutherland*, 30 Iowa 570.

⁹⁰ *State v. Young*, 99 Mo. 284, 288, 289, 12 S. W. 642; *State v. Strattman*, 100 Mo. 540, 550, 13 S. W. 814; *State v. Terry*, 106 Mo. 209, 215, 17 S. W. 288. The statute applies to the case of a female pupil under 18 years of age who is seduced by her teacher and the fact that the pupil's mother knew of the illicit relations of her daughter with the teacher and consented thereto is no defense. *State v. Oakes*, 202 Mo. 86, 100 S. W. 434, 119 Am. St. 792.

⁹¹ *State v. Sibley*, 131 Mo. 519, 33 S. W. 167; *State v. Hill*, 134 Mo. 663, 36 S. W. 223.

⁹² *State v. Rogers*, 108 Mo. 202, 204, 18 S. W. 976; *State v. Sibley*, 131 Mo. 519, 33 S. W. 167.

⁹³ *State v. Young*, 99 Mo. 284, 290, 12 S. W. 642; *State v. McClain*, 137 Mo. 307, 38 S. W. 906.

instance, and either under a form of marriage or without, between two persons too nearly related in consanguinity or affinity to intermarry."⁹⁴

Incest was not indictable at the common law. It is so only by the various statutes which have been enacted both in England and the United States, and which usually define the crime in express terms prescribing what are its essential ingredients and particularly the prohibited degrees of kinship.⁹⁵ The sexual intercourse, whether habitual or not, must of necessity be a concurrent act. The evidence must show beyond a reasonable doubt that the woman voluntarily consented to it. If it appears that she was compelled either by force or fraud to submit without consent, the crime is not incest but rape, though the parties are related within the forbidden degrees.⁹⁶

§ 396. Evidence to show sexual intercourse.—Proof of a single act of sexual intercourse is enough.⁹⁷ Intermarriage, though

⁹⁴ Bishop's St. Cr., § 727; State v. Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. 790n. For other definitions see *Daniels v. People*, 6 Mich. 381; *Commonwealth v. Lane*, 113 Mass. 458, 463, 18 Am. 509n; *De Groat v. People*, 39 Mich. 124; *Territory v. Corbett*, 3 Mont. 50, 55; *Shelly v. State*, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. 926; *Porath v. State*, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. 954; *Barrett v. State*, 55 Tex. Cr. 182, 115 S. W. 1187; *Gillespie v. State*, 49 Tex. Cr. 530, 93 S. W. 556; *Pate v. State* (Tex. Cr.), 93 S. W. 556; *People v. Koller*, 142 Cal. 621, 76 Pac. 500; *Adams v. State*, 78 Ark. 16, 92 S. W. 1123.

⁹⁵ Sexual intercourse between a stepfather and his unmarried stepdaughter is incest. *Nephew v. State*, 5 Ga. App. 841, 63 S. E. 930.

⁹⁶ *State v. Jarvis*, 20 Ore. 437, 26 Pac. 302, 303, 23 Am. St. 141; *State v. Ellis*, 74 Mo. 385, 41 Am. 321; *People v. Harriden*, 1 Park. Cr. (N. Y.)

344; *State v. Hurd*, 101 Iowa 391, 70 N. W. 613. This offense can only be committed by the concurrent act of two persons of opposite sexes; and the assent or concurrence of the one is as essential to the commission of the offense as that of the other, and as a general rule both must be guilty or neither. *People v. Jenness*, 5 Mich. 305, 321; *Delany v. People*, 10 Mich. 241; *Croghan v. State*, 22 Wis. 444; *Schoenfeldt v. State*, 30 Tex. App. 695, 18 S. W. 640; *De Groat v. People*, 39 Mich. 124, 125. The acquittal of one is a bar to the trial of the other. *Baumer v. State*, 49 Ind. 544, 549, 19 Am. 691; *State v. Thomas*, 53 Iowa 214, 217, 4 N. W. 908; *Yeoman v. State*, 21 Neb. 171, 31 N. W. 669. Cf. *Mathis v. Commonwealth* (Ky.), 13 S. W. 360, 11 Ky. L. 882. See *Elliott Evidence*, § 3168. Character of victim of crime, see 14 L. R. A. (N. S.) 725.

⁹⁷ *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. 790n.

relevant, need not be proved.⁹⁸ Any evidence which is relevant to prove adultery between a man and woman is admissible.⁹⁹ The relation and conduct of the parties toward one another, their opportunities for meeting, their oral expressions of affection or liking, and their inclination to seek each other's society are always relevant. Prior acts of incest between the same parties may always be proved.¹⁰⁰ So, too, it may be shown that they indulged in familiarities and caresses when alone or in the presence of others. But evidence of demonstrations of affection indulged in by the parties should always be considered by the jury in the light of the kinship of the parties.¹

§ 397. The kinship existing between the parties—Evidence of accomplices.—The kinship between the parties to the incest may be proved by the evidence of relatives and friends; and, perhaps, by family reputation. The jury are to determine from the evidence what degree of consanguinity or affinity has been shown. But whether the kinship thus proved is or is not within the prohibited degrees is a question which is for the judge exclusively.²

The law regards both parties to the incestuous adultery as accomplices. Hence, the rule requiring the testimony of an accomplice to be corroborated is applicable to the testimony of either testifying against the other.³

⁹⁸ *Simon v. State*, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. 802.

⁹⁹ See §§ 381, 386.

¹⁰⁰ *People v. Cease*, 80 Mich. 576, 45 N. W. 585; *Lefforge v. State*, 129 Ind. 551, 29 N. E. 34. See *ante*, § 390.

¹ Evidence to show the bad character of the woman previous to the incest and that defendant lived upon the wages of her shame is irrelevant. *People v. Benoit*, 97 Cal. 249, 31 Pac. 1128.

² *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, 749, 21 Am. St. 790n. The fact that the daughter was illegitimate is no defense to a charge of incest against the father. *People v. Lake*, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. 344. It is not necessary to prove that the accused knew that the other party was related within the

forbidden degrees. *State v. Bulinger*, 54 Mo. 142; *Simon v. State*, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. 802.

³ *State v. Streeter*, 20 Nev. 403, 22 Pac. 758, 759; *State v. Dana*, 59 Vt. 614, 10 Atl. 727; *State v. Jarvis*, 18 Ore. 360, 23 Pac. 251, 253; *Freeman v. State*, 11 Tex. App. 92, 40 Am. 787; *Coburn v. State*, 36 Tex. Cr. 257, 36 S. W. 442; *State v. Jarvis*, 20 Ore. 437, 26 Pac. 302, 304, 23 Am. St. 141; *State v. Miller*, 65 Iowa 60, 21 N. W. 181, 182; *Clifton v. State*, 46 Tex. Cr. 18, 79 S. W. 824; *Watkins v. State* (Tex. Cr. App., 1910), 124 S. W. 959. It seems that a person may be convicted of incest though he gains his ends by such force as would render him guilty of rape. Here, as the woman is not an accomplice, her evi-

§ 398. Bigamy—The intent—Invalidity or annulment of first marriage.—Bigamy may be defined as the crime of going through the marriage ceremony with another, while a former husband or wife is living, and not divorced, knowing or having reason to believe, that the former spouse is still alive. The material facts are the first and second⁴ marriages and the fact that the first consort was alive⁵ and undivorced at the date of the void marriage. From such facts a bigamous intent may be inferred.⁶ That the first marriage was void,⁷ or had been annulled or dissolved by a divorce, is always relevant as a defense.⁸ But the good faith of the accused, or his belief or opinion that the first marriage was void, or that he had been granted a divorce before his second marriage, is no defense.⁹

§ 399. Presumptions and proof of death of spouse.—The accused may prove that he has been credibly informed that his wife had procured a divorce from him, and may show that he had made due inquiry, and endeavored to ascertain the truth. If he believed, with good reason, that such was the case, he should be acquitted, as the criminal intent is not present.¹⁰ The state must prove af-

dence does not need corroboration. *Smith v. State*, 108 Ala. 1, 19 So. 306; 54 Am. St. 140; *Whittaker v. Commonwealth*, 95 Ky. 632, 27 S. W. 83, 16 Ky. L. 173; *State v. Hurd*, 101 Iowa 391, 70 N. W. 613. *Contra*, *State v. Aker* (Wash., 1909), 103 Pac. 420.

⁴Elliott Evidence, §§ 2864, 2865. Proof of jurisdiction, Elliott Evidence, § 2860. Second marriage in good faith, when defense, Elliott Evidence, § 2872; when not, § 2871. Polygamy, proof under Edmunds' Law, Elliott Evidence, § 2870. Proof of *corpus delicti* in bigamy, see 68 L. R. A. 42.

⁵Elliott Evidence, §§ 2866, 2869.

⁶*People v. Spoor*, 235 Ill. 230, 85 N. E. 207, 126 Am. St. 197n; *Robinson v. State*, 6 Ga. App. 696, 65 S. E. 792.

⁷3 Greenl. on Ev., § 203; Hal-

brook v. State, 34 Ark. 511, 517, 36 Am. 17n; *People v. Chase*, 27 Hun (N. Y.) 256, 270; *McCombs v. State*, 50 Tex. Cr. 490, 99 S. W. 1017, 123 Am. St. 855, 9 L. R. A. (N. S.) 1036n.

⁸*Commonwealth v. Boyer*, 7 Allen (Mass.) 306; *Tucker v. People*, 122 Ill. 583, 13 N. E. 809. The fact that the first marriage was voidable only is no defense and is never relevant. *People v. Beevers*, 99 Cal. 286, 33 Pac. 844; *Barber v. People*, 203 Ill. 543, 68 N. E. 93; Elliott Evidence, § 2861. Divorce as defenses, § 2873.

⁹*Russell v. State*, 66 Ark. 185, 49 S. W. 821, 74 Am. St. 78; *Rice v. Commonwealth* (Ky.), 105 S. W. 123, 31 Ky. L. 1354, Elliott Evidence, § 2804.

¹⁰*Squire v. State*, 46 Ind. 459, 463. Cf. *State v. Hughes*, 58 Iowa 165, 11 N. W. 706.

firmatively, and beyond a reasonable doubt that the first husband or wife was alive at the date of the void marriage. This is not presumed, as matter of law, from proof that he or she was alive at a prior date, for the presumption that the accused is innocent will nullify the presumption of the continuance of life. Hence, in the absence of direct evidence, that the earlier spouse is alive when the later marriage was solemnized, the jury must acquit.¹¹

§ 400. **Competency of wife of accused.**—The first and true wife will never be permitted to testify against her husband when he is accused of bigamy.¹² The second wife may testify to prove the second marriage, but only if the first marriage is already proved or admitted. As the existence or validity of the first marriage is usually the sole issue, and is not usually established until a verdict is reached, the rule often results in excluding both women as witnesses. As the fact of the first marriage alone renders the second wife competent, it must be proved by independent witnesses before she testifies. Even then she is competent only to prove the second marriage, or show facts rendering it void.¹³ The unchastity of the second wife is inadmissible to impeach her evidence.¹⁴

¹¹ *Mitchell v. Commonwealth*, 78 Ky. 204, 39 Am. 227; *Commonwealth v. Parker*, 9 Met. (Mass.) 263, 43 Am. Dec. 396; *Commonwealth v. Bangs*, 9 Mass. 387; *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. St. 468, 28 L. R. A. 318n; *State v. Howard*, 32 Vt. 380; *Hiler v. People*, 156 Ill. 511, 41 N. E. 181, 47 Am. St. 221n; *Wilson v. State*, 2 Ohio St. 319; *Squire v. State*, 46 Ind. 459, 467; *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111n; *Reg. v. Lumley*, L. R. 1 C. C. 196. Some authorities hold that the jury may consider the fact that she was alive at a prior date and base an inference of fact upon it that she was alive at the date of the second marriage. *Commonwealth v. Caponi*, 155 Mass. 534, 30 N. E. 82; *Commonwealth v. McGrath*,

140 Mass. 296, 6 N. E. 515. See *Elliott Evidence*, § 2867.

¹² See § 1 Hale P. C. 693; 1 East 469; *Miles v. United States*, 103 U. S. 304, 309, 313-315, 26 L. ed. 481; *State v. Patterson*, 2 Ired. (N. Car.) 346, 38 Am. Dec. 699; *Williams v. State*, 44 Ala. 24; *State v. McDavid*, 15 La. Ann. 403. *Contra*, *State v. Sloan*, 55 Iowa 217, 7 N. W. 516. Under statute in Maryland making the husband or wife competent the wife is competent. *Richardson v. State*, 103 Md. 112, 63 Atl. 317. Evidence of husband or wife, see *Elliott Evidence*, § 2868; first and second wives as witnesses, § 2874.

¹³ 3 Greenl. on Ev., § 206; *Miles v. United States*, 103 U. S. 304, 315, 26 L. ed. 481.

¹⁴ *State v. Nadal*, 69 Iowa 478, 482, 29 N. W. 451.

§ 401. **Absence of lawful spouse.**—It is sometimes provided by statute that the absence of a husband or a wife without having been heard from during a period specified, ranging from two to seven years, may be proved as a defense by a party who marries again. It may be shown that the absentee was not heard from as alive during the statutory period.¹⁵ But this presumption of death from unexplained silence and absence may be overcome by evidence that the absentee was alive a short time before the second marriage. As we have seen, the burden of proof is always on the state to show the first spouse is alive, and that the accused knows it.¹⁶ And the absence of a wife resulting from having been driven away by the husband is not such absence as will excuse him though more than seven years.¹⁷

The absence of circumstances from which death may be presumed does not justify an inference that the party is alive. There must be positive evidence that he or she is alive, and whether the presumption of death from unexplained absence has been rebutted is for the jury. The burden is on the accused to show that he did not know his wife was living during the seven years prior to his second marriage.¹⁸ Whether evidence of a reasonable belief on the part of the prisoner that the former husband or wife is dead is admissible in his defense, has been differently decided. Some cases maintain the affirmative of this proposition,¹⁹ though later cases support a contrary view.²⁰

§ 402. **Proof of marriage by eye witness or certificate.**—A higher degree of proof of a marriage is required in criminal trials than

¹⁵ *Poss v. State*, 47 Tex. Cr. 486, 83 S. W. 1109; *Robinson v. State*, 6 Ga. App. 696, 65 S. E. 792.

¹⁶ *Gibson v. State*, 38 Miss. 313, 322.

¹⁷ *State v. Goulden*, 134 N. Car. 743, 47 S. E. 450.

¹⁸ *State v. Goulden*, 134 N. Car. 743, 47 S. E. 450.

¹⁹ *Reg. v. Horton*, 11 Cox C. C. 670; *Reg. v. Turner*, 9 Cox C. C. 145.

²⁰ *Medrano v. State*, 32 Tex. Cr. 214, 22 S. W. 684; *Reg. v. Gibbons*, 12 Cox C. C. 237, 238; *Reg. v. Bennett*, 14 Cox C. C. 45. In *Jones v. State*,

67 Ala. 84, the court said: "Every act was done * * * which is declared criminal, and from the act and the circumstances, the criminal intent must be deduced. There was the intent to marry a second time, not *knowing* the husband to be dead, who had been absent for a period of about one year only, and this is the criminal intent, and the only intent which is of the essence of the offense," and see *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802, 62 Am. St. 800, 34 L. R. A. 784.

is necessary in civil actions,²¹ in which marriage may be inferred to exist from evidence of reputation coupled with cohabitation. A marriage in fact must be proved. This may be done by the testimony of an eye witness to the ceremony,²² by that of the person who performed it, or by a marriage certificate.²³

§ 403. Proof of marriage by reputation, cohabitation and conduct.—Though mere cohabitation and holding out do not constitute marriage, in civil cases the existence of the marital relation may be inferred from evidence that the parties cohabited as man and wife, and were reputed to be such among their friends and acquaintances. In a prosecution for bigamy such evidence alone is not sufficient to prove the first marriage. Some of the cases admit evidence of cohabitation, conduct and reputation²⁴ to cor-

²¹ Halbrook v. State, 34 Ark. 511, 517, 36 Am. 17n.

²² Crane v. State, 94 Tenn. 86, 28 S. W. 317; People v. Perriman, 72 Mich. 184, 40 N. W. 425. Method of proving first marriage, see Elliott Evidence, § 2862.

²³ 2 Greenl. on Ev., § 461; 2 Stark. on Ev., 698; Faustre v. Commonwealth, 92 Ky. 34, 17 S. W. 189, 13 Ky. L. 347; State v. Johnson, 12 Minn. 476, 481, 93 Am. Dec. 241n; State v. Armstrong, 4 Minn. 335, 344; State v. Hodgskins, 19 Me. 155, 158, 36 Am. Dec. 742n; State v. Clark, 54 N. H. 456, 459; State v. Williams, 20 Iowa 98; Arnold v. State, 53 Ga. 574, 575; Johnson v. State, 60 Ark. 308, 30 S. W. 31; Swartz v. State, 7 Ohio Cir. Dec. 43. Proof that the ceremony was performed by a justice or other official will suffice without proving his appointment. This will be presumed. 1 Greenl. on Ev., § 92; State v. Abbey, 29 Vt. 60, 65, 67 Am. Dec. 754. A constitutional provision that the accused shall be confronted with the witnesses against him does not exclude certified copies of mar-

riage records which are made receivable by a statute. State v. Matlock, 70 Iowa 229, 30 N. W. 495. A marriage certificate, though inadmissible as such because not properly authenticated and certified according to statute, may, perhaps, be received as a part of the *res gestæ* of the marriage if it is shown to have been made and delivered at the time. People v. Crawford, 133 N. Y. 535, 30 N. E. 1148. See, also, *ante*, § 383, as to proof of marriage.

²⁴ Gahagan v. People, 1 Park. Cr. (N. Y.) 378, 383; People v. McQuaid, 85 Mich. 123, 48 N. W. 161; Hayes v. People, 25 N. Y. 390, 393, 396, 82 Am. Dec. 364; State v. Nadal, 69 Iowa 478, 29 N. W. 451; United States v. Tenney, 2 Ariz. 127, 11 Pac. 472; Rice v. Commonwealth (Ky.), 105 S. W. 123, 31 Ky. L. 1354; State v. Pendleton, 67 Kan. 180, 72 Pac. 527; People v. Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. 408; Hearne v. State, 50 Tex. Cr. 431, 97 S. W. 1050; Coons v. State, 49 Tex. Cr. 256, 91 S. W. 1085.

roborate direct evidence and to prove the continuance of the marriage. Other authorities reject it altogether.²⁵

§ 404. The admissions of the accused as evidence to prove the marriage—Primary evidence of the ceremony—When required.—The cases are not harmonious on the question whether the declarations of the accused are receivable to prove the ceremony of marriage, the names of the parties, or the time and place, when these facts are material. The admissions of the accused, deliberately made, that the marriage relation existed have been repeatedly received.²⁶

On the other hand, it has been repeatedly decided that the defendant's admissions would not dispense with primary, *i.e.*, written evidence, of the specific facts regarding the ceremony, etc., at least where such evidence was in existence and could be procured.²⁷ Such evidence is not conclusive and creates no presump-

²⁵ State v. Roswell, 6 Conn. 446; State v. Johnson, 12 Minn. 476, 482, 93 Am. Dec. 241n; Adkisson v. State, 34 Tex. Cr. 296, 30 S. W. 357; State v. Cooper, 103 Mo. 266, 15 S. W. 327; Tison v. State, 125 Ga. 7, 53 S. E. 809.

²⁶ State v. Goulden, 134 N. Car. 743, 47 S. E. 450; Caldwell v. State, 146 Ala. 141, 41 So. 473; Le Grand v. State, 88 Ark. 135, 113 S. W. 1028; Murphy v. State, 122 Ga. 149, 50 S. E. 48; Tucker v. People, 117 Ill. 88, 90, 7 N. E. 51; State v. Melton, 120 N. Car. 591, 26 S. E. 933; State v. Abbey, 29 Vt. 60, 64, 67 Am. Dec. 754; Commonwealth v. Jackson, 11 Bush (Ky.) 679, 21 Am. 225; Halbrook v. State, 34 Ark. 511, 517, 36 Am. 17n; Oneale v. Commonwealth, 17 Gratt. (Va.) 582; State v. Nadal, 69 Iowa 478, 482, 29 N. W. 451; Miles v. United States, 103 U. S. 304, 311, 26 L. ed. 481; Stanglein v. State, 17 Ohio St. 453, 561; United States v. Tenney, 2 Ariz. 29, 8 Pac. 295; State v. Hodgskins, 19 Me. 155, 158, 36 Am. Dec. 742n; Commonwealth v. Mur-

tagh, 1 Ashm. (Pa.) 272, 275; Warner v. Commonwealth, 2 Va. Cas. 95; State v. Hilton, 3 Rich. (S. Car.) 434, 435, 45 Am. Dec. 783; Wolverton v. State, 16 Ohio 173, 178, 47 Am. Dec. 373; Crane v. State, 94 Tenn. 86, 28 S. W. 317; State v. Ulrich, 110 Mo. 350, 19 S. W. 656; State v. Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. 195; State v. Jenkins, 139 Mo. 535, 41 S. W. 220. See Elliott Evidence, § 2863. Letters written by the accused to his first wife were received against him in Tucker v. People, 122 Ill. 583, 13 N. E. 809. The silence of the accused under circumstances where it is his duty to speak may doubtless be proved against him as an admission of his marriage.

²⁷ People v. Humphrey, 7 Johns. (N. Y.) 314; State v. Roswell, 6 Conn. 446, 449; Commonwealth v. Norcross, 9 Mass. 492; Commonwealth v. Littlejohn, 15 Mass. 163; Miner v. People, 58 Ill. 59, 60; Sherman v. People, 13 Hun (N. Y.) 575; South v. People, 98 Ill. 261, 265; State v. Armstrong, 4 Minn. 335, 344.

tion of law that a valid marriage existed at the time of the bigamous union. It should go to the jury for what it is worth. Coupled with evidence of reputation and cohabitation, it is very strong proof of a valid marriage.²⁸

§ 405. Marriage certificates and transcripts of records as evidence—Presumption of validity—Venue.—A marriage, celebrated in a foreign country, may be proved by a transcript of the foreign record,²⁹ if it is also shown that the law of the place of the marriage required that a record should be made and kept, and that the record was made and kept under and in conformity with that law.³⁰ A marriage certificate or a license and the return are competent as evidence under the rule admitting the entries of third persons made in the course of their professional employment, though there be no evidence of the official character of the person performing the ceremony except his own statement following his signature.³¹ But a certified copy of a marriage license and of the return thereto by the person officiating at the marriage were held to be inadmissible on a trial for bigamy to prove the prior marriage under a statute providing that certified copies of certain records may be admitted in evidence on

²⁸ *State v. Sanders*, 30 Iowa 582, 584; *State v. Cooper*, 103 Mo. 266, 15 S. W. 327; *People v. Crawford*, 133 N. Y. 535, 30 N. E. 1148. Evidence that the defendant cohabited with a woman and had children by her who lived with him, that the woman signed and acknowledged deeds as his wife, sued for and was granted a divorce, the defendant answering in the suit, is competent, and has been held sufficient proof of a marriage. *State v. Gonce*, 79 Mo. 600. Proof that A was granted a divorce from B on a given date is strong evidence that a marriage had existed between A and B at that date, as a divorce is never granted unless a marriage is proved or admitted. *Halbrook v. State*, 34 Ark. 511, 519, 36 Am. 17n; *Pontier v. State*, 107 Md. 384, 68 Atl.

1059. But in *State v. Sharkey*, 73 N. J. L. 491, 63 Atl. 866, a record of a divorce suit by the prosecuting witness against accused was held to be inadmissible as proof of a former marriage on the ground that the suit was a civil proceeding and not admissible because the proof was not beyond a reasonable doubt. As to a petition for a divorce, see *Addisson v. State*, 34 Tex. Cr. 296, 30 S. W. 357.

²⁹ *State v. Dooris*, 40 Conn. 145; *Stanglein v. State*, 17 Ohio St. 453; *State v. Melton*, 120 N. Car. 591, 26 S. E. 933; *Nelson v. State*, 151 Ala. 2, 43 So. 966.

³⁰ *Tucker v. People*, 117 Ill. 88, 7 N. E. 51; *Pontier v. State*, 107 Md. 384, 68 Atl. 1059.

³¹ *Baker v. State (Tex. Cr.)*, 118 S. W. 542.

three days' notice when notice was not given.³² A marriage shown to have been solemnized will be presumed to be valid until its invalidity is shown. The rule that, when a marriage has been consummated, it will be presumed that the former marriage of one of the parties has been legally dissolved, does not apply in a prosecution for bigamy, so, where the state showed that the accused had been married to a woman who was still living at the time of his second marriage to another, the burden was on him to show that his former marriage had been legally dissolved.³³ The burden of proof, where the validity of the first marriage is disputed, is upon the prosecution,³⁴ and direct evidence of non-assent by either party to the marriage is relevant to rebut the presumption of validity.³⁵ The burden is on the accused to prove the validity of a decree of divorce granted before the alleged bigamous marriage and offered by him in evidence where its validity is attacked by the prosecution.³⁶ The venue of the bigamous marriage, unless essential to confer jurisdiction,³⁷ or to establish the specific character of the offense, need not be proved precisely as laid.³⁸

§ 406. **Bigamous cohabitation.**—The *corpus delicti* of bigamy is the unlawful marriage contract. Cohabitation in a bigamous union is not material, and need not be proved unless its proof is required by statute.³⁹ But proof of unlawful cohabitation is always admissible as tending to show the relations of the parties and to corroborate the evidence of a marriage.⁴⁰ The first wife will not be permitted to testify against the defendant.⁴¹

³² *Burton v. State*, 51 Tex. Cr. 196, 101 S. W. 226.

³³ *Fletcher v. State*, 169 Ind. 77, 81 N. E. 1083, 124 Am. St. 219.

³⁴ *People v. Chase*, 27 Hun (N. Y.) 256, 260; *Weinberg v. State*, 25 Wis. 370; *Bird v. Commonwealth*, 21 Gratt. (Va.) 800. *Contra*, *Sokel v. People*, 212 Ill. 238, 72 N. E. 382.

³⁵ *Kopke v. People*, 43 Mich. 41, 4 N. W. 551.

³⁶ *People v. Spoor*, 235 Ill. 230, 85 N. E. 207, 126 Am. St. 197n.

³⁷ *Tucker v. People*, 117 Ill. 88, 92, 7 N. E. 51.

³⁸ *State v. Nadal*, 69 Iowa 478, 483, 29 N. W. 451.

³⁹ *State v. Sloan*, 55 Iowa 217, 7 N. W. 516; *Nelms v. State*, 84 Ga. 466, 20 Am. St. 377, 10 S. E. 1087; *Gise v. Commonwealth*, 81 Pa. St. 428; *State v. Patterson*, 2 Ired. (N. Car.) 346, 38 Am. Dec. 699.

⁴⁰ *United States v. Tenney*, 2 Ariz. 127, 11 Pac. 472.

⁴¹ *Underhill on Ev.*, § 168; *State v. Patterson*, 2 Ired. (N. Car.) 346, 38 Am. Dec. 699; *Williams v. State*, 44 Ala. 24; *State v. McDavid*, 15 La. Ann. 403.

CHAPTER XXVIII.

RAPE.

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| <p>§ 407. Rape defined—The non-consent of the prosecutrix—Presumption of incapacity to consent.</p> <p>408. Rape by infants.</p> <p>409. Relevancy of the victim's complaints—Proving the details of what she said.</p> <p>410. Proving the details to impeach or corroborate.</p> <p>411. Delay in making complaint—Reasons for delay.</p> <p>412. Medical testimony.</p> <p>413. Relevancy of the physical condition of the prosecutrix.</p> | <p>§ 414. The prosecutrix as a witness—Her competency and credibility—Infancy of the prosecutrix when rendering her incompetent as a witness.</p> <p>415. The prior relations of the parties.</p> <p>416. Proof of carnal knowledge requisite.</p> <p>417. The force or fraud employed—Threats and mortal fear—Failure to make outcry.</p> <p>418. Reputation of the prosecutrix for chastity—Proof of specific unchaste acts.</p> |
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§ 407. Rape defined—The non-consent of the prosecutrix—Presumption of incapacity to consent.—Rape is the crime of obtaining carnal knowledge of a female forcibly and without her consent,¹ or "against her will," the latter word as thus used being synonymous with desire or inclination.²

The absence of consent, where it is not presumed from the immaturity of the female, must always be proved beyond a reasonable doubt.³ The absence of consent need not be the result of a conscious exercise of volition withholding it. It is not always

¹ 4 Bl. Com. 210. In Hale's Pleas of the Crown this crime is defined as "the carnal knowledge of any woman above the age of ten years against her will, and of a woman child under the age of ten years with or against her will." It is not easy to express in one definition all the refinements of the cases. Statutory definitions differ,

and cases may be stated which are punishable as rape in some jurisdictions, while not in others.

² People v. Crosswell, 13 Mich. 427. 432, 87 Am. Dec. 774; Brown v. State. 127 Wis. 193, 106 N. W. 536. See State v. Pickett, 11 Nev. 255, 21 Am. 754.

³ Elliott Evidence, § 3093.

necessary to prove active resistance on the part of the female. Absence of consent will be presumed whenever sexual intercourse is procured by fraud, or the woman is physically or mentally incapable of consenting, because she has been drugged, is *non compos mentis*, or is under the statutory age of consent.⁴ If the woman having legal capacity to consent, shall consent to the consummation of the intercourse, a verdict of guilty cannot be sustained, no matter how reluctant or tardy her consent may have been, or how much force had been used.⁵ The question whether she consented is for the jury. As consent, that is the concurrence of her will with the will of the accused, is purely a mental condition, its existence, when put in issue, must be inferred from the facts in the case. From the secret nature of the crime, evidence of circumstances from which intent must be inferred should be carefully scrutinized.⁶ Among the facts which are relevant to show the absence or presence of consent are the resistance which was offered by the woman, her physical condition and strength, and that of the accused,⁷ and the means employed by the latter to inspire her with fear.

A child under the age of ten years was, at common law, conclusively presumed incapable of consenting to sexual intercourse,⁸

⁴ 2 Bish. Crim. Law, § 1115; 1 Hale P. C. 629; Hubert v. State, 74 Neb. 220, 104 N. W. 276, 106 N. W. 774; Harlan v. People, 32 Colo. 397, 76 Pac. 792; State v. Whimpey, 140 Iowa 199, 118 N. W. 281; State v. Peyton (Ark., 1910), 125 S. W. 416; Elliott Evidence, § 3094.

⁵ Mills v. United States, 164 U. S. 644, 41 L. ed. 584, 17 Sup. Ct. 210; Conners v. State, 47 Wis. 523, 2 N. W. 1143; Pollard v. State, 2 Iowa 567; Whittaker v. State, 50 Wis. 518, 7 N. W. 431, 36 Am. 856n; Reynolds v. State, 27 Neb. 90, 92, 42 N. W. 903, 20 Am. St. 659; Hollis v. State, 27 Fla. 387, 391-394, 9 So. 67.

⁶ Anderson v. State, 41 Wis. 430; Brown v. State, 76 Ga. 623, 626. "The importance of resistance is simply to show two elements in the crime; carnal knowledge by force by one of the

parties, and non-consent thereto by the other." State v. Shields, 45 Conn. 256.

⁷ Brown v. Commonwealth, 82 Va. 653, 656; State v. Cunningham, 100 Mo. 382, 391, 12 S. W. 376.

⁸ Commonwealth v. Sugland, 4 Gray (Mass.) 7; Commonwealth v. Roosnell, 143 Mass. 32, 37, 39, 8 N. E. 747; State v. Sullivan, 68 Vt. 540, 35 Atl. 479; Proper v. State, 85 Wis. 615, 631, 632, 55 N. W. 1035; Farrell v. State, 54 N. J. L. 416, 419, 24 Atl. 723; State v. Miller, 42 La. Ann. 1186, 8 So. 309, 21 Am. St. 418; People v. Crosswell, 13 Mich. 427, 87 Am. Dec. 774; People v. McDonald, 9 Mich. 150; Moore v. State, 17 Ohio St. 521, 525; Coates v. State, 50 Ark. 330, 335, 356, 7 S. W. 304. The mother of the child may testify to her age. Mc-

though, if she were so developed mentally and physically as to understand the nature and consequences of the act, the presumption was sometimes regarded as rebuttable. The statutory age of consent now varies in the several states.⁹ If the female is under the statutory age, the presumption of non-consent is conclusive, and evidence to show that force was or was not used, or generally that she did or did not consent, is alike inadmissible.¹⁰ If the female is over the age of consent, proof of mere absence of consent is enough, and evidence of facts constituting an active and positive dissent is not required. The non-consent may be inferred by the jury from proof that the female was mentally weak, at least where such a degree of imbecility is shown that it is evident that she did not realize the meaning, or the nature and consequences of the sexual act.¹¹

§ 408. **Rape by infants.**—In England at common law a boy, under the age of fourteen, was conclusively presumed unable to

Math v. State, 55 Ga. 303, 307. See *Elliott Evidence*, §§ 3095, 3096. Resistance of the female, see *Elliott Evidence*, § 3097.

⁹ 3 *Crim. L. Mag.* 347.

¹⁰ *People v. Miller*, 96 Mich. 119, 55 N. W. 675; *State v. Wray*, 109 Mo. 594, 599, 19 S. W. 86; *Reg. v. Beale*, 10 Cox C. C. 157; *White v. Commonwealth*, 96 Ky. 180, 28 S. W. 340, 16 Ky. L. 421; *State v. Eberline*, 47 Kan. 155, 157, 27 Pac. 839; *State v. Storkey*, 63 N. Car. 7; *Murphy v. State*, 120 Ind. 115, 116, 22 N. E. 106; *State v. Dancy*, 83 N. Car. 608, 609; *Williams v. State*, 47 Miss. 609, 613; *State v. Wright*, 25 Neb. 38, 41, 40 N. W. 596; *Wood v. State*, 46 Neb. 58, 64 N. W. 355; *McMath v. State*, 55 Ga. 303; *Farrell v. State*, 54 N. J. L. 416, 419, 24 Atl. 723; *Comer v. State* (Tex. Cr.), 20 S. W. 547; *State v. Lacey*, 111 Mo. 513, 516, 20 S. W. 238; *Givens v. Commonwealth*, 29 Gratt. (Va.) 830, 832; *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *Mayo v. State*, 7 Tex. App. 342; *Fizell v. State*, 25 Wis. 364; *People v. Goulette*,

82 Mich. 36, 45 N. W. 1124; *State v. Tilman*, 30 La. Ann. 1249, 31 Am. 236; *State v. Grossheim*, 79 Iowa 75, 44 N. W. 541; *Proper v. State*, 85 Wis. 615, 55 N. W. 1035; *Commonwealth v. Murphy*, 165 Mass. 66, 42 N. E. 504, 52 Am. St. 496, 30 L. R. A. 734; *State v. Forsythe*, 99 Iowa 1, 68 N. W. 446; *State v. Bricker*, 135 Iowa 343, 112 N. W. 645; *State v. Mehojovich*, 118 La. 1013, 43 So. 660; *Sigerella v. State* (Del., 1909), 74 Atl. 1081; *Heath v. State* (Ind., 1909), 90 N. E. 310; *State v. Jones* (Iowa, 1909), 123 N. W. 960; *Perkins v. Commonwealth* (Ky., 1909), 124 S. W. 794.

¹¹ *State v. Enright*, 90 Iowa 520, 58 N. W. 901; *Rodriguez v. State*, 20 Tex. App. 542; *Reg. v. Barratt*, 12 Cox C. C. 498; *People v. Crosswell*, 13 Mich. 427, 432, 87 Am. Dec. 774; *State v. Cunningham*, 100 Mo. 382, 392, 12 S. W. 376. If the female is actually under the statutory age of consent, evidence to show facts from which the accused might have inferred that she was of age to consent

commit rape.¹² Most, if not all the American authorities, reasoning from the difference in climate between England and America, the diversity of habits of living and the peculiar intermingling of races in America, have regarded this presumption as rebuttable.¹³

But the evidence of physical capacity or of the actual maturity of the infant must be clear and cogent. Slight or unconvincing evidence of actual capacity will not be enough to justify submitting the case to the jury.¹⁴

§ 409. Relevancy of the victim's complaint—Proving the details of what she said.—The fact that the victim of a rape was weeping,¹⁵ or that she made immediate complaint, as well as when she made it and to whom, being material and relevant to show the commission of the crime, may be proved as original evidence on the direct examination of the prosecutrix¹⁶ as an exception to

is inadmissible. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915.

¹² *Reg. v. Philips*, 8 C. & P. 736; *Reg. v. Jordan*, 9 C. & P. 118; *Rex v. Groombridge*, 7 C. & P. 582; *State v. Handy*, 4 Harr. (Del.) 566, 567; *McKinny v. State*, 29 Fla. 565, 10 So. 732, 30 Am. St. 140.

¹³ *Williams v. State*, 14 Ohio 222, 45 Am. Dec. 536; *People v. Randolph*, 2 Park. Cr. (N. Y.) 174, 177; *Heilman v. Commonwealth*, 84 Ky. 457, 461, 1 S. W. 731, 8 Ky. L. 451, 4 Am. St. 207; *State v. Jones*, 39 La. Ann. 935, 936, 3 So. 57; *Beason v. State* (Miss., 1909), 50 So. 488.

¹⁴ *Godfrey v. State*, 31 Ala. 323, 328, 70 Am. Dec. 494n; *State v. Goin*, 9 Humph. (Tenn.) 174, 177; *Peckham v. People*, 32 Colo. 140, 75 Pac. 422. A boy over fourteen is presumed capable. *State v. Handy*, 4 Harr. (Del.) 566, 567; *State v. Goin*, *supra*. If a crime be not merely the result of boyish pugnacity, but of some passion such as lust in the case of rape, the law will interpose and the infant, though under fourteen, will be punished. Malice and wickedness will

supply the want of age. *State v. Pugh*, 7 Jones (N. Car.) 61, 63. Cf. *Heilman v. Commonwealth*, 84 Ky. 457, 1 S. W. 731, 8 Ky. L. 451, 4 Am. St. 207.

¹⁵ *State v. Bedard*, 65 Vt. 278, 26 Atl. 719.

¹⁶ *State v. Patrick*, 107 Mo. 147, 163, 17 S. W. 666; *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *Griffin v. State*, 76 Ala. 29, 32; *Territory v. Godfrey*, 6 Dak. 46, 50 N. W. 481; *People v. Barney*, 114 Cal. 554, 47 Pac. 41; *Oleson v. State*, 11 Neb. 276, 279, 9 N. W. 38, 38 Am. 366; *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098; *State v. Carpenter*, 124 Iowa 5, 98 N. W. 775; *State v. Sudduth*, 52 S. Car. 488, 30 S. E. 408; *People v. Scattura*, 238 Ill. 313, 87 N. E. 332; *State v. Neil*, 13 Idaho 539, 90 Pac. 860, 91 Pac. 318; *State v. Symens*, 138 Iowa 113, 115 N. W. 878; *State v. Bebb*, 125 Iowa 494, 101 N. W. 189; *State v. Stines*, 138 N. Car. 686, 50 S. E. 851; *Dickey v. State*, 86 Miss. 525, 38 So. 776; *Posey v. State*, 143 Ala. 54, 38 So. 1019; *State v. Egbert*, 125 Iowa 443, 101 N. W. 191; *State v.*

the rule excluding hearsay evidence, or of any other witness. It may be shown that the complaint was made, where and to whom it was made, and that some person was accused who must not be named. But the details of what the prosecutrix said, and particularly the name of the person she accuses of the crime,¹⁷ cannot be proved on the direct examination,¹⁸ unless the complaint is so closely connected with the time or place of the crime as to form a part of the *res gesta*.¹⁹

§ 410. Proving details to impeach or corroborate.—Though the particulars of the complaint are not generally receivable from the

Myrberg (Wash., 1909), 105 Pac. 622.

¹⁷ State v. Griffin, 43 Wash. 591, 86 Pac. 951.

¹⁸ Hannon v. State, 70 Wis. 448, 451, 36 N. W. 1; Lee v. State, 74 Wis. 45, 41 N. W. 960; State v. Langford, 45 La. Ann. 1177, 1179, 14 So. 181, 40 Am. St. 277; Lowe v. State, 97 Ga. 792, 25 S. E. 676; Baccio v. People, 41 N. Y. 265, 272; Thompson v. State, 38 Ind. 39; Ellis v. State, 25 Fla. 702, 708, 6 So. 768; State v. Shettleworth, 18 Minn. 208, 212; People v. Stewart, 97 Cal. 238, 32 Pac. 8; Stephen v. State, 11 Ga. 225; State v. Campbell, 20 Nev. 122, 17 Pac. 620; State v. Mitchell, 68 Iowa 116, 119, 26 N. W. 44; State v. Richards, 33 Iowa 420; State v. Clark, 69 Iowa 294, 28 N. W. 606; Parker v. State, 67 Md. 329, 10 Atl. 219, 1 Am. 387; Stevens v. People, 158 Ill. 111, 41 N. E. 856; Pefferling v. State, 40 Tex. 486; People v. Tierney, 67 Cal. 54, 7 Pac. 37; People v. Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. 126; Hornbeck v. State, 35 Ohio St. 277, 35 Am. 608; Oleson v. State, 11 Neb. 276, 279, 9 N. W. 38, 38 Am. 366; Holst v. State, 23 Tex. App. 1, 3 S. W. 757, 59 Am. 770; Reg. v. Walker, 2 Moo. & R. 212; People v. Bernor, 115 Mich. 692, 74 N. W. 184; People v. Lambert, 120 Cal. 170, 52 Pac. 307; Anderson v. State, 82 Miss. 784, 35 So. 202; State

v. Fowler, 13 Idaho 317, 89 Pac. 757; People v. Scattura, 238 Ill. 313, 87 N. E. 332; State v. Griffin, 43 Wash. 591, 86 Pac. 951; Jeffries v. State, 89 Miss. 643, 42 So. 801; People v. Weston, 236 Ill. 104, 86 N. E. 188; State v. Symens, 138 Iowa 113, 115 N. W. 878.

¹⁹ State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. 766; People v. Glover, 71 Mich. 303, 38 N. W. 874; People v. Gage, 62 Mich. 271, 274, 28 N. W. 835, 4 Am. St. 854; Castillo v. State, 31 Tex. Cr. 145, 150, 19 S. W. 892, 37 Am. St. 794; Barnett v. State, 83 Ala. 40, 3 So. 612; Barnes v. State, 88 Ala. 204, 208, 7 So. 38, 16 Am. St. 48; State v. Byrne, 47 Conn. 465, 467; State v. Kinney, 44 Conn. 153, 26 Am. 436; State v. Patrick, 107 Mo. 147, 163-168, 17 S. W. 666; State v. Jerome, 82 Iowa 749, 48 N. W. 722; Laughlin v. State, 18 Ohio 99, 51 Am. Dec. 444; McMath v. State, 55 Ga. 303, 307; Baccio v. People, 41 N. Y. 265; Stephen v. State, 11 Ga. 225; Reg. v. Eyre, 2 F. & F. 579; Cunningham v. People, 210 Ill. 410, 71 N. E. 389; Adams v. State, 50 Tex. Cr. 586, 99 S. W. 1015; Skaggs v. State, 88 Ark. 62, 113 S. W. 346; State v. Colombo (Del. O. & T. 1909), 75 Atl. 616; Huey v. State (Ga. App., 1910), 66 S. E. 1023.

Declarations of prosecutrix as *res*

witness who testifies to the fact that it was made, counsel for the accused may, with propriety, bring out the details upon cross-examination to contradict or to impeach the witness, or the prosecutrix if she testifies.²⁰

As an exception to the general rule the details of the complaint are sometimes allowed to be shown, sometimes upon the direct examination but usually in rebuttal solely to corroborate the prosecutrix (and then only after she has been impeached on cross-examination), by showing that she told the same story to several persons in or out of court.²¹

But the details of the complaint cannot be introduced if the prosecutrix refuses to testify, or if she cannot testify because she has died before the trial,²² or because she is an imbecile.²³

§ 411. Delay in making complaint—Reasons for delay.—Undue delay and even delay for a few days, unless reasonably explained,

gesta, see 19 L. R. A. 744, note; Elliott Evidence, § 3098. Admissions and confessions, see Elliott Evidence, § 3103; corroboration, § 3102; circumstantial evidence, § 3104; variance, § 3109; clothing worn by prosecutrix or by defendant, admissible, § 3106.

²⁰ State v. Freeman, 100 N. Car. 429, 433, 5 S. E. 921; Wood v. State, 46 Neb. 58, 64 N. W. 355; State v. Clark, 69 Iowa 294, 296, 28 N. W. 606; Barnett v. State, 83 Ala. 40, 44, 3 So. 612; Griffin v. State, 76 Ala. 20, 32; Pleasant v. State, 15 Ark. 624; Thompson v. State, 38 Ind. 39, 3 Greenl. on Ev., § 213; Parker v. State, 67 Md. 329, 331, 10 Atl. 219; Sexton v. State (Ark., 1909), 121 S. W. 1075. "If these declarations are in accordance with the testimony given in court, they tend to strengthen and give effect to that testimony; if against it, the testimony is destroyed." Johnson v. State, 17 Ohio 593; approved in State v. Patrick, 107 Mo. 147, 163, 17 S. W. 666.

²¹ Castillo v. State, 31 Tex. Cr. 145, 151, 19 S. W. 892, 37 Am. St. 794; State v. Byrne, 47 Conn. 465, 467; State v. Kinney, 44 Conn. 153, 26 Am. 433; Barnett v. State, 83 Ala. 40, 44, 3 So. 612; Oleson v. State, 11 Neb. 276, 281, 9 N. W. 38, 38 Am. 366; Proper v. State, 85 Wis. 615, 55 N. W. 1035; State v. Langford, 45 La. Ann. 1177, 1180, 14 So. 181, 40 Am. St. 277; State v. Hutchinson, 95 Iowa 566, 64 N. W. 610; State v. Werner, 16 N. Dak. 83, 112 N. W. 60; State v. Carpenter, 124 Iowa 5, 98 N. W. 775; State v. Parker, 134 N. Car. 209, 46 S. E. 511, and see cases in last note.

²² Reg. v. Megson, 9 C. & P. 420.

²³ State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423n. Such evidence, though in corroboration, may be received before she testifies. Proctor v. Commonwealth (Ky.), 20 S. W. 213, 14 Ky. L. 248; State v. Mitchell, 68 Iowa 116, 119, 26 N. W. 44. *Contra*, Johnson v. State, 17 Ohio 593.

may, it seems, result in the rejection of evidence of the fact that a complaint was made.²⁴

No invariable rule can be laid down defining what weight delay will have. It is so natural that a virtuous female should immediately complain of such an outrage to those connected with her by ties of blood or friendship, that her neglect to do so is a circumstance which may discredit her. Silence and delay in making complaint would be likely to awaken suspicion and doubt as to the truth of the complaint. Failure to make an outcry or complaint is always relevant.²⁵ How much it ought to discredit her depends wholly upon the circumstances and upon the nature and validity of the reasons for her silence.²⁶

²⁴ *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. 608; *Bueno v. People*, 1 Colo. App. 232, 28 Pac. 248; *Higgins v. People*, 58 N. Y. 377; *Thompson v. State*, 33 Tex. Cr. 472, 26 S. W. 987; *State v. Reid*, 39 Minn. 277, 280, 39 N. W. 796; *State v. Wilkins*, 66 Vt. 1, 10, 28 Atl. 323; *State v. Byrne*, 47 Conn. 465, 467; *Jackson v. State*, 91 Wis. 253, 64 N. W. 838; *State v. Peter*, 8 Jones (N. Car.) 19; *Maillet v. People*, 42 Mich. 262, 3 N. W. 854; *People v. Brown*, 53 Mich. 531, 19 N. W. 172; *People v. Glover*, 71 Mich. 303, 38 N. W. 874; *State v. Niles*, 47 Vt. 82; *Johnson v. State*, 27 Neb. 687, 43 N. W. 425; *Bailey v. Commonwealth*, 82 Va. 107, 113, 3 Am. St. 87; *State v. Cassidy*, 85 Iowa 145, 52 N. W. 1, 2; *People v. Lambert*, 120 Cal. 170, 52 Pac. 307; *People v. Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013; *Kearse v. State* (Tex. Cr.), 88 S. W. 363; *Cowles v. State*, 51 Tex. Cr. 498, 102 S. W. 1128; *State v. Griffin*, 43 Wash. 591, 86 Pac. 951. "Mere lapse of time between the perpetration of the act and the complaint is not the test of its admissibility. The time that intervenes is a subject for the jury to consider in passing upon the

weight of her testimony; and the degree of credit to be given it on account of the delay in making it depends on the particular circumstances of the case." The court in *State v. Mulkern*, 85 Me. 106, 107, 26 Atl. 1017; *People v. Gage*, 62 Mich. 271, 275, 28 N. W. 835, 4 Am. St. 854.

²⁵ *People v. Fong Chung*, 5 Cal. App. 587, 91 Pac. 105. In a prosecution for rape, a concealment of the injury for any considerable time after the woman has had an opportunity to complain, and a failure on her part to make an outcry where the act is committed within the probable hearing of other persons, are circumstances which will justify a strong, but not conclusive, inference that the act was with her consent, and not by force. *State v. Goodale*, 210 Mo. 275, 109 S. W. 9.

²⁶ *Higgins v. People*, 58 N. Y. 377, 379; *State v. Knapp*, 45 N. H. 148; *Baccio v. People*, 41 N. Y. 265; *State v. Wilkins*, 66 Vt. 1, 17, 28 Atl. 323; *State v. Niles*, 47 Vt. 82; *Vaughn v. State*, 78 Neb. 317, 110 N. W. 902; *People v. Keith*, 141 Cal. 686, 75 Pac. 304.

If the silence or the delay of the prosecutrix in complaining is urged to lessen the force or credibility of her evidence, she should always be permitted to explain why she was silent. Her delay may be explained and excused by proof of sufficient cause therefor, as, for example, by want of opportunity, or by duress or threats by the perpetrator of the wrong.²⁷ Thus, if she is a child she may show she did not complain immediately to her mother because she was afraid of a whipping, or because the latter was away from home when the crime was committed,²⁸ or because shame prompted her to suppress the fact,²⁹ or that she was deaf and dumb,³⁰ or was very young, lived with the defendant and was influenced and threatened by him.³¹

§ 412. **Medical testimony.**—A physical examination to procure evidence is not indispensable,³² nor should the refusal of a modest prosecutrix to submit to one be allowed to discredit her as a witness.³³ But a physician, after he has made such an examination, may state the age of the prosecutrix, that he found bruises on her,³⁴ may state in detail the appearance of the limbs and genital

²⁷ *State v. Bebb*, 125 Iowa 494, 101 N. W. 189.

²⁸ *Polson v. State*, 137 Ind. 519, 35 N. E. 907, 908; *People v. Terwilliger*, 74 Hun (N. Y.) 310, 26 N. Y. S. 674, aff'd 142 N. Y. 629, 37 N. E. 565.

²⁹ *State v. Wilkins*, 66 Vt. 1, 10, 28 Atl. 323, 327. Whether the reason is a good one is for the jury. *State v. Reid*, 39 Minn. 277, 281, 39 N. W. 796; *Baccio v. People*, 41 N. Y. 265, 271. And it is for them to estimate the force and effect of the silence and delay of the prosecutrix, keeping in view the reasons which caused them.

³⁰ *State v. DeWolf*, 8 Conn. 93, 20 Am. Dec. 90.

³¹ *State v. Byrne*, 47 Conn. 465; *State v. Baker*, 136 Mo. 74, 37 S. W. 810. Cf. *People v. O'Sullivan*, 104 N. Y. 481, 490, 10 N. E. 880, 58 Am. 530. "It would then clearly be

proper to show the reasons of such delay, whether caused by the threats of the prisoner, inability caused by the violence, want of opportunity, or the fear of injury by the communication to the only persons at hand." *State v. Knapp*, 45 N. H. 148, 155; *People v. Glover*, 71 Mich. 303, 307, 38 N. W. 874; *People v. Knight* (Cal., 1895), 43 Pac. 6.

³² *Frazier v. State*, 56 Ark. 242, 19 S. W. 838.

³³ *Barnett v. State*, 83 Ala. 40, 3 So. 612. Defendant cannot insist that the prosecutrix, though a young child, shall submit to a medical examination. It is wholly discretionary with the court. *McGuff v. State*, 88 Ala. 147, 153, 7 So. 35, 16 Am. St. 25.

³⁴ *Myers v. State*, 84 Ala. 11, 12, 4 So. 291; *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *Neill v. State*, 49 Tex. Cr. 219, 91 S. W. 791. The fact

organs of the female,³⁸ and that there had been actual penetration,³⁹ or he may give an opinion whether penetration³⁷ or complete sexual intercourse was possible,³⁸ and whether pregnancy would ensue if a rape had been committed.³⁹ Expert testimony of the physical strength and condition of the prosecutrix is always received to show her ability or inability to resist.⁴⁰ The medical expert witness may give an opinion based upon a hypothetical question containing material facts proved or assumed to be proved, or he may base his opinion as to the causes of the physical condition of the prosecutrix upon the evidence of another physician who, having examined her, describes her condition as he observed it.⁴¹

A physician cannot testify as to the mental effects of indecent liberties on a woman's person,⁴² or whether the accused could have had sexual intercourse with a woman without her consent, without resorting to extraordinary physical violence,⁴³ as the question of consent is for the jury. The victim's exclamations evincing her present feelings, or her statements of present suffering made to a physician in the course of medical treatment or examination may be proved by any one who heard them. They are original evidence, and whether the feelings were or were not simulated is for the jury.⁴⁴

§ 413. Relevancy of the physical condition of the prosecutrix.—

that, on an examination six months later than the alleged rape, the hymen was found unruptured, is admissible, the remoteness of such evidence going merely to its probative force. *Gifford v. People*, 148 Ill. 173, 178, 35 N. E. 754. *Cf.* *State v. Evans*, 138 Mo. 116, 39 S. W. 462, 60 Am. St. 549. As to physical examination and medical testimony, see *Elliott Evidence*, § 3107; 68 Am. St. 252, note.

³⁸ *State v. Symens*, 138 Iowa 113, 115 N. W. 878.

³⁹ *Woodin v. People*, 1 Park. Cr. (N. Y.) 464, 467.

³⁷ *Hardtke v. State*, 67 Wis. 552, 554, 30 N. W. 723; *State v. Watson*, 81 Iowa 380, 46 N. W. 868.

³⁸ *People v. Clark*, 33 Mich. 112; *Proper v. State*, 85 Wis. 615, 55 N. W. 1035.

³⁹ *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896.

⁴⁰ *State v. Knapp*, 45 N. H. 148, 154.

⁴¹ *State v. Watson*, 81 Iowa 380, 46 N. W. 868.

⁴² *People v. Royal*, 53 Cal. 62.

⁴³ *Woodin v. People*, 1 Park. Cr. (N. Y.) 464, 467.

⁴⁴ *Polson v. State*, 137 Ind. 519, 35 N. E. 907, 919; *Underhill on Ev.*, § 52. *Cf.* *State v. Yocum*, 117 Mo. 622, 23 S. W. 765, which holds that whatever the female told her physician is not admissible.

Evidence of the physical appearance and condition of the prosecutrix subsequent to the date of the alleged rape is always relevant to corroborate her evidence and as tending to show the probability or improbability that a rape was committed.⁴³ Non-expert witnesses, who have had adequate opportunities for observation, may testify to facts relating to her condition, if within their own knowledge, where their observation does not require or presuppose the possession of special scientific or medical training.⁴³ Thus, the husband, mother or other relative of the prosecuting witness may testify that they found bruises and other marks of violence on her body,⁴⁴ or to the condition of her underclothing, or the bedding used by her, if it is first shown that they were worn when the alleged rape was committed.⁴⁵ The birth of a child to the prosecuting witness on such a date as it would occur in the course of nature, assuming that she had had sexual intercourse with the accused at the date mentioned is always relevant,⁴⁶ and the prosecuting witness may herself testify to the birth of a child.⁴⁷ It is not permissible to prove a resemblance between the prisoner and a child born to the prosecutrix by exhib-

⁴³ *Myers v. State*, 84 Ala. 11, 12, 4 So. 291; *Brauer v. State*, 25 Wis. 413, 418; *Commonwealth v. Allen*, 135 Pa. St. 483, 19 Atl. 957; *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186; *Skaggs v. State*, 88 Ark. 62, 113 S. W. 346; *Sigerella v. State* (Del., 1909), 74 Atl. 1081; *State v. Colomba* (Del. O. & T. 1909), 75 Atl. 616.

⁴⁴ *State v. Murphy*, 118 Mo. 7, 25 S. W. 95; *State v. Sanford*, 124 Mo. 484, 27 S. W. 1099; *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *State v. Sudduth*, 52 S. Car. 488, 30 S. E. 408. One who has married the prosecutrix after the crime may testify that he had discovered she was not a virgin. *Smith v. State*, 52 Tex. Cr. 344, 106 S. W. 1161.

⁴⁵ *Hannon v. State*, 70 Wis. 448, 451, 36 N. W. 1; *State v. Harness*, 10 Idaho 18, 76 Pac. 788.

⁴⁶ *Gonzales v. State*, 32 Tex. Cr. 611, 620, 25 S. W. 781. The clothing worn by the woman assailed, as well

as that worn by the accused, may be received in evidence to corroborate the evidence of the prosecutrix and as independent evidence to prove the commission of the crime. *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218; *State v. Murphy*, 118 Mo. 7, 16, 25 S. W. 95; *State v. Duffy*, 124 Mo. 1, 10, 27 S. W. 358, 360; *McMurrin v. Rigby*, 80 Iowa 322, 324, 45 N. W. 877. But the clothing must be identified as that which she wore at the time of the crime. *Gonzales v. State*, 32 Tex. Cr. 611, 25 S. W. 781.

⁴⁷ *State v. Walke*, 69 Kan. 183, 76 Pac. 408; *State v. Danforth*, 73 N. H. 215, 60 Atl. 839, 111 Am. St. 600; *Druin v. Commonwealth* (Ky., 1910), 124 S. W. 856.

⁴⁸ *State v. Miller*, 71 Kan. 200, 80 Pac. 51; *State v. Stone*, 74 Kan. 189, 85 Pac. 808; and compare *People v. Robertson*, 88 App. Div. (N. Y.) 198, 84 N. Y. S. 401.

iting an infant three months old to the jury,⁴⁸ though the contrary has been held in the case of an older infant,⁴⁹ nor can her statement that the accused is the father of her child be received.⁵⁰ It may be shown that the female was, upon an examination, found to have a venereal disease. To connect the accused with the rape evidence is then admissible to show that he had a similar disease when he was arrested, and if he denies this he may be cross-examined upon his physical condition at that time.⁵¹ Evidence that the prosecutrix had a venereal disease is not admissible to discredit her,⁵² though it may be proved by the accused by medical testimony that she had such a disease at the date of the rape, that it was contagious and that accused never had it.⁵³

§ 414. The prosecutrix as a witness—Her competency and credibility—Infancy of prosecutrix when rendering her incompetent as a witness.—The woman is competent to testify to the facts of the rape, though her evidence, because of the customary secrecy of the crime, and the ease with which such a charge may be made, should be somewhat carefully scrutinized. It has been held that to sustain a conviction her evidence must be corroborated on all material facts and circumstances if the accused goes on the stand and denies the crime.⁵⁴ But it would seem that in the absence of

⁴⁸ State v. Danforth, 48 Iowa 43-48, 30 Am. 387.

⁴⁹ State v. Danforth, 78 N. H. 215, 60 Atl. 839; State v. Palmberg, 199 Mo. 233, 97 S. W. 566, 116 Am. St. 476.

⁵⁰ State v. Hussey, 7 Iowa 409, 411.

⁵¹ People v. Glover, 71 Mich. 303, 305, 38 N. W. 874. Such a coincidence may create a very strong presumption of guilt in the minds of the jurors which the accused may endeavor to rebut by proving that prior to the date of the alleged rape the woman had sexual intercourse with other men. Nugent v. State, 18 Ala. 521, 526; State v. Otey, 7 Kan. 69, 77. See People v. Ah Lean, 7

Cal. App. 626, 95 Pac. 380. The testimony of a physician to the physical condition of the defendant, gained by an examination in the jail, submitted to voluntarily, the defendant being told that the prosecuting attorney had sent the physician for that purpose only, is not privileged. People v. Glover, 71 Mich. 303, 307, 38 N. W. 874. See also, § 178, *et seq.* Privileged communications.

⁵² State v. Smith, 18 S. Dak. 341, 100 N. W. 740.

⁵³ People v. Fong Chung, 5 Cal. App. 587, 91 Pac. 105.

⁵⁴ Innis v. State, 42 Ga. 473; Thompson v. State, 33 Tex. Cr. 472, 26 S. W. 987; Mathews v. State, 19

statute the credibility of her evidence should be left wholly to the jury as in other cases. They will be justified in convicting the defendant on her evidence alone, though it may be uncorroborated, if it convinces them beyond a reasonable doubt that the accused is guilty.⁵⁵ But her testimony should be carefully scrutinized, and court and jury should diligently guard themselves from the undue influence of the sympathy in her behalf which the circumstances are apt to excite.⁵⁶ So on appeal the testimony

Neb. 330, 336-338, 27 N. W. 234; *People v. Kunz*, 76 Hun (N. Y.) 610, 27 N. Y. S. 945; *State v. Connelly*, 57 Minn. 482, 485, 59 N. W. 479; *Bradshaw v. State*, 49 Tex. Cr. 165, 94 S. W. 223; *Livinghouse v. State*, 76 Neb. 491, 107 N. W. 854; *Klawitter v. State*, 76 Neb. 49, 107 N. W. 121; *Fitzgerald v. State*, 78 Neb. 1, 110 N. W. 676; *People v. Farina*, 118 N. Y. S. 817; *Donovan v. State*, 140 Wis. 570, 122 N. W. 1022. By statute in Iowa Code, § 5488; *State v. Norris*, 127 Iowa 683, 104 N. W. 282, corroboration is required solely for the purpose of connecting accused with the crime. *State v. Bartlett*, 127 Iowa 689, 104 N. W. 285; *State v. Blackburn* (Iowa, 1907), 110 N. W. 275.

⁵⁵ *Scott v. State*, 3 Ga. App. 479, 60 S. E. 112; *Hill v. State* (Tex. Cr.), 77 S. W. 808; *Hammond v. State*, 39 Neb. 252, 58 N. W. 92; *State v. Lattin*, 29 Conn. 389; *Shirwin v. People*, 69 Ill. 55; *Givens v. Commonwealth*, 29 Gratt. (Va.) 830, 835; *State v. Hert*, 89 Mo. 590, 591, 1 S. W. 830; *State v. Wilcox*, 111 Mo. 569, 20 S. W. 314, 33 Am. St. 551; *Fager v. State*, 22 Neb. 332, 35 N. W. 195; *Barnett v. State*, 83 Ala. 40, 3 So. 612; *Lynn v. Commonwealth* (Ky.), 13 S. W. 74, 11 Ky. L. 772; *State v. Dusenberry*, 112 Mo. 277, 296, 20 S. W. 461. Cf. *State v. Connelly*, 57 Minn. 482, 485, 59 N. W. 479; *State v. McLaughlin*, 44 Iowa

82; 2 Bish. on Cr. Pro., § 963; 1 Phill. on Ev., 7; *Curby v. Territory*, 4 Ariz. 371, 42 Pac. 953. Cf. *Mathews v. State*, 19 Neb. 330, 27 N. W. 234; *People v. Doyle* (Fla., 1897), 22 So. 272; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *State v. Day*, 188 Mo. 359, 87 S. W. 465; *Brown v. State*, 127 Wis. 193, 106 N. W. 536; *Thomas v. Commonwealth*, 106 Va. 855, 56 S. E. 705; *State v. Conlin*, 45 Wash. 478, 88 Pac. 932; *State v. Jones*, 32 Mont. 442, 80 Pac. 1095; *Allen v. State* (Miss., 1908), 45 So. 833; *People v. Keith*, 141 Cal. 686, 75 Pac. 304; *Druin v. Commonwealth* (Ky., 1910), 124 S. W. 856. Admissions showing a plan to commit a rape or the flight of the accused have been held to be sufficient corroboration. *Loar v. State*, 76 Neb. 148, 107 N. W. 229; *State v. Hetland*, 141 Iowa 524, 119 N. W. 961. But the refusal of the accused to be examined by a physician is not sufficient corroboration. *Rex v. Gray*, 68 J. P. 327.

⁵⁶ *Boddie v. State*, 52 Ala. 395, 398; *State v. Hatfield*, 75 Iowa 592, 596, 39 N. W. 910; *Smith v. State*, 77 Ga. 705, 711-716. The party ravished may give evidence, but the credibility of her evidence must be left to the jury. If she be of good fame, presently disclosed the offense and made search for the offender, these and like circumstances give greater prob-

of the prosecutrix will be closely scrutinized and if it appears incredible a judgment of guilty should be reversed.⁵⁷

A conviction will not be sustained if the prosecutrix is unable to identify the prisoner. Her statements, describing the man who assaulted her, cannot be proved at the trial by a witness to whom she made them out of court.⁵⁸ If the complainant is too young to comprehend the nature and responsibility of an oath, her testimony is not admissible,⁵⁹ nor are her statements made out of court permitted to be proved.⁶⁰ But the infancy or imbecility of the prosecutrix,^{60a} though of such a nature as to preclude her from giving consent or making resistance, will not exclude her evidence if she is shown to have sufficient mental capacity to comprehend and appreciate the nature of an oath.⁶¹ Much latitude is allowable in the cross-examination of the prosecutrix. She may be asked if she consented to the intercourse with the accused,⁶² and she may also be interrogated upon her silence in reference thereto. She may be asked if she reported the outrage to her priest,⁶³ or if she said that the accused was innocent, and that his prosecution was for blackmailing purposes.⁶⁴

ability to her testimony. If she be of evil fame, unsupported in her testimony by others, concealed the injury a considerable time, and might have been heard, yet made no outcry, these and like circumstances create a strong but not a conclusive presumption that her testimony is incredible. 4 Bl. Comm. 213. When the woman is the sole witness for the prosecution, and her evidence is impeached and contradicted, it may be proved that she had made charges of a like nature against her brother and many others which she subsequently admitted were false. *People v. Evans*, 72 Mich. 367, 381, 40 N. W. 473.

⁵⁷ *State v. Goodale*, 210 Mo. 275, 109 S. W. 9.

⁵⁸ *Brogy v. Commonwealth*, 10 Gratt. (Va.) 722, 725.

⁵⁹ *Reg. v. Cockburn*, 3 Cox C. C. 543; *McMath v. State*, 55 Ga. 303, 308. See also, 65 L. R. A. 316, note.

⁶⁰ *Reg. v. Nicholas*, 2 C. & K. 246; *Rex v. Williams*, 7 C. & P. 320.

^{60a} *State v. Crouch*, 130 Iowa 478, 107 N. W. 173.

⁶¹ *Smith v. Commonwealth*, 85 Va. 924, 927, 9 S. E. 148; *Rodgers v. State*, 30 Tex. App. 510, 17 S. W. 1077; *McMath v. State*, 55 Ga. 303, 308; *State v. Lattin*, 29 Conn. 389. The witness, if young and very ignorant, may be plied with leading questions by the prosecutor. *Ellis v. State*, 25 Fla. 702, 6 So. 768. See § 204. *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186.

⁶² *Woodin v. People*, 1 Park Cr. (N. Y.) 464; *Brown v. State*, 127 Wis. 193, 106 N. W. 536; *Schults v. State*, 49 Tex. Cr. 351, 91 S. W. 786.

⁶³ *Maillet v. People*, 42 Mich. 262, 264, 3 N. W. 854.

⁶⁴ *Shirwin v. People*, 69 Ill. 55, 59; *People v. Knight*. (Cal., 1895), 43 Pac. 6.

§ 415. **The prior relations of the parties.**—The state may prove improper acts and solicitations to sexual intercourse by the accused toward the prosecutrix and other assaults by the accused on her,⁶⁵ as well as acts of voluntary sexual intercourse between them prior to the rape charged,^{66a} in order to show his probable motive or intent.⁶⁶ On the other hand, to prove consent, it may be shown that the prosecutrix sought the company of the accused,⁶⁷ and that their relations were always friendly, though chaste and proper.⁶⁸ But evidence that the prosecutrix knew the accused was a man of bad character,⁶⁹ or evidence to show acts of sexual intercourse by the accused with other women, is not admissible.⁷⁰

⁶⁵ *State v. Campbell*, 210 Mo. 202, 109 S. W. 706; *State v. Allison* (S. Dak., 1909), 124 N. W. 747.

^{66a} *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566, 116 Am. St. 476; *State v. Johnson*, 133 Iowa 38, 110 N. W. 70; *State v. Mobley*, 44 Wash. 549, 87 Pac. 815; *Leedom v. State*, '81 Neb. 585, 116 N. W. 496.

⁶⁶ *State v. Carpenter*, 124 Iowa 5, 98 N. W. 775; *State v. Crouch*, 130 Iowa 478, 107 N. W. 173; *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *State v. Trusty*, 122 Iowa 82, 97 N. W. 989; *State v. Borchert*, 68 Kan. 360, 74 Pac. 1108; *People v. Manahan*, 32 Cal. 68; *State v. Robinson*, 32 Ore. 43, 48 Pac. 357; *People v. Abbott*, 97 Mich. 484, 486, 56 N. W. 662, 37 Am. St. 360; *Hardtke v. State*, 67 Wis. 552, 554, 30 N. W. 723; *State v. Knapp*, 45 N. H. 148, 156; *State v. Patrick*, 107 Mo. 147, 155, 17 S. W. 666; *People v. O'Sullivan*, 104 N. Y. 481, 484, 10 N. E. 880, 58 Am. 530; *Barnes v. State*, 88 Ala. 204, 207, 7 So. 38, 16 Am. St. 48; *Taylor v. State*, 22 Tex. App. 529, 545, 3 S. W. 753, 58 Am. 656n; *State v. Sysinger* (S. Dak., 1910), 125 N. W. 879. Evidence of a previous attempt to commit a rape is not incompetent,

because it comes from the prosecutrix. *People v. O'Sullivan*, 104 N. Y. 481, 484, 10 N. E. 880, 58 Am. 530; *State v. Parish*, 104 N. Car. 679, 10 S. E. 457, and she may be asked why she did not complain of the previous attempts. *People v. Lenon*, 79 Cal. 625, 631, 21 Pac. 967. Evidence of other rapes, or attempts at rape, by the defendant upon the prosecutrix or other females, is usually irrelevant. *Janzen v. People*, 159 Ill. 440, 42 N. E. 862; *State v. Stevens*, 56 Kan. 720, 44 Pac. 992; *State v. Thompson*, 14 Wash. 285, 44 Pac. 533. *It seems*, that such evidence is admissible to account for the absence of an outcry and to explain why there was no laceration of the female organ. *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040; *State v. Gaston*, 96 Iowa 505, 65 N. W. 415.

⁶⁷ *Shirwin v. People*, 69 Ill. 55, 61; *Warren v. State*, 54 Tex. Cr. 443, 114 S. W. 380.

⁶⁸ *Hall v. People*, 47 Mich. 636, 11 N. W. 414.

⁶⁹ *State v. Porter*, 57 Iowa 691, 11 N. W. 644.

⁷⁰ *People v. Bowen*, 49 Cal. 654. The girl may testify that the accused, her father, was a man of great strength, had beaten her mother, was

§ 416. **Proof of carnal knowledge requisite.**—Despite some lack of harmony in the early English cases, it is now settled that an allegation of carnal knowledge is sustained by proof of actual penetration alone; and it is not now, and never seems to have been, required in America, that actual emission should be proved.⁷¹ Penetration may be proved by the direct evidence of the female, though her evidence is neither the best nor the only proper evidence of that fact. Her evidence on this point ought to be convincing and consistent to sustain a conviction.⁷² It may be inferred from the circumstances, as from the physical condition of the female, the marks of violence on her and her complaints of pain and soreness. This rule is very important, and of frequent application in the case of the rape of children, who, from ignorance and inexperience, are incapable of testifying intelligently to this essential fact.⁷³ Proof of penetration beyond a reasonable doubt is always absolutely essential,⁷⁴ both at common law and under the statutes.⁷⁵ Evidence that the woman voluntarily remained with the defendant in a room all night is not sufficient to sustain a conviction.⁷⁶ But proof beyond a reasonable doubt of the least penetration is sufficient.⁷⁷

drunk when he outraged her, and that she was frightened and in great fear. *Maillet v. People*, 42 Mich. 262, 263, 3 N. W. 854. *Cf. Bean v. People*, 124 Ill. 576, 583, 16 N. E. 656. Statements by the defendant, made months before the crime, tending to show his passion towards the woman, are receivable. *Barnes v. State*, 88 Ala. 204, 7 So. 38, 16 Am. St. 48.

⁷¹ *Comstock v. State*, 14 Neb. 205, 206, 15 N. W. 355; *Waller v. State*, 40 Ala. 325, 332; *People v. Crowley*, 102 N. Y. 234, 237, 6 N. E. 384; *State v. Hargrave*, 65 N. Car. 466, 467; *Osgood v. State*, 64 Wis. 472, 25 N. W. 529; *State v. Shields*, 45 Conn. 256; *Taylor v. State*, 111 Ind. 279, 12 N. E. 400; 1 Hale P. C. 628; 2 Bish. Cr. Law, § 1127; *Bradburn v. State*, 162 Ind. 689, 71 N. E. 133.

⁷² *State v. Forshee*, 199 Mo. 142, 97 S. W. 933.

⁷³ *Brauer v. State*, 25 Wis. 413, 415; *Taylor v. State*, 111 Ind. 279, 280, 12 N. E. 400; *Wesley v. State*, 65 Ga. 731, 734; *People v. Crowley*, 102 N. Y. 234, 237, 6 N. E. 384; *Comstock v. State*, 14 Neb. 205, 209, 15 N. W. 355; *State v. Depoister*, 21 Nev. 107, 25 Pac. 1000; *Givens v. Commonwealth*, 29 Gratt. (Va.) 830, 835; *People v. Bernor*, 115 Mich. 692, 74 N. W. 184; *State v. Biggs* (Wash., 1910), 107 Pac. 374.

⁷⁴ *Hardtke v. State*, 67 Wis. 552, 553, 30 N. W. 723; *State v. Dalton*, 106 Mo. 463, 17 S. W. 700; *State v. Grubb*, 55 Kan. 678, 41 Pac. 951; *Vickers v. United States*, 1 Okla. Cr. 452, 98 Pac. 467.

⁷⁵ *People v. Sheffield*, 9 Cal. App. 130, 98 Pac. 67.

⁷⁶ *Dickey v. State*, 21 Tex. App. 430, 2 S. W. 809; *Jacques v. People*, 66 Ill. 84, 86.

⁷⁷ *People v. Crowley*, 102 N. Y. 234.

§ 417. **The force or fraud employed—Threats and mortal fear—Failure to make outcry.**—To convict, the jury must be satisfied that the sexual intercourse was either obtained by force, or if it was actually obtained by trick or fraud, that the accused intended to employ force if the fraud should fail.⁷⁸ An actual force used by the accused sufficient to create an apprehension of death in the mind of the victim need not be proved.⁷⁹ If a less degree of force is used but coupled with threats to kill or to inflict bodily harm, in fear of which she involuntarily submits, the intimidation practiced will be regarded as constructive force.⁸⁰ The kind and

237, 6 N. E. 384; *People v. Courier*, 79 Mich. 366, 367, 44 N. W. 571; *Brauer v. State*, 25 Wis. 413, 415; *State v. Shields*, 45 Conn. 256; *Bailey v. Commonwealth*, 82 Va. 107, 113, 3 Am. St. 87; *Bean v. People*, 124 Ill. 576, 583, 16 N. E. 656; *People v. Rivers*, 147 Mich. 643, 111 N. W. 201, 14 Det. Leg. N. 6. If the evidence satisfies the jury that any part of the *membrum virile* of the accused was within the *labia* of the *puendum*, a verdict of guilty should be rendered. *Reg. v. Lines*, 1 C. & K. 393, 47 E. C. L. 393.

⁷⁸ *Commonwealth v. Fields*, 4 Leigh (Va.) 648; *State v. Shepard*, 7 Conn. 54; *Eberhart v. State*, 134 Ind. 651, 655, 34 N. E. 637; *Garrison v. People*, 6 Neb. 274; *McNair v. State*, 53 Ala. 453; *Lewis v. State*, 30 Ala. 54, 56, 68 Am. Dec. 113; *Osgood v. State*, 64 Wis. 472, 474, 25 N. W. 529; *Reg. v. Stanton*, 1 C. & K. 415; *Reg. v. Camplin*, 1 C. & K. 746; *State v. Urie*, 101 Iowa 411, 70 N. W. 603; *State v. Neil*, 13 Idaho 539, 90 Pac. 860, 91 Pac. 318. It is usually said that the utmost reluctance and resistance by the woman should appear. *People v. Morrison*, 1 Park. Cr. (N. Y.) 625; *People v. Crosswell*, 13 Mich. 427, 433, 87 Am. Dec. 774; *People v. Abbot*, 19 Wend. (N. Y.)

192, 195; *Whittaker v. State*, 50 Wis. 518, 523, 7 N. W. 431, 36 Am. 856n; *State v. Burgdorf*, 53 Mo. 65, 67; *Don Moran v. People*, 25 Mich. 356, 12 Am. 283n; *Anderson v. State*, 104 Ind. 467, 474, 4 N. E. 63, 5 N. E. 711; *People v. Murphy*, 145 Mich. 524, 108 N. W. 1009; *Gaskin v. State*, 105 Ga. 631, 31 S. E. 740; 3 Greenl. on Ev. 210. "The resistance must be up to the point of being overpowered by actual force, or of inability from loss of strength longer to resist, or from the number of persons attacking resistance must be dangerous or absolutely useless, or there must be duress or fear of death." *People v. Dohring*, 59 N. Y. 374, 382, 383, 17 Am. 349; *People v. Bransby*, 32 N. Y. 525, 531, 540.

⁷⁹ *Waller v. State*, 40 Ala. 325, 331.

⁸⁰ *Pleasant v. State*, 13 Ark. 360; *State v. Urie*, 101 Iowa 411, 70 N. W. 603; *Huston v. People*, 121 Ill. 497, 499, 13 N. E. 538; *State v. Ward*, 73 Iowa 532, 35 N. W. 617; *State v. Dusenberry*, 112 Mo. 277, 282, 296, 20 S. W. 461; *Turner v. People*, 33 Mich. 363; *Huber v. State*, 126 Ind. 185, 186, 25 N. E. 904. To establish the crime of rape, the utmost reluctance on the part of the woman must be shown, and also that she availed herself of every reasonable

degree of resistance which must be exerted, and which may reasonably be expected, depend upon the physical and mental condition of the parties, their ages and the relations existing between them and the surrounding circumstances. No invariable rule can be laid down as to the amount or character of the facts which must be proved to show a reasonable resistance.⁸¹ Facts must be shown. The testimony of the woman that she fought accused or did her utmost to resist him is merely an opinion or conclusion and not proof.⁸²

It is always admissible, as bearing on the question of resistance, and consent, to show that the woman screamed or cried out for aid when she was assaulted by the defendant. And proof that she was silent or that her garments were neither torn, soiled nor disarranged may also be received. Such evidence, though by no means conclusive, is of weight in favor of the defendant if not sufficiently explained. From proof of her silence at the time of the alleged commission of the crime, taken in connection with evidence of her mature age and general intelligence, the jury may be justified in the inference that she consented to the intercourse.⁸³ But her silence is always open to explanation. Hence

opportunity to make the utmost resistance in repelling the assailant and preventing him from accomplishing his purpose; and a showing of a passive demeanor is not sufficient, where the woman is sufficiently possessed of her mental faculties to apprehend her danger and to control her physical powers in her defense. *Devoy v. State*, 122 Wis. 148, 99 N. W. 455.

⁸¹*Hawkins v. State*, 136 Ind. 630, 36 N. E. 419; *Anderson v. State*, 104 Ind. 467, 474, 4 N. E. 63, 5 N. E. 711; *Commonwealth v. McDonald*, 110 Mass. 405, 406; *Eberhart v. State*, 134 Ind. 651, 655, 34 N. E. 637; *Pomcroy v. State*, 94 Ind. 96, 48 Am. 146; *People v. Dohring*, 59 N. Y. 374, 383, 17 Am. 349; *Waller v. State*, 40 Ala. 325; *State v. Sudduth*, 52 S. Car. 488, 30 S. E. 408; *State v. Carpenter*, 124 Iowa 5, 98 N. W. 775.

⁸²"The nature and extent of resistance which ought reasonably to be expected in each particular case, must necessarily depend very much upon the peculiar circumstances attending it, and it is hence quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance." *Anderson v. State*, 104 Ind. 467, 474, 4 N. E. 63, 5 N. E. 711; *Eberhart v. State*, 134 Ind. 651, 655, 34 N. E. 637; *Huber v. State*, 126 Ind. 185, 186, 25 N. E. 904; *Davis v. State*, 63 Ark. 470, 39 S. W. 356.

⁸³*Devoy v. State*, 122 Wis. 148, 99 N. W. 455; *Brown v. State*, 127 Wis. 193, 106 N. W. 536.

⁸⁴*State v. Cone*, 1 Jones (N. Car.) 18; *Eberhart v. State*, 134 Ind. 651, 656, 34 N. E. 637; *State v. Cross*, 12 Iowa 66, 70, 79 Am. Dec. 519; *Peo-*

her evidence explaining and giving reasons for her silence, as for example, where she testifies that she did not make an outcry because she was gagged or choked by the accused, or because she was terrified by his threats, or because she was unconscious, must always be considered by the jury in determining the evidential value of her silence.⁸⁴

It is never absolutely necessary to prove that her screams were heard by every person who was within earshot, if her statement that she made an outcry is corroborated by some evidence.⁸⁵ The clothing of the prosecutrix, an infant properly identified by her mother, is competent to show the force employed which may be inferred from their torn condition.⁸⁶

§ 418. Reputation of the prosecutrix for chastity.—Proof of specific unchaste acts.—The bad reputation of the prosecuting witness for unchastity existing prior to the date of the crime is always relevant in evidence to show that the sexual intercourse may have been consented to by her.⁸⁷ An exception to this rule is made

ple v. Morrison, 1 Park. Cr. (N. Y.) 625, 644; State v. Brown, 54 Kan. 71, 72, 37 Pac. 996; People v. Kirwan, 22 N. Y. S. 160, 67 Hun (N. Y.) 652, without opinion; Warren v. State, 54 Tex. Cr. 443, 114 S. W. 380.

⁸⁴ State v. Reid, 39 Minn. 277, 279, 39 N. W. 796.

⁸⁵ Bean v. People, 124 Ill. 576, 580, 16 N. E. 656. Cf. Brown v. Commonwealth, 82 Va. 653; Reynolds v. People, 41 How. Pr. (N. Y.) 179; Barney v. People, 22 Ill. 160; State v. Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095.

⁸⁶ State v. Brannan, 206 Mo. 636, 105 S. W. 602.

⁸⁷ State v. Barrick, 60 W. Va. 576, 55 S. E. 652; People v. Ryno, 148 Mich. 137, 111 N. W. 740, 14 Det. Leg. N. 69; State v. Detwiler, 60 W. Va. 583, 55 S. E. 654; Black v. State, 119 Ga. 746, 47 S. E. 370; Clark v. Commonwealth (Ky.), 92 S. W. 573,

29 Ky. L. 154; 14 L. R. A. (N. S.) 714; Elliott Evidence, § 3101; O'Brien v. State, 47 N. J. L. 279, 280; Pleasant v. State, 15 Ark. 624, 645-653; People v. Johnson, 106 Cal. 289, 39 Pac. 622; People v. Hartman, 103 Cal. 242, 246, 37 Pac. 153, 42 Am. St. 108; State v. Hollenbeck, 67 Vt. 34, 30 Atl. 696; Brown v. State, 72 Miss. 997, 17 So. 275; State v. Eberline, 47 Kan. 155, 27 Pac. 839; State v. Brown, 55 Kan. 766, 42 Pac. 363; State v. Forshner, 43 N. H. 89, 80 Am. Dec. 132; Shields v. State, 32 Tex. Cr. 498, 502, 23 S. W. 893; Commonwealth v. Kendall, 113 Mass. 210, 211, 18 Am. 469; Rex v. Barker, 3 C. & P. 589; State v. Daniel, 87 N. Car. 507; Anderson v. State, 104 Ind. 467, 471, 4 N. E. 63, 5 N. E. 711; State v. Johnson, 28 Vt. 512, 514; Boddie v. State, 52 Ala. 395, 398; Rex v. Clarke, 2 Starkie 214. Cf. Fry v. Commonwealth, 82 Va. 334; Tyler v. State, 46 Tex. Cr. 10, 79 S.

where the female is under the age of consent. Evidence of her reputation for unchastity or of acts of sexual intercourse with the accused or with other men is then irrelevant as her consent is immaterial.⁸⁸ When the accused attacks the chastity of the prosecuting witness by evidence of reputation for unchastity or of illicit intercourse, the prosecution may introduce evidence of her reputation for chastity to discredit such testimony.⁸⁹

The cases are not harmonious upon the question whether the reputation for unchastity of a woman over the age of consent, existing subsequent to the date of the alleged crime, is admissible. The weight of the cases is against it.⁹⁰ The evidence of unchaste reputation must come from a witness who has been a resident in the neighborhood where the female also resided. The report of what a detective heard about the woman, on inquiring among her acquaintances, is inadmissible.⁹¹

Acts of voluntary sexual intercourse by the prosecuting witness with the defendant prior to the date of the crime may be proved by her extra-judicial admissions,⁹² by her answers on her

W. 558; *Shoemaker v. State* (Tex. Cr. App., 1910), 126 S. W. 887. Her bad character for chastity may show, or tend to show, that the prisoner believed he would meet with little or no resistance. *Pratt v. State*, 19 Ohio St. 277, 279. *Cf. Myers v. State*, 51 Neb. 517, 71 N. W. 33. Evidence of good character of defendant in prosecution for rape, see 103 Am. St. 899, note.

⁸⁸ *State v. Smith*, 18 S. Dak. 341, 100 N. W. 740; *People v. Abbott*, 97 Mich. 484, 486, 56 N. W. 862, 37 Am. St. 360; *People v. Glover*, 71 Mich. 303, 38 N. W. 874; *Plunkett v. State*, 72 Ark. 409, 82 S. W. 845; *State v. Lawrence*, 74 Ohio St. 38, 77 N. E. 266; *Renfroe v. State*, 84 Ark. 16, 104 S. W. 542; *State v. Rivers* (Conn., 1909), 74 Atl. 757. Compare, *contra*, *Sykes v. State*, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. 972n.

⁸⁹ *Leedom v. State*, 81 Neb. 585, 116 N. W. 496; *Warren v. State*, 54 Tex. Cr. 443, 114 S. W. 380.

⁹⁰ *State v. Ward*, 73 Iowa 532, 35 N. W. 617; *State v. Forshner*, 43 N. H. 89, 90, 80 Am. Dec. 132; *Rex v. Clarke*, 2 Stark. 214; *People v. Abbot*, 19 Wend. (N. Y.) 192; *State v. Day*, 188 Mo. 359, 87 S. W. 465 (where prosecutrix was under the age of consent). *Contra*, *Rex v. Barker*, 3 C. & P. 589, 3 Greenl. § 214; *Lake v. Commonwealth* (Ky.), 104 S. W. 1003, 31 Ky. L. 1232.

⁹¹ *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132. It may not be necessary to prove that the reputation for unchastity is well known or ancient. Thus evidence of the general reputation of the prosecutrix for chastity in the community is relevant where it appeared that she had only been in town for about twenty-four hours, during which time she had openly solicited sexual intercourse with several men. *State v. Brown*, 55 Kan. 766, 42 Pac. 363.

⁹² *State v. Cook*, 65 Iowa 560, 562, 22 N. W. 675.

cross-examination,⁹³ or otherwise.⁹⁴ Such evidence is relevant to show that the apparently forced intercourse was voluntarily submitted to by her.

The great majority of the cases maintain the rule that acts of sexual intercourse participated in by the alleged victim of the rape prior to the date of the crime but with other men than the accused cannot be shown to prove her consent.⁹⁵ This rule is said to be based upon the assumption that the prosecutrix is unprepared to confute and disprove sudden and unexpected accusation of adulterous acts. In the main, however, it is founded upon the theory that no inference can be drawn that she consented to intercourse with the accused from the fact that she had previously submitted to the embraces of other men. Though evidence of adulterous acts with other men is not generally admissible, evidence of other acts indicating the possession of an immoral character is relevant. Evidence of drunkenness and

⁹³ *Bedgood v. State*, 115 Ind. 275, 17 N. E. 621; *Shirwin v. People*, 69 Ill. 55; *State v. Gereke*, 74 Kan. 196, 86 Pac. 160, 87 Pac. 759; *State v. Sechrist* (Mo., 1910), 126 S. W. 400.

⁹⁴ *People v. Abbott*, 97 Mich. 484, 486, 56 N. W. 862, 37 Am. St. 360; *Barnes v. State*, 88 Ala. 204, 207, 7 So. 38, 16 Am. St. 48; *State v. Jefferson*, 6 Ired. (N. Car.) 305; *Woods v. People*, 55 N. Y. 515, 14 Am. 309; *Rex v. Martin*, 6 C. & P. 562; *Bedgood v. State*, 115 Ind. 275, 279, 17 N. E. 621; *Hall v. People*, 47 Mich. 636, 11 N. W. 414; *State v. Cassidy*, 85 Iowa 145, 52 N. W. 1; *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132; *People v. Grauer*, 12 App. Div. (N. Y.) 464, 42 N. Y. S. 721; *State v. Conlin*, 45 Wash. 478, 88 Pac. 932; *People v. Nichols* (Mich., 1909), 124 N. W. 25, 16 Det. Leg. N. 890; *Boyd v. State* (Ohio, 1910), 90 N. E. 355.

⁹⁵ *State v. Cassidy*, 85 Iowa 145, 149, 52 N. W. 1; *State v. Brown*, 55 Kan. 766, 42 Pac. 363; *Commonwealth v. Harris*, 131 Mass. 336;

Commonwealth v. Kendall, 113 Mass. 210, 211; *State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446, 49 Am. St. 766; *Pleasant v. State*, 15 Ark. 624, 648; *O'Brien v. State*, 47 N. J. L. 279; *State v. Knapp*, 45 N. H. 148, 156; *McCombs v. State*, 8 Ohio St. 643, 646; *People v. Abbott*, 97 Mich. 484, 486, 56 N. W. 862, 37 Am. St. 360; *State v. Patrick*, 107 Mo. 147, 17 S. W. 666; *State v. Campbell*, 20 Nev. 122, 17 Pac. 620; *McQuirk v. State*, 84 Ala. 435, 4 So. 775, 5 Am. 381; *People v. McLean*, 71 Mich. 309, 38 N. W. 917, 15 Am. St. 263; 2 Phil. on Ev., § 940; 1 Greenl. Ev., § 458; *Rosc. Cr. Ev.* 903; *State v. Turner*, 1 Hous. C. C. (Del.) 76. *Contra*, *State v. Johnson*, 28 Vt. 512, 513, 515; *Bennett, J.*, dissenting; *People v. Abbott*, 19 Wend. (N. Y.) 192; *Benstine v. State*, 2 Lea (Tenn.) 169, 173, 31 Am. 593; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Knight* (Cal., 1895), 43 Pac. 6; *State v. Whitesell*, 142 Mo. 467, 44 S. W. 332. Evidence of other offenses in prosecution for rape, see *Elliott Evi-*

dissipation, of the keeping of late hours and of street walking on the part of the prosecutrix will always be received.⁹⁸

Because of the irrelevancy of adultery with other men it has been held, according to the majority of the earlier cases in both England and America, that when on her cross-examination a question is put to the woman as regards her illicit relations with other men, and she waives her privilege of refusing to answer and denies the act, the accused is bound by her answer.⁹⁹ The more recent cases hold, however, that the accused under such circumstances is not concluded by her answer, though the matter may not be strictly relevant; but may contradict it solely for impeachment, by proving adulterous actions with other men if they are not too remote in point of time.¹⁰⁰

The admissions of the defendant, particularly an offer on his part to pay a certain sum of money to the prosecutrix or her mother to settle the matter, are always relevant against him.¹⁰¹ And on the other hand it is competent for the prosecution to prove that the prosecutrix felt friendly toward the accused and did not wish to have him indicted.¹⁰²

dence, § 3105; 62 Am. St. 193, note; 105 Am. St. 1004, note.

⁹⁸ *Brennan v. People*, 7 Hun (N. Y.) 171. This reasoning clearly possesses little validity or application where the accused is shown to be a prostitute, who disposes of her favors to all men indiscriminately.

⁹⁹ *Reg. v. Cockcroft*, 11 Cox C. C. 410; *Reg. v. Holmes*, 12 Cox C. C. 137; *People v. Jackson*, 6 N. Y. Cr. 393.

¹⁰⁰ *People v. Flaherty*, 79 Hun (N. Y.) 48, 29 N. Y. S. 641; *People v. Knight* (Cal., 1895), 43 Pac. 6. "In determining that question [of consent], which is purely a mental act, it is important to ascertain whether her consent would, from her previous habits, be the natural result of her mind, or whether it would be inconsistent with her previous life, and repugnant to all her moral feelings." By the court in *State v. Johnson*, 28

Vt. 512; *Strang v. People*, 24 Mich. 1, 7.

¹⁰¹ *Hardtke v. State*, 67 Wis. 552, 30 N. W. 723; *McMath v. State*, 55 Ga. 303, 308. But evidence to prove acts of sexual intercourse by him with other women must be rejected. *People v. Stewart*, 85 Cal. 174, 24 Pac. 722; *State v. La Mont* (S. Dak., 1909), 120 N. W. 1104. Where the evidence tends to show that the prosecutrix is pregnant, and the accused denies the sexual intercourse, it may be shown that the woman had intercourse with another man at a period which would account for her pregnancy. *Rice v. State*, 37 Tex. Cr. 38, 38 S. W. 803. *Contra*, *State v. Blackburn* (Iowa, 1907), 110 N. W. 275, permitting evidence of adultery with other men to take a wide range as impeachment.

¹⁰² *Huff v. State*, 106 Ga. 432, 32 S. E. 348; *Denton v. State*, 46 Tex. Cr. 193, 79 S. W. 560.

CHAPTER XXIX.

FORGERY, COUNTERFEITING AND FALSE PRETENSES.

- 419. Forgery—Definition and classification.
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- 423. Evidence of similar crimes to show the intent—Effect of acquittal—Relevancy of possession of forged papers on charge of forgery.
- 424. Proof of uttering forged paper.
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- 444. The false pretenses not necessarily verbal.
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§ 419. Forgery—Definition and classification.—Forgery at the common law is the fraudulent making or alteration of a writing

to the prejudice of another's right. It may be committed in any writing, which, if genuine, would operate as the foundation of another's liability or the evidence of his right.¹ The following facts must be shown. First, that a false writing has been made. Second, that it was apparently capable of accomplishing a fraudulent purpose. And third, the fraudulent intent.² A material alteration in a true document may under some circumstances be forgery.³ To constitute an alteration a forgery it must be proved that some material part of the instrument has been altered.⁴ Whether an alteration is material or not is a question of law for the court.⁵ Generally, any alteration in an instrument which makes it speak a language which is different in its legal effect from that which it originally spoke or which creates some change in the rights, interests or obligations of the parties may be regarded as a material alteration.⁶

¹ *State v. Thompson*, 19 Iowa 299; *McLean v. State*, 3 Ga. App. 660, 60 S. E. 332; *Goodman v. People*, 228 Ill. 154, 81 N. E. 830.

² Mr. Bishop thus defines the crime: "Forgery is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bish. Cr. L. adopted as correct in *Rembert v. State*, 53 Ala. 467, 468, 25 Am. 639. Forgery is the fraudulent making of a false writing, which, if genuine, would apparently be of some legal efficacy; and the uttering, publishing, and putting off as true of the same, with intent to defraud, is the offense specified in Gen. St. 1894, § 6702. *State v. Wills* (Minn.), 73 N. W. 177. A fraudulent insertion of additional words, or an alteration in a material part of a true document by which another may be defrauded is a forgery. *State v. Brett*, 16 Mont. 360, 40 Pac. 873, 877; *Commonwealth v. Boutwell*, 129 Mass. 124, 125; *Rex v. Dawson*, 1

Stra. 19; *State v. Flye*, 26 Me. 312, 318; *State v. Floyd*, 5 Strobh. (S. Car.) 58, 53 Am. Dec. 689; *State v. Weaver*, 13 Ired. (N. Car.) 491, 493; *State v. Maxwell*, 47 Iowa 454, 455; *State v. Marvels*, 2 Harr. (Del.) 527; *Haynes v. State*, 15 Ohio St. 455, 457; *State v. Van Auken*, 98 Iowa 674, 68 N. W. 454; *State v. Wills* (Minn., 1897), 73 N. W. 177; *Murphy v. State*, 118 Ala. 137, 23 So. 719.

³ *State v. Mitton*, 36 Mont. 376, 92 Pac. 969; *State v. Barrett*, 121 La. 1058, 46 So. 1016; *Fischl v. State*, 54 Tex. Cr. 55, 111 S. W. 410; *State v. Lotono*, 62 W. Va. 310, 58 S. E. 621; *People v. Collins*, 9 Cal. App. 622, 99 Pac. 1109; *State v. Floyd*, 169 Ind. 136, 81 N. E. 1153.

⁴ *State v. Mitton*, 36 Mont. 376, 92 Pac. 969.

⁵ *State v. Lotono*, 62 W. Va. 310, 58 S. E. 621.

⁶ *State v. Lotono*, 62 W. Va. 310, 58 S. E. 621. An alteration of the figures in a check is an immaterial alteration, the words of the check

§ 420. **Competency of witnesses.**—A subscribing witness or a person taking an acknowledgment to a forged instrument may testify that what purports to be his signature is forged.⁷

In England at common law the person bound on the forged instrument, if not discharged from his liability was incompetent because of interest. If the instrument were genuine he would be liable thereon; while, if it were a forgery, the writing was forfeited to the crown and destroyed.⁸ This rule, though followed in a few early cases, is now universally rejected in America. The obligor is always competent for the state,⁹ and if he can be produced he is a proper witness and should be called by the state.¹⁰ His interest as obligor may be proved to affect the credibility of his evidence.¹¹ He is not an indispensable witness. The falsity of the writing may be proved by other witnesses.¹²

§ 421. **Variance in proving the writing.**—Any material variance between the alleged forged writing as proved and as set forth in the indictment is fatal when the writing is pleaded according to its tenor.¹³ The cases are strict in defining the diversity between

determining its legal effect. *State v. Lotono*, 62 W. Va. 310, 58 S. E. 621. Presumptions and burden of proof in prosecution for forgery, see *Elliott Evidence*, § 2986, 2987.

⁷ *People v. Sharp*, 53 Mich. 523, 19 N. W. 168. See *Underhill on Ev.*, §§ 138-142.

⁸ 2 Stark. Ev. 338, 339. See *Elliott Evidence*, § 2989.

⁹ *Anson v. People*, 148 Ill. 494, 505, 35 N. E. 145; *State v. Bateman*, 3 Ired. (N. Car.) 474, 479; *People v. Howell*, 4 Johns. (N. Y.) 296, 302; *State v. Phelps*, 11 Vt. 116, 122, 34 Am. Dec. 672; *Commonwealth v. Waite*, 5 Mass. 261; *State v. Hooper*, 2 Bailey (S. Car.) 37, 40; *Simmons v. State*, 7 Ohio 116; *Williams v. State* (Tex. Cr., 1895), 32 S. W. 532; *McGlasson v. State*, 37 Tex. Cr. 620, 40 S. W. 503, 66 Am. St. 842. Where one of a firm whose signature was

forged was absent from the state his partner may testify that the signature was not in the handwriting of the absentee. *Washington v. State*, 143 Ala. 62, 39 So. 388. Condonation by the obligor is irrelevant. *State v. Tull*, 119 Mo. 421, 24 S. W. 1010.

¹⁰ *Simmons v. State*, 7 Ohio 116. Cf. *Anson v. People*, 148 Ill. 494, 505, 35 N. E. 145.

¹¹ *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

¹² *State v. Farrington*, 90 Iowa 673, 57 N. W. 606; *Commonwealth v. Smith*, 6 S. & R. (Pa.) 568, 570; *State v. Hooper*, 2 Bailey (S. Car.) 37, 40; *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767n; 2 Stark. Ev. 585. See *post*, § 429.

¹³ *Mackquire v. State*, 91 Miss. 151, 44 So. 802; *State v. Handy*, 20 Me. 81, 83; *Luttrell v. State*, 85 Tenn. 232, 239, 1 S. W. 886, 4 Am. St. 760;

the indictment and the writing as proved which shall constitute a material variance and which shall exclude the alleged forged instrument from evidence.

The misspelling,¹⁴ or the omission of a final letter from the alleged forged name as proved, or of a single figure from the amount,¹⁵ or reversing the order of names,¹⁶ are some extreme instances of material and fatal variance.¹⁷ But other cases permit a wider latitude in the proof and disregard unimportant discrepancies in names and dates, particularly if the names are *idem sonans*.¹⁸ An allegation of forging a writing is sustained by proving an instrument partly written and partly printed,¹⁹ and the fact that the instrument proved was acknowledged, while

Wilson v. State, 70 Miss. 595, 12 So. 332, 13 So. 225, 35 Am. St. 664; Haslip v. State, 10 Neb. 590, 592, 7 N. W. 331; Thomas v. State, 103 Ind. 419, 435, 2 N. E. 808; People v. Marion, 29 Mich. 31; State v. Carlson (Iowa, 1909), 123 N. W. 765. Though it is not necessary for the indictment to describe the writing with extreme minuteness, yet when so described strict proof must be had. Powell v. Commonwealth (Ky.), 9 S. W. 245, 10 Ky. L. 329; State v. Smith, 31 Mo. 120, 121; Hess v. State, 5 Ohio 5, 9, 22 Am. Dec. 767n; State v. Fleshman, 40 W. Va. 726, 22 S. E. 309; Commonwealth v. Wilson, 2 Gray (Mass.) 70, 71; McDonnell v. State, 58 Ark. 242, 24 S. W. 105.

¹⁴ Westbrook v. State, 23 Tex. App. 401, 403, 5 S. W. 248; McClellan v. State, 32 Ark. 609, 611; Hale v. State, 120 Ga. 183, 47 S. E. 531.

¹⁵ Burress v. Commonwealth, 27 Gratt. (Va.) 934, 944.

¹⁶ State v. Lane, 80 N. Car. 407; State v. Woodrow, 56 Kan. 217, 42 Pac. 714.

¹⁷ A note signed "J. C. Orr" will not sustain an allegation of forging one signed "James C. Orr." State v. Fay, 65 Mo. 490, 494. See State v. Pease, 74 Ind. 263, 264.

¹⁸ People v. Munroe (Cal., 1894), 33 Pac. 776; Bench v. State, 63 Ark. 488, 39 S. W. 360; Davis v. State, 37 Tex. Cr. 218, 39 S. W. 296; Agee v. State, 113 Ala. 52, 21 So. 207; Allgood v. State, 87 Ga. 668, 13 S. E. 569; Sutton v. Commonwealth, 97 Ky. 308, 30 S. W. 661, 17 Ky. L. 184; State v. Collins, 115 N. Car. 716, 20 S. E. 452; People v. Smith, 103 Cal. 563, 37 Pac. 516; Stewart v. State, 113 Ind. 505, 508, 16 N. E. 186; Trask v. People, 151 Ill. 523, 38 N. E. 248; Roush v. State, 34 Neb. 325, 51 N. W. 755; State v. Bibb, 68 Mo. 286, 288; State v. Gryder, 44 La. Ann. 962, 965, 11 So. 573, 32 Am. St. 358; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; Hennessy v. State, 23 Tex. App. 340, 354, 5 S. W. 215; State v. Lane, 80 N. Car. 407, 409; State v. Blanchard, 74 Iowa 628, 38 N. W. 519, 520; Langdale v. People, 100 Ill. 263, 268; Garmire v. State, 104 Ind. 444, 446, 4 N. E. 54; Lassiter v. State, 35 Tex. Cr. 540, 34 S. W. 751; Telfair v. State, 56 Fla. 104, 47 So. 863; People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. 50.

¹⁹ State v. Jones, 1 McMullen (S. Car.) 236, 243, 36 Am. Dec. 257.

that alleged was not, is immaterial.²⁰ The delivery of a writing containing blanks which are evidently intended to be filled creates an implied authority on the receiver to complete the instrument. This is a rule in the law of contracts but it does not apply to a prosecution for forgery where it appears that the instrument was complete when delivered and the filling of the blank was not only without the consent of the person who signed the instrument but was a material alteration of it.²¹

§ 422. Fraudulent intent and guilty knowledge—Circumstantial evidence to show.—The intent of the accused to defraud is the essence of the crime and must be proved beyond a reasonable doubt.²² And if it is shown, evidence that the party whose name was forged had no legal capacity to sign is irrelevant.²³

²⁰ *People v. Baker*, 100 Cal. 188, 190, 34 Pac. 649, 38 Am. St. 276; *Lassiter v. State*, 35 Tex. Cr. 540, 34 S. W. 751. The peculiar strictness required at the common law was largely the outcome of the severity of the punishment inflicted. In consequence of the more humane rules now in force, a wider latitude in variance would doubtless be allowed. *Thomas v. State*, 103 Ind. 419, 437, 2 N. E. 808. See also, *Reg. v. Wilson*, 2 C. & K. 527. An allegation of an intent to defraud several persons is sustained by proving an intent to defraud any one of them. *McDonnell v. State*, 58 Ark. 242, 24 S. W. 105.

²¹ *State v. Mitton*, 37 Mont. 366, 96 Pac. 926, 127 Am. St. 732.

²² *People v. Corrigan*, 129 App. Div. (N. Y.) 75, 113 N. Y. S. 513; *Montgomery v. State*, 12 Tex. App. 323, 330; *People v. Wiman*, 148 N. Y. 29, 42 N. E. 408; *Snell v. State*, 2 Humph. (Tenn.) 347; *Commonwealth v. Ladd*, 15 Mass. 526, 529; *People v. Stearns*, 21 Wend. (N. Y.) 409; *Fox v. People*, 95 Ill. 71, 75; *Elsev v. State*, 47 Ark. 572, 2 S. W.

337; *Barfield v. State*, 29 Ga. 127, 74 Am. Dec. 49; *Leonard v. State*, 29 Ohio St. 408; *State v. Shelters*, 51 Vt. 102, 105, 31 Am. 679; *State v. Gavigan*, 36 Kan. 322, 13 Pac. 554; *State v. Redstrake*, 39 N. J. L. 365, 369; *State v. Williams*, 66 Iowa 573, 24 N. W. 52; *People v. Caton*, 25 Mich. 388; *Couch v. State*, 28 Ga. 367, 368; *Stephens v. State*, 56 Ga. 604; *Commonwealth v. Connolly*, 11 Pa. Co. Ct. 414; *Agee v. State*, 113 Ala. 52, 21 So. 207; *People v. Elphis*, 72 Pac. 838, 139 Cal. XIX, not reported in full; *Norton v. State*, 129 Wis. 659, 109 N. W. 531, 116 Am. St. 979; *Wells v. Territory* (Okla. Cr. App., 1908), 98 Pac. 483; *Elliott Evidence*, § 2990; *Feeney v. State* (Tex. Cr. App., 1910), 124 S. W. 944. One who, with intent to defraud, utters a promissory note as the note of a person other than the signer and procures to it the name of an innocent person who does not thereby intend it to bind himself, is guilty of forgery. "When that intent exists, and the instrument is the fruit of it, the author of the fraud cannot escape the charge of

It is not necessary to show that it was the intention of the defendant to defraud any particular person. It is enough that a general intent to defraud is shown.²⁴

The intent is always a question for the jury. It may be inferred by them from what the accused does and says and from all the facts and circumstances involved in the transaction.²⁵

The intent may be inferred from the circumstances of the accused doing an act which he knows the law forbids, as signing a name not his own,²⁶ or making a false entry to conceal a previous defalcation,²⁷ but not alone from an act not criminal *per se* and which may be innocent under particular circumstances.²⁸

A false or fictitious entry or written instrument may be made by mistake, or for book-keeping purposes, or a forged writing may be innocently uttered. Guilty knowledge is always material. It must be strictly proved, though direct and positive evidence is not required if, from existing circumstances, it may be inferred that the accused knew the fraudulent character of the transaction, as where he makes a false statement that he was the payee of the alleged forged note.²⁹

forgery by procuring one who happens to bear a name that suits his purpose to supply him with a pretended genuine signature." Commonwealth v. Foster, 114 Mass. 311, 322, 19 Am. 353.

²⁵ People v. Krummer, 4 Park. Cr. (N. Y.) 217; State v. Eades, 68 Mo. 150, 152, 30 Am. 780.

²⁶ McClure v. Commonwealth, 86 Pa. St. 353, 356; State v. Keneston, 59 N. H. 36, 37; Snell v. State, 2 Humph. (Tenn.) 347, 350; United States v. Moses, 4 Wash. C. C. 726, 728, 27 Fed. Cas. 15825; Reg. v. Vaughan, 8 C. & P. 276, 281. Cf. Commonwealth v. Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. 736n, 1 L. R. A. 620; Henderson v. State, 14 Tex. 503, 517; Green v. State, 36 Tex. Cr. 109, 35 S. W. 971; Rohr v. State, 60 N. J. L. 576, 38 Atl. 673; People v. Campbell (Mich., 1910), 125 N. W. 42, 16 Det. Leg. N. 1082.

²⁷ State v. Williams, 66 Iowa 573, 575, 24 N. W. 52; Timmons v. State, 80 Ga. 216, 4 S. E. 766; Reg. v. Cooke, 8 C. & P. 582, 585; State v. Mitton, 37 Mont. 366, 96 Pac. 926, 127 Am. St. 732; Fischl v. State, 54 Tex. Cr. 55, 111 S. W. 410; Spears v. People, 220 Ill. 72, 77 N. E. 112, 4 L. R. A. (N. S.) 402n.

²⁸ State v. Hahn, 38 La. Ann. 169, 172; Smith v. State (Tex. Cr., 1895), 32 S. W. 696; United States v. Houghton, 14 Fed. 544, 549.

²⁹ Phelps v. People, 72 N. Y. 365, 6 Hun (N. Y.) 428.

³⁰ Fox v. People, 95 Ill. 71.

³¹ State v. Williams, 66 Iowa 573, 575, 24 N. W. 52; Parker v. People, 97 Ill. 32, 38; Reg. v. Geach, 9 C. & P. 499, 503. In proving a charge of uttering forged writings, it must be proved that the accused knew they were forged. State v. Lowry, 42 W. Va. 205, 24 S. E. 561; Sands v. Com-

§ 423. Evidence of similar crimes to show intent—Effect of acquittal—Relevancy of possession of forged papers on charge of forgery.—Evidence of similar forgeries, or of the possession of forged papers about the same time, is admissible to show a uniform course of acting from which guilty knowledge and criminal intent may be inferred,³⁰ though an indictment is pending against

monwealth, 20 Gratt. (Va.) 800, 823; United State v. Mitchell, Bald. C. C. (U. S.) 366, 26 Fed. Cas. 15787; Commonwealth v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; Miller v. State, 51 Ind. 405, 406. The jury may infer guilty knowledge if they are satisfied that the accused had reason to believe the writing was forged. Wells v. Territory, 1 Okla. Cr. 469, 98 Pac. 483.

³⁰ Lingafelter v. State, 28 Ohio Cir. Ct. 800; Wooldridge v. State, 49 Fla. 137, 38 So. 3; Wright v. State, 138 Ala. 69, 34 So. 1009; State v. Mitton, 37 Mont. 366, 96 Pac. 926, 127 Am. St. 732; People v. Peck, 139 Mich. 680, 103 N. W. 178, 12 Det. Leg. N. 28; Dillard v. United States, 141 Fed. 303, 72 C. C. A. 451; People v. Dolan, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. 521; People v. Harben, 5 Cal. App. 29, 91 Pac. 398; People v. Dolan, 111 App. Div. (N. Y.) 600, 97 N. Y. S. 929; State v. Stark, 202 Mo. 210, 100 S. W. 642; Juretech v. People, 223 Ill. 484, 79 N. E. 181; State v. Newman, 34 Mont. 434, 87 Pac. 462; State v. Murphy, 17 N. Dak. 48, 115 N. W. 84; Wooldridge v. State, 49 Fla. 137, 38 So. 3; Langford v. State, 33 Fla. 233, 242, 14 So. 815; Carver v. People, 39 Mich. 786, 788; People v. Everhardt, 104 N. Y. 591, 594, 11 N. E. 62; People v. Bibby, 91 Cal. 470, 477, 27 Pac. 781; Fox v. People, 95 Ill. 71, 75; State v. Myers, 82 Mo. 558, 564-570, 52 Am. 389; People v. Frank, 28

Cal. 507, 515; Commonwealth v. Russell, 156 Mass. 196, 30 N. E. 763; Hennessy v. State, 23 Tex. App. 340, 5 S. W. 215; Devere v. State, 5 Ohio Cr. Ct. 509; United States v. Burns, 5 McLean (U. S.) 23, 24 Fed. Cas. 14691; Anson v. People, 148 Ill. 494, 503, 35 N. E. 145; Strang v. State, 32 Tex. Cr. 219, 22 S. W. 680; State v. Minton, 116 Mo. 605, 613, 22 S. W. 808; State v. McAllister, 24 Me. 139, 143; Commonwealth v. Edgerly, 10 Allen (Mass.) 184, 186, 187; State v. Twitty, 2 Hawks (N. Car.) 248, 258; Martin v. Commonwealth, 2 Leigh (Va.) 745, 749; Harding v. State, 54 Ind. 359; Thomas v. State, 103 Ind. 419, 432, 2 N. E. 808; Card v. State, 109 Ind. 415, 421, 9 N. E. 591; Commonwealth v. Stearns, 10 Met. (Mass.) 256; Wash v. Commonwealth, 16 Gratt. (Va.) 530; Commonwealth v. Turner, 3 Met. (Mass.) 19, 24; Commonwealth v. Stone, 4 Met. (Mass.) 43, 47; Smith v. State, 29 Fla. 408, 421, 10 So. 894; Lindsey v. State, 38 Ohio St. 507; United States v. Craig, 4 Wash. C. C. (U. S.) 729, 25 Fed. Cas. 14883; State v. Williams, 2 Rich. (S. Car.) 418, 45 Am. Dec. 741; Bishop v. State, 55 Md. 138, 141. Cf. People v. Sanders, 114 Cal. 216, 46 Pac. 153. It is error not to warn the jury against accepting such evidence as proof of the *corpus delicti*. Anson v. People, 148 Ill. 494, 504, 35 N. E. 145; Francis v. State, 7 Tex. App. 501; Carver v. People, 39 Mich. 786,

the accused for the other acts.³¹ Evidence that the accused had been indicted for another forgery, or for having forged papers in his possession, is not inadmissible because he had been acquitted. The acquittal merely exempts him from punishment and from another prosecution. It does not necessarily show that he was innocent.³² Proof of possession and of use of forged papers, whether by the accused or by an accomplice, is admissible whether before or after the date of the alleged forgery for which the accused is upon trial.³³ But the admission by the accused of any facts concerning the false instrument found in his possession, or which he is shown to have uttered, is not receivable,³⁴ though

788; *People v. Everhardt*, 104 N. Y. 591, 594, 11 N. E. 62. Evidence of other crimes in prosecutions for forgery, see *Elliott Evidence*, § 2994; 62 L. R. A. 193, note; 105 Am. St. 976, note.

³¹ *Commonwealth v. White*, 145 Mass. 392, 395, 14 N. E. 611; *State v. Williams*, 2 Rich. (S. Car.) 418, 45 Am. Dec. 741; *State v. McAllister*, 24 Me. 139, 143; *United States v. Doebler*, 1 Bald. C. C. (U. S.) 519, 527, 25 Fed. Cas. 14977; *Bell v. State*, 57 Md. 108, 115.

³² *Bell v. State*, 57 Md. 108, 117; *McCartney v. State*, 3 Ind. 353, 354, 56 Am. Dec. 510; *State v. Houston*, 1 Bailey (S. Car.) 300, 303; *State v. Jesse*, 3 Dev. & Bat. (N. Car.) 98, 103, 108, 109; *State v. Robinson*, 16 N. J. L. 507, 508, 509. In *McCartney v. State*, 3 Ind. 353, on pp. 354 and 355, the court says: "We can see no reason why the fact that indictments had been found, or that convictions or acquittals had been had upon them, should affect the admissibility of such utterings. Neither the indictments nor the records of conviction or acquittal need be, nor, it strikes us (though the point is not for decision in this case), should be given in evidence, but the facts and

attendant circumstances alone of the utterings as though no indictment had been found. Nor do we think that the fact that some of these other counterfeit or false bills purported to be upon banks different from that on which the indictment being tried was based, should render the evidence inadmissible. It might affect its force, but not, we think, its competency."

³³ *Commonwealth v. Price*, 10 Gray (Mass.) 472, 476, 71 Am. Dec. 668n; *Commonwealth v. Coe*, 115 Mass. 481, 501; *Commonwealth v. Hall*, 4 Allen (Mass.) 305, 306; *Commonwealth v. White*, 145 Mass. 392, 395, 14 N. E. 611; *Harding v. State*, 54 Ind. 359, 365; 1 Greenl. Ev., § 53. See *ante*, note. It is not necessary to prove that they were technically forgeries if they were fabricated with an intent to deceive. *People v. Altman*, 147 N. Y. 473, 42 S. E. 180; *Commonwealth v. Ayer*, 3 Cush. (Mass.) 150, 152; *Commonwealth v. Hinds*, 101 Mass. 209, 210.

³⁴ *People v. Corbin*, 56 N. Y. 363, 365, 15 Am. 427; *Anson v. People*, 148 Ill. 494, 506, 35 N. E. 145; *Fox v. People*, 95 Ill. 71, 75. Evidence of other forgeries is competent where the accused admits he signed a name and claims he was authorized to do

his admissions or statements of any fact regarding the note with whose forgery he is charged are always receivable.³⁵

Evidence of the possession of forged papers by the accused or by an accomplice,³⁶ while always admissible upon the question of intent, is never conclusive upon the general issue of the guilt of the accused. The fact that a forged writing is found in the defendant's possession raises no presumption of law that he forged it or any other writing.³⁷ The possession or uttering may be proved upon a charge of forgery, but merely as a circumstance to be considered by the jury. The defendant should then be allowed to prove any facts which may rebut the possible inference of guilt or of guilty knowledge.³⁸ If, however, it is proved to the satisfaction of the jury that the accused had forged notes in his possession, with the plates or other instruments used in forging them, a *prima facie* case is made out against him. Such facts, unexplained, may create as strong a presumption that the person in whose possession they were found is the actual forger, as the possession of stolen goods creates that the one in whose possession they are found is the actual thief. Both presumptions may be repelled by proof. But in the absence of any explanation the inference may be as strong in the one case as in the other.³⁹

so. *Usher v. State*, 47 Tex. Cr. 93, 81 S. W. 309.

³⁵ Thus it may be shown that he had, after indictment, released a judgment taken on the note without consideration. *Burdge v. State*, 53 Ohio St. 512, 42 N. E. 594. Evidence that forged notes were found in the possession of the wife of the accused is not received against him unless a concert of action is proved between them or it appears that she was cognizant of their character and of the connection of the accused with them. *People v. Thoms*, 3 Park. Cr. (N. Y.) 256, 271.

³⁶ *United States v. Hinman*, 1 Bald. C. C. (U. S.) 292, 26 Fed. Cas. 15370.

³⁷ *Miller v. State*, 51 Ind. 405, 406; *Fox v. People*, 95 Ill. 71, 75.

³⁸ *People v. Everhardt*, 104 N. Y.

591, 595, 11 N. E. 62; *Crossland v. State*, 77 Ark. 537, 92 S. W. 776. Proof of the existence or the production of the collateral forged writings is always indispensable. *State v. Breckenridge*, 67 Iowa 204, 205, 25 N. W. 130; *Fox v. People*, 95 Ill. 71, 74; *Anson v. People*, 148 Ill. 494, 506, 35 N. E. 145; *Reg. v. Cooke*, 8 C. & P. 582; 3 Greenl. on Ev., §§ 107-113. Cf. *Reed v. State*, 15 Ohio 217, and *Barnes v. Commonwealth*, 101 Ky. 556, 41 S. W. 772, 19 Ky. L. 803.

³⁹ *Spencer's Case*, 2 Leigh (Va.) 751, 757; *Gardner v. State*, 96 Ala. 12, 11 So. 402; *State v. Morgan*, 2 Dev. & B. (N. Car.) 348; *State v. Britt*, 3 Dev. (N. Car.) 122; *State v. Lane*, 80 N. Car. 407, 409. "The conditions to the introduction of such evidence are, that where such instru-

§ 424. Proof of uttering forged paper.—Proof that a forged writing was delivered to a person for value with an intent to pass it as good, or was used to obtain money or credit, directly or indirectly, is enough to sustain a charge of uttering,⁴⁰ without proof of forging it.⁴¹ It must also be proved that there was a declaration or assertion, either by language or actions, that the signature was valid and the instrument good.⁴²

§ 425. The writing alleged to have been forged as evidence—Primary evidence.—This must usually be produced in evidence by the prosecution, or its absence satisfactorily accounted for.⁴³ It is

ments are offered in proof of guilty knowledge, there must be strict proof that they are forgeries, and the forgery, possession or uttering must, in point of time or circumstances, be so near the commission of the alleged offense, that the inference arises that the defendant must have intended, by the principal forgery, to perpetrate a fraud, or knew that the instrument uttered was spurious." 3 Greenl., § 111; Rosc. 95; Anson v. People, 148 Ill. 494, 504, 35 N. E. 145; People v. Whiteman, 114 Cal. 338, 46 Pac. 99.

⁴⁰ State v. Redstrake, 39 N. J. L. 365; State v. Horner, 48 Mo. 520, 522; People v. Ah Woo, 28 Cal. 205, 212; People v. Brigham, 2 Mich. 550; United States v. Mitchell, 1 Bald. C. C. (U. S.) 366, 26 Fed. Cas. 15787; People v. Rathbun, 21 Wend. (N. Y.) 509; Thurmond v. State, 25 Tex. App. 366, 8 S. W. 473; Espalla v. State, 108 Ala. 38, 19 So. 82; State v. Sherwood, 90 Iowa 550, 58 N. W. 911, 48 Am. St. 461. The note must have been parted with or tendered or offered in some way to get money or credit. Rex v. Shukard, Russ. & Ry. 200. A person is guilty of forgery, notwithstanding he intends ultimately to take up the forged paper, and although he supposes that the man

whose name is forged will suffer no loss. If the jury are satisfied that the accused knew the writing was forged, and uttered it as true and believed that the party to whom he offered it would advance money upon it, they have ample evidence of an intent to defraud. That the forged bill has since been paid by the prisoner is immaterial if the offense was complete at the time of the uttering. Reg. v. Geach, 9 C. & P. 499, 505.

⁴¹ State v. Fisk, 170 Ind. 166, 83 N. E. 995; Maloney v. State (Ark., 1909), 121 S. W. 728. The making of a forged instrument, and the uttering it by the same person at the same time as one transaction, constitute but one offense. State v. Klugherz, 91 Minn. 406, 98 N. W. 99.

⁴² People v. Brigham, 2 Mich. 550; Chahoon v. Commonwealth, 20 Gratt. (Va.) 733; Folden v. State, 13 Neb. 328, 14 N. W. 412, 413; Couch v. State, 28 Ga. 367, 368; Commonwealth v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; Koch v. State, 115 Ala. 99, 22 So. 471.

⁴³ State v. Breckenridge, 67 Iowa 204, 25 N. W. 130; Haun v. State, 13 Tex. App. 383, 387, 44 Am. 706; Butler v. State, 22 Ala. 43; Manaway v. State, 44 Ala. 375, 379; 2 Arch.

immaterial that it is badly written, if it is decipherable.⁴⁴ Its meaning may be ascertained by parol evidence; and, if it is ambiguous, the jury may infer its true meaning from all the evidence.⁴⁵ Where the alleged forged writing is shown to have been lost or destroyed, or is beyond the jurisdiction or suppressed by the accused, or if it is so mutilated that its identity is unascertainable, its contents may be proved by secondary evidence.⁴⁶ If the state alleges that the writing is in the hands of the accused, or his friends, it must prove a seasonable demand on him or his counsel before secondary evidence is admissible.⁴⁷ In order that the contents of the forged writing or its signature shall be proved by secondary evidence it is necessary to show that a diligent search has been made for the original in a place where it was likely to be found.⁴⁸ The best evidence in the possession of the state is always required. If a copy exists, oral proof will be rejected, and the copy must be produced.⁴⁹

A photograph is admissible to prove the language of the writ-

Cr. Pr. & Pl. 395; 2 Bish. Cr. Pro., § 433; Elliott Evidence, § 2992; Deal v. State (Miss., 1909), 50 So. 495. Secondary evidence of forged instruments, see Elliott Evidence, § 2993.

* Hagar v. State, 71 Ga. 164, 166; McGarr v. State, 75 Ga. 155, 158.

* McGarr v. State, 75 Ga. 155, 158.

* Thornley v. State, 36 Tex. Cr. 118, 34 S. W. 264, 61 Am. St. 837; Mead v. State, 53 N. J. L. 601, 605, 23 Atl. 264; State v. Potts, 9 N. J. L. 26, 17 Am. Dec. 449; State v. Davis, 69 N. Car. 313, 317; Henderson v. State, 14 Tex. 503, 511. See Underhill on Ev., § 130, 132; State v. Champoux, 33 Wash. 339, 74 Pac. 557.

* State v. Lowry, 42 W. Va. 205, 24 S. E. 561; Rollins v. State, 21 Tex. App. 148, 152, 17 S. W. 466; Henderson v. State, 14 Tex. 503, 511; Devere v. State, 5 Ohio Cir. Ct. 509; Johnson v. State, 9 Tex. App. 249, 258; State v. Flanders, 118 Mo. 227, 237, 239, 23 S. W. 1086; State v. Saunders, 68 Iowa 370, 27 N. W. 455;

State v. Potts, 9 N. J. L. 26, 17 Am. Dec. 449; 3 Greenl. Ev., § 107; 2 Bish. Cr. Pro., § 433; 2 Arch. Cr. Pr. & Pl. 555; Rex v. Haworth, 4 Car. & P. 254. On the general subject of notice to produce writings, see Underhill on Ev., § 126.

* Sims v. State (Ala., 1908), 46 So. 493.

* Thompson v. State, 30 Ala. 28; Commonwealth v. Snell, 3 Mass. 82, 86; Pendleton's Case, 4 Leigh (Va.) 694, 26 Am. Dec. 342; State v. Ford, 2 Root (Conn.) 93. When it is sought to prove the forged paper by a certified or examined copy, under a statute permitting such proof, it must appear from the copy itself that all the requirements of the statute have been rigidly complied with, or the copy may be rejected. The copy should be supplemented by the oath of some competent witness that it is a true and correct copy. Underhill on Ev., § 142c; Johnson v. State, 9 Tex. App. 249, 258.

ing when the ink has faded, if it is shown by any witness that it is literally reproduced. But when the question is, does the photograph exactly reproduce the form, color and shading of the original? supplementary expert evidence may be required.⁶⁰

§ 426. **Proving the venue.**—The difficulty of proving the locality in which the writing was actually forged, because of the customary secrecy by which this act is accompanied, is elsewhere adverted to.⁶¹ It need only be said in this place that the possession of forged instruments, or the uttering of them in the county where the indictment was found, is strong evidence in law that the forgery was committed in the same county.⁶²

§ 427. **Fictitious names—Evidence to prove existence or non-existence of persons.**—Forgery is committed when a fictitious name,⁶³ or the name of a dead person,⁶⁴ is signed to an instrument with a fraudulent intent. The name signed must be that of some other person than the accused though it may be of a man of the same name, if by signing that name the accused meant to defraud someone.⁶⁵ Hence, evidence is relevant, which shows or tends to show the existence or non-existence of the person who is supposed, or pretended to be indicated by the name. But the state need not prove beyond a reasonable doubt that there was no such

⁶⁰ Duffin v. People, 107 Ill. 113, 122, 47 Am. 431. See Underhill on Ev., §§ 38a, 132.

⁶¹ See *ante*, § 37.

⁶² State v. Yerger, 86 Mo. 33; State v. Rucker, 93 Mo. 88, 90, 5 S. W. 609; Spencer's Case, 2 Leigh (Va.) 751, 757; Heard v. State, 121 Ga. 138, 48 S. E. 905.

⁶³ Lascelles v. State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. 216; Rex v. Bolland, 1 Leach C. C. 97; *Ex parte* Hibbs, 26 Fed. 421, 423; Johnson v. State, 35 Tex. Cr. 271, 33 S. W. 231; State v. Hahn, 38 La. Ann. 169, 170; People v. Krummer, 4 Park. Cr. (N. Y.) 217; State v. Minton, 116 Mo. 605, 610, 22 S. W. 808; State v. Vineyard, 16 Mont. 138, 40 Pac. 173, 175; People v. Brown, 72 N. Y. 571, 28

Am. 183; Commonwealth v. Costello, 120 Mass. 358, 370; Thompson v. State, 49 Ala. 16; Peete v. State, 2 Lea (Tenn.) 513; State v. Covington, 94 N. Car. 913, 55 Am. 650n; State v. Bauman, 52 Iowa 68, 2 N. W. 956; People v. Warner, 104 Mich. 337, 62 N. W. 405, 406; Davis v. State, 34 Tex. Cr. 117, 29 S. W. 478; Lasister v. State, 49 Tex. Cr. 532, 94 S. W. 233; People v. Browne, 118 App. Div. (N. Y.) 793, 103 N. Y. S. 903; Logan v. United States, 123 Fed. 291, 59 C. A. 476; Maloney v. State (Ark. 1909), 121 S. W. 728.

⁶⁴ Brewer v. State, 32 Tex. Cr. 74, 22 S. W. 41, 40 Am. St. 760.

⁶⁵ Murphy v. State, 49 Tex. Cr. 488, 93 S. W. 543.

person.⁵⁶ A resident of the town in which he is alleged to have lived is competent to prove that he was unknown there, though the witness may not be able to swear absolutely that he knew every resident.⁵⁷ It is not always necessary for the prosecution to produce in court the person whose name is alleged to have been forged. The fact that he did not consent to the signing of his name may be proved from the circumstances.⁵⁸ It may be shown in general that policemen, postmen and residents had never heard of him,⁵⁹ and that an officer of the court, as a sheriff, though he made a diligent search among persons most likely to know him, was unable to find him, or to secure any information of his whereabouts.⁶⁰ The searcher may state what he did and the fact that he had a conversation with some one, and with whom, and could get no information, though he may not repeat answers made to his inquiries (as these would be hearsay) for the purpose of proving the fictitious character of the person.⁶¹ Evidence of this sort, proving *prima facie* the non-existence of the person whose name was signed, may be sufficient in the absence of rebuttal. The defendant may prove any facts by which the inference that the name is fictitious may be overcome. So, when it was shown that no one could be found to answer to the name which was signed, the accused was allowed to show that the person, being threatened with a criminal prosecution, had left the state, and that he had endeavored in vain to find him.⁶²

§ 428. Proving the corporate existence of the bank upon which the forged check is drawn.—The existence of the bank must be

⁵⁶ State v. Allen, 116 Mo. 548, 22 S. W. 792.

⁵⁷ Commonwealth v. Meserve, 154 Mass. 64, 71, 27 N. E. 997, 998.

⁵⁸ People v. Browne, 118 App. Div. (N. Y.) 793, 103 N. Y. S. 903.

⁵⁹ State v. Hahn, 38 La. Ann. 169, 172.

⁶⁰ People v. Sharp, 53 Mich. 523, 525, 19 N. W. 168. The extent of the search goes to the weight not to the competency of this evidence. When the accused having signed a fictitious name has procured some one to represent himself as of that name, the

state may prove the falsity of that person's statement regarding his business, residence, occupation and ownership of property. This is so, even when the accused admits the name is fictitious. Commonwealth v. Costello, 120 Mass. 358, 359.

⁶¹ People v. Jones, 106 N. Y. 523, 526, 13 N. E. 93; Wiggins v. People, 4 Hun (N. Y.) 540; State v. Ryno, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303n.

⁶² Commonwealth v. Costello, 119 Mass. 214, 215.

shown under an allegation of forging bank notes or checks.⁶³ The charter or articles of incorporation need not be produced. It is enough to prove the existence of the bank *de facto* by parol evidence that it had a banking house, issued bills and exercised banking powers,⁶⁴ or by the production of a note whose genuineness is proved or admitted,⁶⁵ and in the case of a foreign bank by reputation,⁶⁶ whether the intent charged was to defraud the bank or an individual.⁶⁷

§ 429. Proving the handwriting—Expert evidence—Standards of comparison.—Expert evidence is admissible to prove the genuineness or falsity of the writing. The expert may testify to his opinion and may then state the reasons for his opinion.⁶⁸ He may explain how writing may be removed from paper by chemicals or other means, and the blank space filled with other writing; and this he may do even where it has not first been proved that the accused was acquainted with this method of treating writings.⁶⁹ The expert may illustrate his testimony by illustrations on the blackboard. The expert may, as a rule, state his opinion based upon a comparison made by him of the forged instrument with any writing proved to have been made by the defendant, whether it has been introduced in evidence or not.⁷⁰ The

⁶³ State v. Murphy, 17 R. I. 698, 707, 24 Atl. 473, 16 L. R. A. 550; Commonwealth v. Smith, 6 S. & R. (Pa.) 568, 570; Elliott Evidence, § 2956.

⁶⁴ Cady v. Commonwealth, 10 Gratt. (Va.) 776, 779; People v. Caryl, 12 Wend. (N. Y.) 547, 548; People v. Chadwick, 2 Park. Cr. (N. Y.) 163, 165; Dennis v. People, 1 Park. Cr. (N. Y.) 469, 473.

⁶⁵ People v. Davis, 21 Wend. (N. Y.) 309, 313; People v. Peabody, 25 Wend. (N. Y.) 472, 473.

⁶⁶ People v. Ah Sam, 41 Cal. 645; People v. D'Argencour, 18 N. Y. Wkly. Dig. 532; Sasser v. State, 13 Ohio 453; Cady v. Commonwealth, 10 Gratt. (Va.) 776, 779; Reed v. State, 15 Ohio 217; Stone v. State, 20 N. J. L. 401.

⁶⁷ Dennis v. People, 1 Park. Cr. (N.

Y.) 469, 473; State v. Sharpless, 212 Mo. 176, 111 S. W. 69. *Contra*, Jones v. State, 5 Sneed (Tenn.) 346, 347.

⁶⁸ State v. Ryno, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303n; Ausmus v. People (Colo., 1910), 107 Pac. 204.

⁶⁹ People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. 50.

⁷⁰ Mallory v. State, 37 Tex. Cr. 482, 36 S. W. 751, 66 Am. St. 808; State v. Calkins, 73 Iowa 128, 131, 34 N. W. 777; State v. Farrington, 90 Iowa 673, 57 N. W. 606; State v. Phair, 48 Vt. 366; State v. Bibby, 91 Cal. 470, 476, 27 Pac. 781; State v. Tompkins, 71 Mo. 613, 616; State v. David, 131 Mo. 380, 33 S. W. 28. See, on this subject, Underhill on Ev., §§ 140, 141; State v. Scott, 45 Mo. 302; State v. Shinborn, 46 N. H. 497, 501, 88 Am.

remoteness of the date of making the comparison from the trial, or the fact that the accused was not present when the comparison was made, does not necessarily exclude the opinion of the expert based on a comparison.⁷¹ This would seem the most reasonable rule, but some cases hold that the standard of comparison can be selected only from writings which are relevant, and which are actually introduced as evidence.⁷² The court must usually by statute first find as a matter of fact that the standard was written by the accused before it should go to the expert or to the jury. Press copies and copies made by machine cannot be used as standards.⁷³ Any one who is familiar with a person's writing from having seen him write, though only once, or, never having seen him write, from carrying on a correspondence with him, or from opportunities afforded from frequently handling writings known to have been written by the person, is competent,

Dec. 224; *People v. Hutchings*, 137 Mich. 527, 100 N. W. 753; *State v. Webb*, 18 Utah 441, 56 Pac. 159; *Johnson v. State* (Tex. Cr., 1907), 102 S. W. 1133; *Warren v. State*, 54 Tex. Cr. 443, 114 S. W. 380; *State v. Skillman* (N. J. Eq. 1908), 70 Atl. 83; *Riley v. State* (Tex. Cr., 1898), 44 S. W. 498; *Rinker v. United States*, 151 Fed. 755, 81 C. C. A. 379; *Woolbridge v. State*, 49 Fla. 137, 38 So. 3; *Ausmus v. People* (Colo., 1910), 107 Pac. 205.

⁷¹ *Riley v. State* (Tex. Cr., 1898), 44 S. W. 498.

⁷² *People v. Parker*, 67 Mich. 222, 224, 34 N. W. 720, 11 Am. St. 578; *Merritt v. Campbell*, 79 N. Y. 625; *Hynes v. McDermott*, 82 N. Y. 41, 52, 37 Am. 538; *Vinton v. Peck*, 14 Mich. 287, 293, 294; *Van Sickle v. People*, 29 Mich. 61, 64; *State v. Clinton*, 67 Mo. 380, 383, 385, 29 Am. 506; *State v. Scott*, 45 Mo. 302, 305; *Manaway v. State*, 44 Ala. 375; *Moore v. United States*, 91 U. S. 270, 274, 23 L. ed. 346; *Morgan's Case*, 1 Mood. & R. 134; *People v. Schooley*, 149 N. Y. 99, 43 N. E. 536; *People v. Cree-*

gan, 121 Cal. 554, 53 Pac. 1082; *State v. Fillpot*, 51 Wash. 223, 98 Pac. 659. The papers to be used as standards of comparison must be admitted, acknowledged or otherwise proved to be in the handwriting of the accused. *State v. Ezekiel*, 33 S. Car. 115, 116, 11 S. E. 635; *Johnson v. Commonwealth*, 102 Va. 927, 46 S. E. 789.

⁷³ *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *State v. Simmons*, 52 Wash. 132, 100 Pac. 269; *Gaut v. State*, 49 Tex. Cr. 493, 94 S. W. 1034; *Washington v. State*, 143 Ala. 62, 39 So. 388. The condition of a person, whether drunk or sober, when he wrote the standard, is competent. *People v. Parker*, 67 Mich. 222, 228, 34 N. W. 720, 11 Am. St. 578. In Oregon the statute provides that comparison shall be made only with writings "admitted or treated as genuine" by the party against whom offered; this means the accused in a criminal proceedings and limits the comparison to instruments actually admitted by him to have been written by him. *State v. Branton*, 49 Ore. 86, 87 Pac. 535.

as a non-expert, to give his opinion as to the genuineness of his signature.⁷⁴ The weight of the evidence to prove the genuineness of handwriting, whether given by experts or by those who know the party's handwriting, is wholly for the jury, who, of course, may be guided in their deliberations by the instructions of the court relative to the force and credibility of expert evidence. But as a matter of law, evidence of witnesses who knew the handwriting of the accused, to the effect that the signature to the alleged forged writing is not his, is of little value, as the forger seeks to disguise his own handwriting and to imitate that of the man whose signature he forges.⁷⁵ On the other hand, it is not relevant to show that the accused was skilled in imitating writing.⁷⁶ The guilt or innocence of the accused is not to be determined on such grounds. No inference of guilt can be established by proving that the accused had the ability to commit the crime.⁷⁷

⁷⁴ *State v. Goldstein*, 74 N. J. L. 598, 62 Atl. 1006; *De La Motte's Case*, 21 How. St. Tr. 564, 810; *State v. Hooper*, 2 Bailey (S. Car.) 37, 42; *State v. Gay*, 94 N. Car. 814, 819; *State v. Stair*, 87 Mo. 268, 56 Am. 449; *State v. Farrington*, 90 Iowa 673, 57 N. W. 606; *State v. Minton*, 116 Mo. 605, 22 S. W. 808; *Commonwealth v. Smith*, 6 S. & R. (Pa.) 568, 571; *Thomas v. State*, 103 Ind. 419, 429, 2 N. E. 808; *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *State v. Freshwater*, 30 Utah 442, 85 Pac. 447, 116 Am. St. 853; *Bess v. Commonwealth*, 118 Ky. 858, 82 S. W. 576, 26 Ky. L. 839; *Rinker v. United States*, 151 Fed. 755, 81 C. C. A. 379; *State v. Goldstein*, 72 N. J. L. 336, 62 Atl. 1003; *State v. Simmons*, 52 Wash. 132, 100 Pac. 269; *Commonwealth v. Meehan*, 170 Mass. 362, 49 N. E. 648; *State v. Olds*, 217 Mo. 305, 116 S. W. 1080; *Wooldridge v. State*, 49 Fla. 137, 38 So. 3; *Pittman v. State*, 51 Ala. 94, 41 So. 385. The letters re-

ceived may be produced and identified, and the genuineness of their signatures proved by another witness to corroborate the first. *Thomas v. State*, 103 Ind. 419, 429, 2 N. E. 808; 1 Greenl. Ev., § 577; *Rosc.* 174, 175. Any person accustomed to receive, handle or pay out bank-notes may testify to the signatures to them though he may never have seen the person write. *May v. State*, 14 Ohio 461, 45 Am. Dec. 548; *United States v. Keen*, 1 McLean (U. S.) 429, 26 Fed. Cas. 15510; *People v. Caryl*, 12 Wend. (N. Y.) 547; *Commonwealth v. Carey*, 2 Pick. (Mass.) 47. As to testimony by person familiar with the handwriting of the accused, see *Underhill on Ev.*, § 139.

⁷⁵ *Langdon v. People*, 133 Ill. 382, 394, 24 N. E. 874; *People v. Sanders*, 114 Cal. 216, 46 Pac. 153.

⁷⁶ *State v. Hopkins*, 50 Vt. 316, 332.
⁷⁷ The subject of comparison of handwriting is fully discussed in *Underhill on Ev.*, § 140, *et seq.*

§ 430. Evidence to show that the forged writing could not accomplish the purpose intended.—It may be shown by producing the writing itself that it could not, in law, be employed to defraud or prejudice any person.⁷⁸ If this fact is shown to the satisfaction of the jury the accused should be acquitted. In other words it is necessary to show not only that the document forged was not signed by the party whose name purports to be attached to it, but also that the forged writing was so similar to the genuine writing of the party that persons ordinarily would be deceived thereby. But the similarity between the forged and the genuine handwriting need only be sufficient to deceive a reasonable and ordinary person into accepting the same as true and genuine. The forged writing need not be so skillfully done as to require an expert to detect its falsity.⁷⁹ The writing should be such a one as would be available in law to produce the result required. It must be such an instrument as, if genuine, would have a legal validity, and hence an instrument which on its face shows that it has no legal force is not the subject of forgery.⁸⁰ It matters not how clearly a fraudulent intent may be proved, a writing which is upon its face illegal or innocuous, or which is intrinsically void and incapable of creating a legal obligation, as, for example, an unattested will, or a mere letter of recommendation, is not enough to support a charge of forgery. But extrinsic circumstances may be proved showing how such a writing may have been used to defraud,⁸¹ if such extrinsic facts and circumstances are set out

⁷⁸ *Waterman v. People*, 67 Ill. 91, 93; *People v. Tomlinson*, 35 Cal. 503; *Norton v. State*, 129 Wis. 659, 109 N. W. 531, 116 Am. St. 979.

⁷⁹ *Goodman v. People*, 228 Ill. 154, 81 N. E. 830; *Wilson v. State* (Ga. App., 1910), 67 S. E. 705.

⁸⁰ *Farrell, In re*, 36 Mont. 254, 92 Pac. 785; *People v. Di Ryana*, 8 Cal. App. 333, 96 Pac. 919; *Crayton v. State*, 47 Tex. Cr. 88, 80 S. W. 839; *People v. McGlade*, 139 Cal. 66, 72 Pac. 600.

⁸¹ *Lingafelter v. State*, 28 Ohio Cir. Ct. 800; *Howell v. State*, 37 Tex. 591; *Commonwealth v. Hinds*, 101 Mass.

209; *People v. Stearns*, 21 Wend. (N. Y.) 409, 414; *People v. Shall*, 9 Cow. (N. Y.) 778; *State v. Smith*, 8 Yerg. (Tenn.) 150, 152; *People v. Tomlinson*, 35 Cal. 503, 507; *Brown v. People*, 86 Ill. 239, 242, 29 Am. 25; *Commonwealth v. Ladd*, 15 Mass. 526, 527; *Rembert v. State*, 53 Ala. 467, 469, 471, 25 Am. 639; *Finley, Ex parte*, 66 Cal. 262, 263, 5 Pac. 222; *People v. Galloway*, 17 Wend. (N. Y.) 540, 541; *State v. Wheeler*, 19 Minn. 98, 100; *Roode v. State*, 5 Neb. 174, 177, 25 Am. 475; *Rex v. Moffatt*, 2 Leach C. C. 483; *United States v. Williams*, 14 Fed. 550, 552-

with reasonable certainty in the averments of the indictment.⁸² If the writing purports to be a valid instrument it is enough,⁸³ nor is it necessary to show that any particular person has been defrauded if the writing was effectual for that purpose.⁸⁴ Whether the writing shows on its face that it is capable of creating a legal obligation is a question of construction, and for this reason, is for the court to determine. Where there is ambiguity in the meaning of the language the introduction of parol evidence to explain the writing may raise a question of fact which would be for the jury under instructions from the court. In the case of an order for the payment of money, as a check or draft on a bank, or directing the delivery of goods, the writing is a subject of forgery if there appears on the face of the writing itself that the drawer has the disposing power over the goods or money, that it indicates a person who is under an obligation to him to pay or to deliver the goods, and someone is sufficiently described therein to whom delivery or payment must be made.⁸⁵

§ 431. Sufficiency of evidence—Pecuniary condition of the accused.—The weight of evidence is for the jury. They may be justified in convicting the accused upon proof of a few essential facts, if they are convinced of his guilt beyond a reasonable doubt. The evidence of the person whose name was forged to that fact, with proof that the accused had passed the forged check or other instrument, or had obtained money or credit thereon, may, unless rebutted or explained, be sufficient.⁸⁶

554; *Henry v. State*, 35 Ohio St. 128, 130; *State v. Dalton*, 2 Murph. (N. Car.) 379; *Bennett v. State*, 62 Ark. 516, 36 S. W. 947; *State v. Van Auker*, 98 Iowa 674, 68 N. W. 454; *Burden v. State*, 120 Ala. 388, 25 So. 190, 74 Am. St. 37; *State v. Mitton*, 37 Mont. 366, 96 Pac. 926, 127 Am. St. 732; *Belden v. State*, 50 Tex. Cr. 565, 99 S. W. 563; *McLean v. State*, 3 Ga. App. 660, 60 S. E. 332. Whether a paper is so imperfect and inaccurate as not to deceive a man of ordinary prudence is a question for the jury. *State v. Warren*, 109 Mo. 430, 19 S. W. 191, 32 Am. St. 681.

⁸² *Goodman v. People*, 228 Ill. 154, 81 N. E. 830.

⁸³ *United States v. Turner*, 7 Pet. (U. S.) 132, 134, 8 L. ed. 633; *State v. Hauser*, 112 La. 313, 36 So. 396; *Shelton v. State*, 143 Ala. 98, 39 So. 377.

⁸⁴ *State v. Hahn*, 38 La. Ann. 169, 172; *State v. Gullette*, 121 Mo. 447, 26 S. W. 354.

⁸⁵ *Russell v. State*, 51 Fla. 124, 40 So. 625.

⁸⁶ *Allgood v. State*, 87 Ga. 668, 13 S. E. 569; *Henderson v. State*, 14 Tex. 503. Weight and sufficiency of

It may be shown that a person accused of forging a deed had a record title to the property conveyed,⁸⁷ or that shortly before uttering the forged deed he claimed the land under another deed. A genuine deed on record is not notice to the prisoner, and cannot be proved to bring home to him knowledge that his own deed was a forgery. Constructive or actual notice of the genuine deed is not a substitute for guilty knowledge in a criminal trial.⁸⁸ Thus it is an error to charge the jury that the accused had knowledge of the character of a forged instrument passed by him, if he had notice of any suspicious circumstance sufficient to put a reasonably prudent man on an inquiry which, if followed up, would have led him to a knowledge of the forgery.⁸⁹ In spite of the general rule that mere constructive notice raises no presumption of actual knowledge that a deed or other writing is forged, it has been held in one case that the possession by the accused of a forged instrument payable to his order raises a presumption that he knew that it was forged. The presumption, however, is one of fact and may be overcome by proof showing the accused was ignorant of the false character of the instrument.⁹⁰

As an exception to the general rule the pecuniary condition of the accused may sometimes be shown, as, for example, where he stands charged with forging a receipt for money alleged to have been paid by him. The fact that he was impecunious immediately before or at the date of the receipt may justify the inference that no money was paid and that the receipt was forged. And where the accused is charged with the forgery of a check cashed for him it may be shown that he was without money before the check was cashed and immediately thereafter had a considerable sum in his possession.⁹¹

the evidence, see Elliott Evidence, § 2997. Evidence in general in prosecution for forgery, see Elliott Evidence, § 2995. Evidence in defense in prosecution for forgery, see Elliott Evidence, § 2996. Questions of law or fact in prosecutions for forgery, see Elliott Evidence, § 2988.

⁸⁷ *People v. Parker*, 67 Mich. 222, 227, 34 N. W. 720, 11 Am. St. 578.

⁸⁸ *Pearson v. State*, 55 Ga. 659, 662; *State v. Harness*, 10 Idaho 18, 76 Pac. 788.

⁸⁹ *Wells v. Territory*, 1 Okla. Cr. 469, 98 Pac. 483.

⁹⁰ *State v. Waterbury*, 133 Iowa 135, 110 N. W. 328.

⁹¹ *Walker v. State*, 127 Ga. 48, 56 S. E. 113, 119 Am. St. 314n, 8 L. R. A. (N. S.) 1175n.

§ 432. Counterfeiting—Elements of the crime—Intent and guilty knowledge—Evidence of similar offenses.—It must be shown to the satisfaction of the jury that the defendant uttered the note⁸² with the intention to defraud the person receiving it, or some other person through him, and that the note uttered was a counterfeit.⁸³ The existence of the bank by which the note purports to have been issued need not be shown,⁸⁴ even when the court permits an expert to testify that a bill submitted to his inspection is, in his opinion, a counterfeit.⁸⁵ The knowledge of the defendant that he was passing counterfeit money must be shown.

Evidence that the defendant was seen several times in company with another person when the latter passed counterfeit bills,⁸⁶ and evidence to show that the accused and some third person had conspired to pass counterfeit money, or that a counterfeit had been passed by some person resembling the defendant,⁸⁷ or that he had, about the same time, knowingly uttered a counterfeit,⁸⁸ or that he had been indicted and convicted at another time for the same offense,⁸⁹ is always admissible to show

⁸² *United States v. Weikel*, 8 Mont. 124, 19 Pac. 396.

⁸³ *United States v. Provenzano*, 171 Fed. 675, Elliott Evidence, § 2954.

⁸⁴ *State v. Cole*, 19 Wis. 129, 135, 88 Am. Dec. 678; *People v. Peabody*, 25 Wend. (N. Y.) 472; *Jennings v. People*, 8 Mich. 81; *State v. Hayden*, 15 N. H. 355, 359; *Kennedy v. Commonwealth*, 2 Met. (Ky.) 36.

⁸⁵ *Jones v. State*, 11 Ind. 357, 360.

⁸⁶ *State v. Spalding*, 19 Conn. 233, 238, 48 Am. Dec. 158; *Martin v. Commonwealth*, 2 Leigh (Va.) 745.

⁸⁷ *People v. Clarkson*, 56 Mich. 164, 165, 22 N. W. 258.

As to mode of proving corporate existence of bank without producing its charter, see *People v. McDonnell*, 80 Cal. 285, 22 Pac. 190, 13 Am. St. 159; *Sasser v. State*, 13 Ohio 453; *Commonwealth v. Riley*, Thach. Cr. Cas. (Mass.) 67; *People v. Davis*, 21 Wend. (N. Y.) 309; Elliott Evidence, § 2956.

⁸⁸ *State v. Cole*, 19 Wis. 129, 134, 88 Am. Dec. 678; *Commonwealth v. Stearns*, 10 Metc. (Mass.) 256, 258; *Commonwealth v. Bigelow*, 8 Metc. (Mass.) 235, 236; *Hendrick's Case*, 5 Leigh (Va.) 707; *Steele v. People*, 45 Ill. 152, 157; *State v. Tindal*, 5 Harr. (Del.) 488, 490; *United States v. Noble*, 5 Cranch C. C. (U. S.) 371, 27 Fed. Cas. 15895. If it is sought to prove that defendant passed other counterfeit bills of the same denomination, and on the same bank, they should have been produced, if within reach of the prosecution. *State v. Cole*, 19 Wis. 129, 135, 88 Am. Dec. 678; *People v. Lagrille*, 1 Wheel. Cr. (N. Y.) 412; *Reed v. State*, 15 Ohio 217; *Commonwealth v. Edgerly*, 10 Allen (Mass.) 184, 186.

⁸⁹ *McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510; Elliott Evidence, § 2954.

the criminal intent. And the defendant's declarations when passing other counterfeit money may be proved against him for the same purpose.¹⁰⁰ But evidence of similar offenses is only admissible to prove guilty knowledge, never solely to show that the bill or coin was a counterfeit.¹ The inference of guilty knowledge which the jury may draw from such evidence may be rebutted. Thus the defendant may bring out facts and circumstances tending to show that he was so drunk as not to know what he was doing;² he supposed the money was genuine; that it was so, in fact, and may also prove that his belief in the genuineness of the money was founded upon information derived from the most approved sources.³

§ 433. Evidence to show that counterfeit money or implements for its manufacture were found in the possession of the accused.—

The possession of implements or appliances, such as plates and dies adapted or designed for making counterfeit coin or bills, or the possession of the counterfeits, with a knowledge of their spurious character, and with an intent to pass them, is, in many states, a felony by statute.⁴ And the finding of tools or machinery⁵ for the coining of money, or of spurious coin,⁶ in defendant's

¹⁰⁰ *State v. Smith*, 5 Day (Conn.) 175, 178, 5 Am. Dec. 132; *Commonwealth v. Edgerly*, 10 Allen (Mass.) 184, 186; *United States v. Doeblor*, Baldw. (U. S.) 519, 25 Fed. Cas. 14977.

¹ *Elliott Evidence*, § 2954.

² *Jones v. State*, 11 Ind. 357, 360.

³ *State v. Morton*, 8 Wis. 167. Evidence of other crimes in prosecution for counterfeiting, see 62 L. R. A. 193, note; 105 Am. St. 996, note. Presumptions and burden of proof, see *Elliott Evidence*, § 2953. Admissions in prosecution for counterfeiting, see *Elliott Evidence*, § 2957. Evidence of accomplice, see *Elliott Evidence*, § 2958. Evidence of good character of defendant, see 103 Am. St. 903.

⁴ The criminal intention of the pos-

session must be proved. *People v. White*, 34 Cal. 183, 187; *Hutchins v. State*, 13 Ohio 198, 200. See *United States v. Taranto*, 74 Fed. 219.

⁵ *State v. Antonio*, 3 Brev. (S. Car.) 562; *Hess v. State*, 5 Ohio 5, 9, 22 Am. Dec. 767n; *United States v. Provenzano*, 171 Fed. 675. Whether he knew the false character of the money in his possession is for the jury. *United States v. Stevens*, 52 Fed. 120.

⁶ *Stalker v. State*, 9 Conn. 341, 343; *United States v. Hinman*, 1 Baldw. (U. S.) 292, 26 Fed. Cas. 15370; *People v. Thoms*, 3 Park. Cr. (N. Y.) 256, 262, 270; *State v. Twitty*, 2 Hawks (N. Car.) 248, 258; *State v. Bridgman*, 49 Vt. 202, 210, 24 Am. 124; *People v. White*, 34 Cal. 183, 189. The counterfeit money found

possession, even subsequently to the act for which he is indicted, may always be proved for the purpose of showing guilty knowledge and criminal intent.⁸ But the accused must be allowed to explain his possession, in order to rebut any presumption that may arise against him.⁹ His failure to explain how he became possessed of counterfeit money may be proved.¹⁰ The possession must be exclusive and actual. The fact that counterfeiter's tools were found in the possession of the wife of the accused is not relevant where he exercised no control over them.¹¹

§ 434. Resemblance to the genuine.—This is a question for the jury,¹² and must be proved by evidence that will show an imitation or a resemblance that will deceive persons of ordinary in-

must, it seems, be similar in kind to that for uttering which he is on trial. *Bluff v. State*, 10 Ohio St. 547.

⁷ *Commonwealth v. Price*, 10 Gray (Mass.) 472, 476, 71 Am. Dec. 668n; *Reg. v. Forster*, 6 Cox C. C. 521; *Bottomley v. United States*, 1 Story (U. S.) 135, 3 Fed. Cas. 1688; *Elliott Evidence*, § 2955; 25 Am. St. 387, 389. Defenses in prosecution for counterfeiting, see *Elliott Evidence*, § 2961.

⁸ "The object of the testimony is not to convict or accuse him of other crimes, but to establish the fact of such a knowledge, on his part, of the true character of the bill uttered by him, and which is proved to be counterfeit, as will justify the jury in inferring his guilt in the case on trial. And so far as this may be deemed a departure from the technical rules of evidence, it is a departure justified by the peculiar nature of the crime of passing counterfeit money; consisting not in the fact of passing, which may be done by an innocent person, but in the guilty knowledge connected with such passing." *Commonwealth v. Bigelow*, 8 Met. (Mass.) 235; *United State v. Mitchell*, *Baldw.* (U. S.) 366, 26 Fed. Cas. 15787; *United*

State v. Noble, 5 Cranch C. C. (U. S.) 371, 27 Fed. Cas. 15895; *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168.

⁹ *United States v. Burns*, 5 McLean (U. S.) 23, 24 Fed. Cas. 14691; *United States v. King*, 5 McLean (U. S.) 208, 26 Fed. Cas. 15535; *United States v. Craig*, 4 Wash. C. C. (U. S.) 729, 25 Fed. Cas. 14883.

¹⁰ *United States v. Kenneally*, 5 Biss. (U. S.) 122, 26 Fed. Cas. 15522.

¹¹ *People v. Thoms*, 3 Park. Cr. (N. Y.) 256, 262. It may be proved that the prisoner attempted to utter the note at different times and places, where it had been suspected and challenged as false, that he had declared it to be genuine and true; or that he attempted to secrete himself, or to destroy a note found on him. *State v. Smith*, 5 Day (Conn.) 175, 178, 5 Am. Dec. 132. A person who, in concert with the police, buys counterfeit money of the accused for the purpose of entrapping him, is not an accomplice, and the rule requiring corroboration does not apply to him. *People v. Farrell*, 30 Cal. 316.

¹² *United States v. Stevens*, 52 Fed. 120.

telligence and powers of observation.¹³ Expert evidence is admissible to prove the genuineness of the alleged counterfeit,¹⁴ though it seems that experience acquired in judging bank notes when receiving, handling and paying them out does not necessarily qualify a witness as an expert upon the genuineness of the signatures.¹⁵ The money which it is alleged has been counterfeited ought to be produced in court. Evidence that bills or coin were counterfeit is not ordinarily received unless this is done, though if the money has been lost or destroyed secondary evidence may be received to show what sort of money it was.¹⁶ It is not usually necessary in the case of the counterfeiting of bank bills to produce an officer of the bank to prove that the signatures of the bank officers to the bills are forged or to prove that the bills are counterfeit.¹⁷

§ 435. **False pretenses.**—At common law defrauding a person of money or of other property by mere lying was no offense. It was necessary to prove that the fraud was accomplished by means of some false token¹⁸ or writing, or by means of false weights or measures, or that there was a conspiracy to defraud. In other words, besides the intention to cheat, it must be shown that the means employed were such as would deceive persons who used due diligence and precautions.¹⁹

¹³ *State v. McKenzie*, 42 Me. 392, 394; *People v. Osmer*, 4 Park. Cr. (N. Y.) 242, 244. See *ante*, § 430.

¹⁴ *United States v. Keen*, 1 McLean (U. S.) 429, 26 Fed. Cas. 15510; *Hess v. State*, 5 Ohio 5, 7, 22 Am. Dec. 767n; *Keating v. People*, 160 Ill. 480, 43 N. E. 724; *Elliott Evidence*, § 2959.

¹⁵ *State v. Allen*, 1 Hawks (N. Car.) 6, 10, 9 Am. Dec. 616n. See *ante*, § 429.

¹⁶ *State v. Orsborn*, 1 Root (Conn.) 152; *State v. Phelps*, 2 Root (Conn.) 87; *Armitage v. State*, 13 Ind. 441; *State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449.

¹⁷ *State v. Hooper*, 2 Bailey (S. Car.) 37; *Martin v. Commonwealth*,

2 Leigh (Va.) 745; *Commonwealth v. Carey*, 2 Pick. (Mass.) 47; *Commonwealth v. Taylor*, 5 Cush. (Mass.) 605; *Sarles, In re*, 4 City H. Rec. (N. Y.) 107.

¹⁸ *Elliott Evidence*, § 2977.

¹⁹ *Commonwealth v. Warren*, 6 Mass. 72, 73; *People v. Johnson*, 12 Johns. (N. Y.) 292, 293; *People v. Babcock*, 7 Johns. (N. Y.) 201, 204, 5 Am. Dec. 256; *Rex v. Lara*, 6 T. R. 565; *State v. Patillo*, 4 Hawks (N. Car.) 348; *State v. Stroll*, 1 Rich. (S. Car.) 244; *State v. Justice*, 2 Dev. (N. Car.) 199, 201; *Hughes v. People*, 223 Ill. 417, 79 N. E. 137; *Commonwealth v. Burton*, 183 Mass. 461, 67 N. E. 419; *Elliott Evidence*,

Four essential facts must be proved to constitute the crime of false pretenses. First, the intent to defraud some particular person or people generally. Second, an actual fraud committed. Third, the false pretense, and fourth, that the fraud resulted from the employment of the false pretense.²⁰ But this rule that to obtain money or property by mere lying did not constitute a crime, was found inadequate as soon as the employment of commercial credit became general in consequence of the increase of commerce, domestic and foreign. Hence by statute, 30 George II., ch. 24, it was enacted that "All persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any person or persons²¹ money, goods, wares or merchandises with intent to cheat or defraud any person or persons of the same * * * shall be deemed offenders against law and the public peace." The crime of false pretenses is distinct from larceny in the following particulars: If the evidence shows that the trick or fraud practiced resulted only in inducing the owner of the property to part with the naked possession of the same, he intending to retain in himself his right and title as owner, the taking will be larceny only; but if the owner intended not only to part with possession but with the title or right of property in the goods, the offense is false pretenses.²²

§ 2978. Evidence to prove the false pretense, see Elliott Evidence, § 2980; 10 L. R. A. 307, note.

²⁰ Commonwealth v. Drew, 19 Pick. (Mass.) 179; State v. Clark, 46 Kan. 65, 66, 26 Pac. 481; People v. Jordan, 66 Cal. 10, 12, 4 Pac. 773, 56 Am. 73; People v. Wakely, 62 Mich. 297, 303, 28 N. W. 871; State v. Bingham, 51 Wash. 616, 99 Pac. 735; Morris v. State, 54 Fla. 80, 45 So. 456; Young v. State, 156 Ala. 670, 46 So. 580; Ryan v. State, 104 Ga. 78, 30 S. E. 678; Griffin v. State, 3 Ga. App. 476, 60 S. E. 277; State v. Wedbee (N. C., 1910), 67 S. E. 60; People v. Pointdexter, 243 Ill. 68, 90 N. E. 261. To constitute the offense of obtaining property by false pretenses there must be an intent to defraud, there must be an actual fraud committed, false pre-

tenses must be used for the purpose of perpetrating the fraud, and the fraud must be accomplished by means of the false pretenses made use of for that purpose. Clawson v. State, 129 Wis. 650, 109 N. W. 578, 116 Am. St. 972.

²¹ Which obviously in modern times at least would include a corporation. State v. Briscoe (Del.), 67 Atl. 154; State v. Harnett (Del., 1909), 74 Atl. 82.

²² 2 Russell on Crimes (9th Am. Ed.) 618; Smith v. People, 53 N. Y. 111, 114, 13 Am. 474; Lewer v. Commonwealth, 15 S. & R. (Pa.) 93; Cline v. State, 43 Tex. 494, 497; Miller v. Commonwealth, 78 Ky. 15, 19, 39 Am. 194; State v. Anderson, 47 Iowa 142, 145; People v. Rae, 66 Cal. 423, 425, 6 Pac. 1, 56 Am. 102; Zink v. People,

If the accused, having obtained legal possession of the goods with the owner's consent, and, as a bailee or trustee, afterwards converts them to his own use he is guilty of embezzlement only. To constitute the crime of false pretenses it must be proved that the accused, *at the time of the taking of the property*, was acting dishonestly and with a fraudulent intent and that he then and there, by false pretenses, induced the owner to part with both the title and the possession and not with the possession alone.²³

§ 436. **Evidence to show the intention of the owner.**—It will thus be seen that the intention of the owner as respects his title to the property is of the greatest importance, for it is upon his intention that the character of the crime depends. He may always testify to the intention with which he transferred the property to the accused.²⁴ He may relate in evidence at length the circumstances under which the transfer was made, including everything that was said or done, either by him or by the accused, as a part of the *res gestæ*; and from these circumstances the jury may infer that he consented to divest himself of his title in the property upon the strength of the false representations.²⁵

§ 437. **The intent to defraud.**—An intent to defraud must always be proved²⁶ beyond a reasonable doubt. The intent is always a

77 N. Y. 114, 33 Am. 589; *Canter v. State*, 7 Lea (Tenn.) 349, 350; *People v. Martin*, 102 Cal. 558, 36 Pac. 952; *Jones v. State*, 93 Ga. 547, 553, 19 S. E. 250; *Commonwealth v. Call*, 21 Pick. (Mass.) 515.

²³ *Commonwealth v. Barry*, 124 Mass. 325, 327; *State v. Keyes*, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369; *Day v. Commonwealth* (Ky.), 110 S. W. 417, 33 Ky. L. 560; *State v. Dickinson*, 21 Mont. 595, 55 Pac. 539; *Beckwith v. Galice Mines Co.*, 50 Ore. 542, 93 Pac. 453, 16 L. R. A. (N. S.) 723.

²⁴ *Commonwealth v. Drew*, 153 Mass. 588, 595, 27 N. E. 593.

²⁵ *Commonwealth v. Schwartz*, 92

Ky. 510, 513, 18 S. W. 358, 775, 13 Ky. L. 929, 36 Am. St. 609. Cf. *State v. Vaughan*, 1 Bay (S. Car.) 282, 283; *State v. Benson*, 110 Mo. 18, 21, 19 S. W. 213; *State v. Bingham*, 51 Wash. 616, 99 Pac. 735; *People v. Snyder*, 110 App. Div. (N. Y.) 699, 97 N. Y. S. 469.

²⁶ *Sharp v. State*, 53 N. J. L. 511, 513, 21 Atl. 1026; *Carlisle v. State*, 76 Ala. 75; *Todd v. State*, 31 Ind. 514, 516; *State v. Fields*, 118 Ind. 491, 492, 21 N. E. 252; *Bowler v. State*, 41 Miss. 570, 578; *People v. Kendall*, 25 Wend. (N. Y.) 399, 401, 37 Am. Dec. 240; *Commonwealth v. Devlin*, 141 Mass. 423, 430, 6 N. E. 64; *People v. Baker*, 96 N. Y. 340,

question for the jury.²⁷ The intent to defraud may be inferred from the facts and circumstances of the case, as, for example, from the fact that the representations were false and that the accused knew they were so when he made them.²⁸ And where the alleged fraudulent transaction is at all complicated, it is competent to prove, not only the facts constituting the transaction itself, but also all facts and circumstances involved in the steps preliminary thereto, and all facts which tend to show the course of dealing between the parties before and after the date of the offense laid in the indictment. The widest latitude is allowed. All available information should be received and no circumstances should be excluded which will throw, or tend to throw, any light upon the intent of the parties, or upon the falsity of the representations.²⁹

An intention upon the part of the defendant to pay for the property obtained, or to return the money procured by false pretenses, is immaterial. Hence the defendant cannot prove, to rebut the intent to defraud, that he promised to repay, or that he was able or willing to repay,³⁰ wanted to procure work so as to

349; *People v. Getchell*, 6 Mich. 496, 504; *Ager v. State*, 2 Ga. App. 158, 58 S. E. 374; *State v. Briscoe* (Del., 1907), 67 Atl. 154; 25 Am. St. 387, note; *Elliott Evidence*, § 2975; *Martins v. State*, 17 Wyo. 319, 98 Pac. 709; *State v. Luff* (Del., 1909), 74 Atl. 1079. Presumption and burden of proof in prosecution for false pretense, see 25 Am. St. 380, 389. Defenses in prosecutions for false pretense, see *Elliott Evidence*, § 2982. Evidence of good character of defendant, see 103 Am. St. 902; sufficiency of evidence—variance, see *Elliott Evidence*, § 2984; 25 Am. St. 389.

²⁷ *State v. Norton*, 76 Mo. 180, 182; *Brown v. People*, 16 Hun (N. Y.) 535, 537; *People v. Thomas*, 3 Hill (N. Y.) 169; *Parmelee v. People*, 8 Hun (N. Y.) 623; *Dorsey v. State*, 111 Ala. 40, 20 So. 629.

²⁸ *People v. Herrick*, 13 Wend. (N. Y.) 87, 91; *State v. Walton*, 114 N.

Car. 783, 787, 18 S. E. 945; *People v. Baker*, 96 N. Y. 340, 2 N. Y. Cr. 218. Cf. *People v. Getchell*, 6 Mich. 496, 505; *State v. Briscoe* (Del., 1907), 67 Atl. 154; *People v. Leavens* (Cal. App., 1909), 106 Pac. 1103.

²⁹ *People v. Gibbs*, 98 Cal. 661, 665, 33 Pac. 630; *State v. Rivers*, 58 Iowa 102, 110, 12 N. W. 117, 43 Am. 112; *People v. Shelters*, 99 Mich. 333, 334, 58 N. W. 362; *People v. Winslow*, 39 Mich. 505, 506; *State v. Hartnett* (Del., 1909), 74 Atl. 82. As to deeds, letters and telegrams forming a part of the *res gesta*, see *Commonwealth v. Jeffries*, 7 Allen (Mass.) 548, 561, 83 Am. Dec. 712n, and *State v. Alexander*, 119 Mo. 447, 462, 24 S. W. 1060.

³⁰ *People v. Oscar*, 105 Mich. 704, 63 N. W. 971; *People v. Lennox*, 106 Mich. 625, 64 N. W. 488; *Commonwealth v. Coe*, 115 Mass. 481, 503; *Commonwealth v. Mason*, 105 Mass.

earn money to repay,³¹ or actually did repay, persons from whom money had been obtained.³² Nor can he prove that, in procuring the money, he was acting under legal advice unless he shows, first, that he stated to the attorney who advised him, fully and fairly all the facts, and unless it also appears that he acted in perfect good faith.³³

§ 438. Evidence of other similar crimes not inadmissible when relevant to show the intent to defraud.—Evidence of similar offenses, involving the making of other false representations, is admissible against the prisoner to show that he was aware of the falsity of the statements made by him in the present instance, and that, knowing them to be false, he made them with the intent to deceive.³⁴ Evidence of similar false pretenses is particularly relevant when it appears that the fraudulent act for which the accused is on trial does not stand alone, but is a part of a scheme, not merely to defraud one individual, but to swindle the com-

163, 7 Am. 507; *State v. Thatcher*, 35 N. J. L. 445, 448; *People v. Wieger*, 100 Cal. 352, 34 Pac. 826; *Reg. v. Naylor*, 10 Cox C. C. 149; *Reg. v. Boulton*, 1 Den. C. C. 508, 509; *State v. Hill*, 72 Me. 238, 242; *Commonwealth v. Schwartz*, 92 Ky. 510, 514, 18 S. W. 358, 775, 13 Ky. L. 929, 36 Am. St. 609; *State v. Hartnett* (Del., 1909), 74 Atl. 82. *Contra*, *People v. Herrick*, 13 Wend. (N. Y.) 87, 92.

³¹ *Meek v. State*, 117 Ala. 116, 23 So. 155.

³² *Commonwealth v. Howe*, 132 Mass. 250, 261.

³³ *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588.

³⁴ *Hutcherson v. State* (Tex., 1896), 35 S. W. 375; *Martin v. State*, 36 Tex. Cr. 125, 35 S. W. 976; *People v. Henssler*, 48 Mich. 49, 11 N. W. 804; *State v. Walton*, 114 N. Car. 783, 18 S. E. 945; *Trogon v. Commonwealth*, 31 Gratt. (Va.) 862, 871-875; *State v. Myers*, 82 Mo. 558, 52 Am. 389; *State v. Long*, 103 Ind. 481,

485, 3 N. E. 169; *State v. Jackson*, 112 Mo. 585, 589, 20 S. W. 674; *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Commonwealth v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712n; *State v. Lapage*, 57 N. H. 245, 24 Am. 69; *Bielschowsky v. People*, 3 Hun (N. Y.) 40; *Mayer v. People*, 80 N. Y. 364, 372; *Strong v. State*, 86 Ind. 208, 213, 44 Am. 292n. *Contra*, *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *People v. Garrahan*, 19 App. Div. (N. Y.) 347, 46 N. Y. S. 497; *Meek v. State*, 117 Ala. 116, 23 So. 155; *State v. Sparks*, 79 Neb. 504, 113 N. W. 154; *State v. Jackson*, 21 S. Dak. 494, 113 N. W. 880; *People v. Levin*, 119 App. Div. (N. Y.) 233, 104 N. Y. S. 647, affirmed in 194 N. Y. 554, 87 N. E. 1124. Evidence of other offenses in prosecution for false pretense, see 62 L. R. A. 193, note; 25 Am. St. 387, note; 105 Am. St. 1001, note.

munity at large.³⁵ Thus, where the representations consist of statements by the accused of his financial condition, and the exhibition of a memorandum claimed by him to be a correct account of the profits of his business, it may be shown that previous to these statements he had made similar statements to other persons and by such statements had procured money from others.³⁶ The same rule has been applied to statements of the accused in an endeavor to sell stock in a corporation.³⁷ The theory upon which similar statements by the accused are admitted in evidence is that they bring home to him a knowledge of the falsity of the representations, when he made them and also show his intent to deceive.

§ 439. The pretenses made and evidence to show their falsity.—The burden of proving the nature of the representations is always upon the prosecution. An indictment charging two or more false pretenses is sustained by proving one or more of them.³⁸ Having

³⁵ *Rafferty v. State*, 91 Tenn. 655, 666, 16 S. W. 728; *Carnell v. State*, 85 Md. 1, 36 Atl. 117; *Commonwealth v. Howe*, 132 Mass. 250, 260; *Commonwealth v. Coe*, 115 Mass. 481, 501; *People v. Henssler*, 48 Mich. 49, 53, 11 N. W. 804; *Strong v. State*, 86 Ind. 208, 217, 44 Am. 292n; *Commonwealth v. Blood*, 141 Mass. 571, 576, 6 N. E. 769; *State v. Gibson*, 132 Iowa 53, 106 N. W. 270; *State v. Sparks*, 79 Neb. 504; 113 N. W. 154, rehearing denied, 79 Neb. 511, 114 N. W. 598; *Commonwealth v. Burton*, 183 Mass. 461, 67 N. E. 419; *State v. Newman*, 73 N. J. L. 202, 62 Atl. 1008; *State v. Seligman*, 127 Iowa 415, 103 N. W. 357; *State v. Poole*, 42 Wash. 192, 84 Pac. 727; *People v. Weil*, 244 Ill. 176, 91 N. E. 112. But independent fraudulent acts unconnected with the crime in question were rejected in *Todd v. State*, 31 Ind. 514, 519; *Commonwealth v. Jackson*, 132 Mass. 16, 21. The entire history of the fraud

may be shown. If the facts disclose that other similar crimes have been committed, this does not render them incompetent. *Commonwealth v. Blood*, 141 Mass. 571, 575, 6 N. E. 769.

³⁶ *People v. Noblett*, 184 N. Y. 612, 77 N. E. 1193.

³⁷ *People v. Whalen*, 154 Cal. 472, 98 Pac. 194.

³⁸ *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102; *Limouze v. People*, 58 Ill. App. 314; *State v. Vandimark*, 35 Ark. 396, 402; *Skiff v. People*, 2 Park. Cr. (N. Y.) 139, 146; *Todd v. State*, 31 Ind. 514, 523; *Rex v. Ady*, 7 C. & P. 140; *Commonwealth v. Morrill*, 8 Cush. (Mass.) 571, 574; *State v. Mills*, 17 Me. 211; *Webster v. People*, 92 N. Y. 422, 427; *People v. Blanchard*, 90 N. Y. 314, 319; 2 Bish. Cr. Pro. (4th ed.), § 187(2); *State v. Keyes*, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369n; *Cunningham v. State*, 61 N. J. L. 666, 40 Atl. 696; *Day v. Commonwealth* (Ky.), 110 S. W. 417, 33 Ky. L. 560.

proved the making of the pretenses, the burden remains upon the state to prove their falsity.³⁹ The admissions of the defendant tending to show the falsity of the representations made by him, though not usually enough to sustain a conviction, unless corroborated,⁴⁰ may always be received in evidence against him,⁴¹ their weight being left to the jury, who must determine whether the representations made were false or true. Direct evidence to establish the falsity of the representations is not indispensable. This may be inferred from evidence of circumstances which tend legitimately and necessarily to show it.⁴² The false representation must be of some existing or past material fact, as distinct from a mere promise or opinion.⁴³ Only such pretenses can be proved as relate to events past or present which are complete and certain. The representations must be of such a character that their truth or falsity can be determined. This necessarily cannot be done where the representations relate to future events which are uncertain and contingent, or where they consist of promises or vague opinions concerning the truth of which no person can tell anything.⁴⁴ But, though false representations as to future

³⁹ *Babcock v. People*, 15 Hun (N. Y.) 347, 352; *Bowler v. State*, 41 Miss. 570, 577; *State v. Wilbourne*, 87 N. Car. 529, 532; *People v. Leavens* (Cal. App., 1909), 106 Pac. 1103.

⁴⁰ *State v. Lewis*, 45 Iowa 20, 22; *State v. Penny*, 70 Iowa 190, 30 N. W. 561.

⁴¹ *State v. Long*, 103 Ind. 481, 3 N. E. 169; *Meek v. State*, 117 Ala. 116, 23 So. 155; *Lawrence v. State*, 103 Md. 17, 63 Atl. 96; *People v. Chrones*, 75 Pac. 180, 141 Cal. XVIII, not reported in full.

⁴² *People v. Pinckney*, 67 Hun (N. Y.) 428, 430, 22 N. Y. S. 118.

⁴³ 2 Bish. Cr. L., § 429; *Bitdile v. United States*, 156 Fed. 759, 84 C. C. A. 415; *State v. Hollingsworth*, 132 Iowa 471, 109 N. W. 1003; *Cook v. State*, 71 Neb. 243, 98 N. W. 810; *Goddard v. State*, 2 Ga. App. 154, 58 S. E. 304; *People v. Huggins*, 110 App. Div. (N. Y.) 613, 97 N. Y. S.

187; *State v. Phelps*, 41 Wash. 470, 84 Pac. 24; *Young v. State* (Ala., 1908), 46 So. 580.

⁴⁴ *Dillingham v. State*, 5 Ohio St. 280, 285; *Rex v. Codrington*, 1 C. & P. 661; *People v. Morphy*, 100 Cal. 84, 87, 34 Pac. 623; *Commonwealth v. Drew*, 19 Pick. (Mass.) 179, 185; *Commonwealth v. Warren*, 94 Ky. 615, 619, 23 S. W. 193, 15 Ky. L. 249; *Commonwealth v. Moore*, 99 Pa. St. 570, 574; *Gray v. State*, 55 Ala. 86; *Ryan v. State*, 45 Ga. 128, 129; *Thomas v. State*, 90 Ga. 437, 440, 16 S. E. 94; *Keller v. State*, 51 Ind. 111, 117; *Commonwealth v. Stevenson*, 127 Mass. 446, 449; *Snyder, In re*, 17 Kan. 542, 557; *State v. Green*, 7 Wis. 571; *State v. Phifer*, 65 N. Car. 321, 325; *State v. Daniel*, 114 N. Car. 823, 824, 19 S. E. 100; *People v. Blanchard*, 90 N. Y. 314, 325; *Allen v. State*, 16 Tex. App. 150, 151; *Johnson v.*

events which of necessity are in the nature of a promise or opinion, may not be enough alone to sustain a conviction of false pretenses, it often happens that false representations of material facts and promises are intermingled in the same statement. This does not necessarily keep out the statement if the statement of a fact and the promise can be separated. And if it is proved that the person defrauded relied in part on the statement of fact the promise may be disregarded by the jury and the defendant properly convicted.⁴⁵ For if the statement of an existing fact which is false produces its result only because it is coupled with a promise that is also false a statement of fact and the promise may be reasonably regarded as constituting a false misrepresentation upon which the prosecuting witness relied.⁴⁶ Representations of value of property as an existing fact are not mere opinion, but are material; and if made with a knowledge of their falsity, with an intent to procure money or property, and if the party to whom they are made parts with money or property to the person making them in reliance upon their truth, a conviction will be sustained. It is a question for the jury to determine upon all the facts and circumstances whether a representation of value is a mere opinion or the statement of a fact.⁴⁷

§ 440. The pretenses must have been calculated to deceive.—Not only must the representations be proved to have been false, but it must also be shown that they were such as were calculated to

State, 41 Tex. 65, 67; *State v. Haines*, 23 S. Car. 170, 173; *Canter v. State*, 7 Lea (Tenn.) 349, 351; *State v. Petty*, 119 Mo. 425, 24 S. W. 1010; *State v. Stanley*, 64 Me. 157, 159; *Commonwealth v. Jackson*, 132 Mass. 16, 17; *State v. Moore*, 111 N. Car. 667, 673, 16 S. E. 384; *State v. King*, 67 N. H. 219, 34 Atl. 461. The evidence to prove the truth or falsity of the representations will vary according to their nature. The evidence must be relevant to the specific facts contained in the representations. Thus, if the statement upon the strength of which goods were sold on credit was that the accused was

the owner of a lucrative business and had a substantial bank account, it will not be permissible to prove in his defense that he was the owner of considerable real estate. Such evidence, however, would be admissible where his statement was merely that he was a man of wealth. *Carnell v. State*, 85 Md. 1, 36 Atl. 117.

⁴⁵ *Morris v. State*, 54 Fla. 80, 45 So. 456; *McDowell v. Commonwealth* (Ky., 1909), 123 S. W. 313.

⁴⁶ *Morris v. State*, 54 Fla. 80, 45 So. 456.

⁴⁷ *Williams v. State*, 77 Ohio St. 468, 83 N. E. 802.

deceive a person of ordinary caution and intelligence.⁴⁸ Hence evidence is always admissible to show that the person who was defrauded could have ascertained the truth or falsity of the statements of the accused.⁴⁹ Whether the representations were calculated to deceive, whether the owner relied upon them as the main inducement, and whether they were known to be false, by the accused, are questions for the jury. In determining them the jurors must consider all the circumstances of the case, such as the ages of the parties, their experience and knowledge of the world, the customs of the business or profession in which they are engaged, and their several means of acquiring knowledge.⁵⁰

§ 441. **The value of the property obtained.**—It must be proved, beyond a reasonable doubt, that the property which was obtained by means of the false representations had some value;⁵¹ and that the representations operated to prejudice or injure the person to whom they were made.⁵² In a prosecution for obtaining a specified sum of money proof of obtaining any sum

⁴⁸ *Higler v. People*, 44 Mich. 299, 303, 6 N. W. 664, 38 Am. 267; *Commonwealth v. Moore*, 99 Pa. St. 570; *Scott v. People*, 62 Barb. (N. Y.) 62, 75-81; *Shaffer v. State*, 82 Ind. 221, 224, 225; *State v. Burnett*, 119 Ind. 392, 393, 21 N. E. 972; *Commonwealth v. Grady*, 13 Bush (Ky.) 285, 286, 26 Am. 192; *Thomas v. People*, 113 Ill. 531, 533, 537; *Delaney v. State*, 7 Baxt. (Tenn.) 28, 30; *Miller v. State*, 73 Ind. 88, 91; *McCorkle v. State*, 1 Cold. (Tenn.) 333; *People v. Cook*, 41 Hun (N. Y.) 67, 69; *State v. DeHart*, 6 Baxt. (Tenn.) 222, 224; *Watson v. People*, 87 N. Y. 561, 565, 41 Am. 397n; *Commonwealth v. Haughey*, 3 Met. (Ky.) 223; *Meek v. State*, 117 Ala. 116, 23 So. 155; *Elliott Evidence*, § 2979.

⁴⁹ *People v. Henssler*, 48 Mich. 49, 11 N. W. 804; *Wagoner v. State*, 90 Ind. 504, 507; *People v. Oyer & Terminer*, 83 N. Y. 436, 449; *People v.*

Dimick, 41 Hun (N. Y.) 616; *State v. Jones*, 70 N. Car. 75, 77; *McKee v. State*, 111 Ind. 378, 381, 12 N. E. 510; *Shaffer v. State*, 100 Ind. 365, 368; *Goddard v. State*, 2 Ga. App. 154, 58 S. E. 304.

⁵⁰ See also, *Commonwealth v. Grady*, 13 Bush (Ky.) 285, 286, 26 Am. 192; *Winslow v. State*, 97 Ala. 68, 12 So. 423; *Woodbury v. State*, 69 Ala. 242, 44 Am. 515; *McDowell v. Commonwealth (Ky.)*, 123 S. W. 313.

⁵¹ *State v. Lewis*, 26 Kan. 123, 129; *State v. Shaffer*, 89 Mo. 271, 278, 1 S. W. 293; *Rosales v. State*, 22 Tex. App. 673, 675, 3 S. W. 344; *Moore v. Commonwealth*, 8 Pa. St. 260; *Morgan v. State*, 42 Ark. 131, 140, 48 Am. 55; *State v. Gibson*, 132 Iowa 53, 106 N. W. 270.

⁵² *People v. Galloway*, 17 Wend. (N. Y.) 540; *People v. Cook*, 41 Hun (N. Y.) 67, 70.

is sufficient,⁵³ as this crime is not usually graded according to the amount taken.⁵⁴

§ 442. **Belief in false representations.**—The prosecuting witness may testify that he believed in the false pretenses.⁵⁵ The evidence must show beyond a reasonable doubt that he believed that the representations were true and that, relying and acting upon them, he parted with his property upon faith in them.⁵⁶ But they need not be proved to have been the sole, exclusive and decisive cause thereof. He may have been influenced by considerations of friendship, or the desire of gain, and whether he was so influenced, and by what and to what extent, are questions for the jury.⁵⁷ It is a false pretense under the statute for the accused to represent himself or his firm to be in a sound pecuniary condition, or worth so much, or to have a certain sum of money in his or their hands or in the bank, knowing these assertions to be false.⁵⁸

⁵³ *State v. Briscoe* (Del.), 67 Atl. 154; *Bowman v. State*, 54 Fla. 16, 45 So. 308; *People v. Osborn* (Cal. App., 1910), 106 Pac. 891.

⁵⁴ As to procuring a promissory note by false pretenses, *Clawson v. State*, 129 Wis. 650, 109 N. W. 578, 116 Am. St. 972. Cf. *Brunaugh v. State* (Ind., 1910), 90 N. E. 1019.

⁵⁵ *People v. Herrick*, 13 Wend. (N. Y.) 87, 91; *Snyder, In re*, 17 Kan. 542, 553; *People v. Weil*, 244 Ill. 176, 91 N. E. 112.

⁵⁶ *Trogdon v. Commonwealth*, 31 Gratt. (Va.) 862, 884; *Reg. v. Mills*, 7 Cox C. C. 263; *Meek v. State*, 117 Ala. 116, 23 So. 155; *Swift v. State*, 126 Ga. 590, 55 S. E. 478; *People v. Sattlekau* (App. Div. (N. Y.)) 104 N. Y. S. 805; *Goddard v. State*, 2 Ga. App. 154, 58 S. E. 304; *State v. Bingham*, 51 Wash. 616, 99 Pac. 735; *State v. Pickett*, 174 Mo. 663, 74 S. W. 844; *Elliott Evidence*, § 2981. See also cases in next note.

⁵⁷ *State v. Thatcher*, 35 N. J. L. 445, 449; *Therasson v. People*, 20 Hun (N. Y.) 55, 67; *Van Buren v. People*, 7 Colo. App. 136, 42 Pac. 599;

People v. Haynes, 14 Wend. (N. Y.) 546-555, 28 Am. Dec. 530; *People v. Baker*, 96 N. Y. 340, 348; *Berry v. State*, 97 Ga. 202, 23 S. E. 833; *Skiff v. People*, 2 Park. Cr. (N. Y.) 139; *State v. Williams*, 103 Ind. 235, 237, 2 N. E. 585; *Woodbury v. State*, 69 Ala. 242, 246, 44 Am. 515; *Wax v. State*, 43 Neb. 18, 61 N. W. 117; *State v. Dunlap*, 24 Me. 77; *Commonwealth v. Stevenson*, 127 Mass. 446; *Fay v. Commonwealth*, 28 Gratt. (Va.) 912; *Cowen v. People*, 14 Ill. 348; *Britt v. State*, 9 Humph. (Tenn.) 30; *State v. Fooks*, 65 Iowa 196, 21 N. W. 561, 773; *Snyder, In re*, 17 Kan. 542; *State v. Tessier*, 32 La. Ann. 1227; *Smith v. State*, 55 Miss. 513; *People v. Gibbs*, 98 Cal. 661, 663, 33 Pac. 630; *Donohoe v. State*, 59 Ark. 375; 27 S. W. 226; *State v. Palmer*, 50 Kan. 318, 32 Pac. 29.

⁵⁸ *Commonwealth v. Schwartz*, 92 Ky. 510, 515, 18 S. W. 358, 775, 13 Ky. L. 929, 36 Am. St. 609; *Rothschild v. State*, 13 Lea (Tenn.) 294, 300-302; *Commonwealth v. Drew*, 153 Mass. 588, 595, 27 N. E. 593; *State v.*

§ 443. **Evidence of the pecuniary condition of the accused at the date of making the representations.**—The rule that the pecuniary condition of the accused is irrelevant is subject to an exception in the case of the crime of false representation. That a man is destitute or embarrassed with debt does not justify an inference that he will forge or steal and evidence that the defendant is very poor should be rejected in a prosecution for larceny or forgery. But where one person procures the property of another because of the confidence the owner has in his financial responsibility and intention to pay, the fact that the person obtaining the goods was insolvent, and that he knew it, would indicate very strongly that he intended to deprive the owner of his property without paying for it, and with an intention to defraud. Hence, evidence tending to show the solvency or insolvency of the accused,⁵⁹ or of some other person,⁶⁰ upon whose credit property is procured, is relevant to prove that he made the statements in good faith, or the reverse.⁶¹

If the accused refers the owner of the property to a third person for information, who, on being questioned, and while the transaction is pending, makes a statement, upon faith in which

Neimeier, 66 Iowa 634, 637, 24 N. W. 247; Higler v. People, 44 Mich. 299, 303, 6 N. W. 664, 38 Am. 267; Commonwealth v. Wallace, 114 Pa. St. 405, 411, 6 Atl. 685, 60 Am. 353; Reg. v. Howarth, 11 Cox C. C. 588; State v. Pryor, 30 Ind. 350, 351; Hathcock v. State, 88 Ga. 91, 13 S. E. 959.

⁵⁹ State v. Hill, 72 Me. 238, 242.

⁶⁰ Where a person was defrauded by a false statement as to which of two persons of the same name was the maker of a note, evidence of the financial standing of the alleged maker, and of the irresponsibility of the other, is admissible to show intent. People v. Cook, 41 Hun (N. Y. 67, 71.

⁶¹ Reg. v. Howarth, 11 Cox C. C. 588, 592; Wood v. People, 53 N. Y. 511; Brown v. State, 37 Tex. Cr. 104,

38 S. W. 1008, 66 Am. St. 794. "Evidence of the pecuniary condition of the accused in such a case is not offered to show that he was under a peculiar temptation to commit the offense, or was more likely to cheat and defraud because he was in embarrassed circumstances, but for the purpose of showing the natural and necessary consequence of his act, which the law presumes he intended." Commonwealth v. Jeffries, 7 Allen (Mass.) 548, 569, 83 Am. Dec. 712n; Commonwealth v. Drew, 153 Mass. 588, 595, 27 N. E. 593. Evidence that the accused mortgaged all his property, including the goods obtained, three days thereafter, is relevant. State v. Call, 48 N. H. 126, 131. See also, State v. Long, 103 Ind. 481, 484, 3 N. E. 169.

the owner acts, the statement is received as the statement of the accused.⁶² Where the representations of financial ability made by the accused were alleged to be false, his subsequent declaration that he was too poor to retain counsel are relevant.⁶³ But the admissions of the accused, made upon an examination in proceedings supplementary to execution, are not receivable where the statute expressly provides that such admissions cannot be used against him upon a criminal prosecution.⁶⁴ The insolvency of the defendant may be proved by any witness having a competent knowledge of his financial condition.⁶⁵

§ 444. The false pretenses not necessarily verbal.—It is never necessary for the prosecution to prove that the false pretenses were made by, or contained in, verbal statements or communications, oral or written. Actions often speak louder than words. The language of the accused is always relevant in evidence; but evidence of his actions, unaccompanied by language, may also be received and the false representations may be implied by the jury from evidence of such actions.⁶⁶

If the ideas properly and naturally conveyed by the actions of the accused produce a false impression upon the mind of the owner of the property which is obtained, and it also appears from all the facts in evidence that the accused knew and intended that they should produce such a false impression, an allegation of false pretenses is sustained.⁶⁷ Thus it has repeatedly been held that the action of the accused in drawing a check upon a bank in which he has no funds, and which he therefore knows will not be honored on presentation, and passing the same, is by implication

⁶² *Todd v. State*, 31 Ind. 514, 520. Cf. *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. 341.

⁶³ *State v. Fooks*, 65 Iowa 196, 198, 452, 21 N. W. 561, 773. If the indictment does not negative the representations of solvency, evidence of insolvency is not admissible. *State v. Long*, 103 Ind. 481, 3 N. E. 169.

⁶⁴ *Barber v. People*, 17 Hun (N. Y.) 366, 368.

⁶⁵ *Commonwealth v. Jeffries*, 7 Al-

len (Mass.) 548, 83 Am. Dec. 712n. The notes of the accused are relevant to show what he owes. *Hathcock v. State*, 88 Ga. 91, 13 S. E. 959.

⁶⁶ *State v. Briscoe* (Del., 1907), 67 Atl. 154.

⁶⁷ *Musgrave v. State*, 133 Ind. 297, 306, 32 N. E. 885; *Commonwealth v. Murphy*, 96 Ky. 28, 27 S. W. 859, 16 Ky. L. 224; *Brown v. State*, 37 Tex. Cr. 104, 38 S. W. 1008, 66 Am. St. 794.

a false representation that he has money in the bank on which the check is drawn.⁶⁸

§ 445. **Proving the venue.**—The false representation may be proved to have been made in one place and the property may have been obtained in another. This occurs where the accused has written and mailed a letter to the owner of the money or goods, who resides or does business in a distant city, and the property is sent to him upon faith in the false representations contained in the letter. The place in which the owner parts with his property determines the venue of the crime. Hence, evidence to prove where the false representations were made is immaterial. But it must always be proved where the false statements were acted upon by the owner and where the money or goods were obtained.⁶⁹

⁶⁸ *People v. Donaldson*, 70 Cal. 116, 118, 11 Pac. 681; *Commonwealth v. Drew*, 19 Pick. (Mass.) 179, 27 N. E. 593; *Rex v. Jackson*, 3 Campb. 370, 371; *Foote v. People*, 17 Hun (N. Y.) 218, 219; *Reg. v. Radcliffe*, 12 Cox C. C. 474. *Contra*, *Reg. v. Partidge*, 6 Cox C. C. 182, 186; *Brown v. State*, 37 Tex. Cr. 104, 38 S. W. 1008, 66 Am. St. 794. The fact that a person, not a member of the university, went to a shop wearing a cap and gown and obtained goods is sufficient evidence of false pretenses though he said nothing. *Rex v. Barnard*, 7 C. & P. 784, 785. See also, *Speer v. State*, 50 Tex. Cr. 273, 97 S. W. 469.

⁶⁹ *State v. Shaeffer*, 89 Mo. 271, 278, 1 S. W. 293; *State v. House*, 55 Iowa

466, 472, 8 N. W. 307; *Norris v. State*, 25 Ohio St. 217, 18 Am. 291; *Commonwealth v. Van Tuyl*, 1 Met. (Ky.) 1, 4, 71 Am. Dec. 455; *People v. Adams*, 3 Denio (N. Y.) 190, 45 Am. Dec. 468; *Commonwealth v. Karpouski*, 15 Pa. Co. Ct. 280. A letter may be relevant evidence aside from the writing contained in it to show the representations made and the place of their making. The printed matter at the head of the letter may indicate the false character which the accused has assumed in order to effect his criminal designs and purposes. *Taylor v. Commonwealth*, 94 Ky. 281, 284, 22 S. W. 217, 15 Ky. L. 49.

CHAPTER XXX.

OFFENSES AGAINST PUBLIC JUSTICE.

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§ 446. Obstructing justice and resisting arrest—Proof of official character of officer resisted—Validity of his appointment.—Though in civil cases the courts will judicially notice that certain persons are officers,¹ on a trial for resisting or assaulting an officer it

¹ Underhill on Ev., § 240.

must be shown that the person resisted was an officer and that the accused was aware of his official character.² These facts cannot be presumed.³ The officer who issued or served the writ may testify orally that he was an officer and acted as such. It is enough that he was an officer *de facto*,⁴ and evidence to prove the invalidity of his appointment is usually inadmissible.⁵ If the officer is alleged with unnecessary particularity "to have been legally appointed and duly qualified," the court may require his appointment to be proved.⁶ In the case of an indictment for

² *Pettibone v. United States*, 148 U. S. 197, 205, 37 L. ed. 419, 13 Sup. Ct. 542; *Merritt v. State* (Miss., 1889), 5 So. 386; *Rex v. Osmer*, 5 East 304; *State v. Carpenter*, 54 Vt. 551; *State v. Maloney*, 12 R. I. 251; *State v. Downer*, 8 Vt. 424, 429, 30 Am. Dec. 482; *Commonwealth v. Israel*, 4 Leigh (Va.) 675; *Yates v. People*, 32 N. Y. 509; *Commonwealth v. Kirby*, 2 Cush. (Mass.) 577; *State v. Hilton*, 26 Mo. 199; *State v. Smith*, 11 Ore. 205, 8 Pac. 343; *Horan v. State*, 7 Tex. App. 183; *Duncan v. State*, 7 Humph. (Tenn.) 148; *State v. Beasom*, 40 N. H. 367; *State v. Murphy* (Del., 1907), 66 Atl. 335. *Cf.* *Putman v. State*, 49 Ark. 449, 453, 5 S. W. 715; *State v. Pickett*, 118 N. Car. 1231, 24 S. E. 350; *Johnson v. State*, 51 Fla. 44, 40 So. 678. Evidence of other offenses to show that accused was resisting arrest for another crime, see 105 Am. St. 991, note.

³ *State v. Downer*, 8 Vt. 424, 429, 30 Am. Dec. 482; *State v. Carpenter*, 54 Vt. 551, 553. It may, and perhaps must, be proved that the officer stated he came to arrest the defendant, or that he read a warrant to him, or stated he had a warrant for him. These facts are essential, though if the accused began his resistance on seeing the officer it is not necessary

to prove the warrant was read. *Commonwealth v. Cooley*, 6 Gray (Mass.) 350, 356. See *Ormond v. Ball*, 120 Ga. 916, 48 S. E. 383; *State v. Smith*, 11 Ore. 205, 207, 8 Pac. 343; *State v. Maloney*, 12 R. I. 251; *Oliver v. State*, 17 Ark. 508, 510; *Commonwealth v. McCue*, 16 Gray (Mass.) 226, 227; *State v. Zeibart*, 40 Iowa 169, 175.

⁴ *Floyd v. State*, 79 Ala. 39, 42; *Cockerham v. State* (Miss., 1895), 19 So. 195; *State v. Bates*, 23 Iowa 96, 99. To require every officer to establish the validity of his appointment in collateral proceedings would be intolerable and a dangerous obstruction of justice. *Heath v. State*, 36 Ala. 273, 276.

⁵ *Robinson v. State*, 82 Ga. 535, 546, 9 S. E. 528; *Commonwealth v. Kirby*, 2 Cush. (Mass.) 577, 581; *State v. Armistead*, 106 N. Car. 639, 642, 10 S. E. 872; *People v. Hopson*, 1 Denio (N. Y.) 574. *Contra*, *Creighton v. Commonwealth*, 83 Ky. 142, 147, 4 Am. St. 143. It seems, however, that the validity of a written warrant of appointment may be inquired into and if invalid, it is inadmissible. *United States v. Phelps*, 4 Day (Conn.) 469, 470.

⁶ *State v. Sherburne*, 59 N. H. 99; *State v. Copp*, 15 N. H. 212.

resisting arrest it must be shown to authorize a conviction that an attempt was made to arrest the accused.⁷

§ 447. Intention to obstruct justice—Evidence of threats, or to show invalidity of warrant.—The intention to obstruct the officer may be inferred from the language of the accused. Threats and violent epithets against the officer are admissible,⁸ though not alone sufficient to constitute the offense of obstructing an officer,⁹ nor is it necessary to prove that the officer was beaten or assaulted.¹⁰ Evidence that the obstruction was unsuccessful,¹¹ or that the person whose arrest the accused tried to prevent was not in fact guilty,¹² or that property which the officer attached, believing it belonged to the defendant, did not belong to him,¹³ has been held not relevant.

The motive which prompts the conduct of the accused in resisting arrest is important. The accused may show any fact tending to prove that the officer used undue violence or force in arresting him, and that he, in self-defense, used force necessary to repel it.¹⁴ If, however, having submitted to an arrest which was accompanied with undue violence or force, he subsequently resists the officer while in his custody, a verdict of guilty will be sustained.¹⁵ The validity of the warrant under which an arrest was attempted will be presumed until the contrary is shown.¹⁶ The burden to prove its invalidity is on the defendant.¹⁷ The illegality or invalidity of the warrant is always relevant. Any

⁷ *Cooksey v. State*, 84 Ark. 485, 106 S. W. 674.

⁸ *State v. Morrison*, 46 Kan. 679, 684-689, 27 Pac. 133; *State v. Seery*, 95 Iowa 652, 64 N. W. 631; *Woodward v. State* (Tex. Cr. App., 1910), 126 S. W. 271.

⁹ *Allen v. State*, 5 Ga. App. 237, 62 S. E. 1003.

¹⁰ *Woodworth v. State*, 26 Ohio St. 196, 200. But evidence showing only an effort to elude arrest will not sustain a charge of resisting an officer. *State v. Welch*, 37 Wis. 196, 202, 203; *Clay v. State* (Miss., 1897), 22 So. 62.

¹¹ *State v. Gilbert*, 21 Ind. 474.

¹² *Commonwealth v. Tracy*, 5 Met. (Mass.) 536, 553; *State v. Bates*, 23 Iowa 96, 98; *State v. Garrett*, 80 Iowa 589, 590, 46 N. W. 748.

¹³ *State v. Downer*, 8 Vt. 424, 428, 30 Am. Dec. 482; *State v. Fifield*, 18 N. H. 34, 38.

¹⁴ *State v. Dennis*, 2 Marv. (Del.) 433.

¹⁵ *State v. Dennis*, 2 Marv. (Del.) 433.

¹⁶ *Underhill on Ev.*, § 231.

¹⁷ *State v. Freeman*, 8 Iowa 428, 74 Am. Dec. 317; *Kernan v. State*, 11 Ind. 471, 472; *Spear v. State*, 120 Ala. 351, 25 So. 46. Cf. *Gibson v. State*, 118 Ga. 29, 44 S. E. 811.

person may resist arrest and may use such force as is necessary to prevent the arrest under an illegal warrant and may show its invalidity on his trial by parol evidence.¹⁸

The defendant cannot be permitted to prove that, after having resisted arrest, he offered to surrender himself and to go before some other justice if his attorney should advise him the warrant was valid.¹⁹

§ 448. Preventing attendance of witnesses.—A willful and corrupt attempt to prevent the attendance of a witness before a lawful tribunal is an offense at common law. The essence of the offense is the attempt to interfere with and obstruct the administration of justice.²⁰ No physical act of intervention is necessary to constitute the crime, but it may be committed by persuasion, advice or threats.²¹ At common law it need not be proved that the witness was under a subpoena,²² that he was called in behalf of either party, or that his evidence was material.²³

§ 449. False swearing.—This crime consists in testifying knowingly and falsely under oath in a non-judicial proceeding, as, for example, on applying for a marriage license, or on registration as a voter. The language used by the accused and his knowledge

¹⁸ *State v. Wimbush*, 9 S. Car. 309, 317; *State v. Hailey*, 2 Strobb. (S. Car.) 73; *Underhill on Ev.*, § 208; *State v. Knapp*, 50 Wash. 229, 96 Pac. 1076, 21 L. R. A. (N. S.) 66; *Lee v. State*, 45 Tex. Cr. 94, 74 S. W. 28; *Ryan v. City of Chicago*, 124 Ill. App. 188. It is sufficient to charge resistance or obstruction in the language of the statute. The particular manner is matter of evidence. *Oliver v. State*, 17 Ark. 508, 509; *United States v. Bachelder*, 2 Gall. (U. S.) 15, 24 Fed. Cas. 14490; *State v. Copp*, 15 N. H. 212, 215; *Gibson v. State*, 118 Ga. 29, 44 S. E. 811. *Contra*, *Horan v. State*, 7 Tex. App. 183, 191; *Lamberton v. State*, 11 Ohio 282.

¹⁹ *King v. State*, 89 Ala. 43, 46, 8 So. 120, 18 Am. St. 89.

²⁰ *State v. Holt*, 84 Me. 509, 24 Atl. 951; *Perrow v. State*, 67 Miss. 365, 368, 7 So. 340; *State v. Curdy* (Del., 1910), 75 Atl. 868.

²¹ *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132.

²² *State v. Keyes*, 8 Vt. 57, 66, 67, 30 Am. Dec. 450; *State v. Horner* (Del.), 26 Atl. 73, 74; *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132; *Commonwealth v. Bailey* (Ky.), 87 S. W. 299, 26 Ky. L. 583.

²³ *Commonwealth v. Reynolds*, 14 Gray (Mass.) 87, 89, 74 Am. Dec. 665. See *Gandy v. State*, 77 Neb. 782, 110 N. W. 862. See *post*, § 470. *Cf.* *Tedford v. People*, 219 Ill. 23, 76 N. E. 60; *Young, In re*, 137 N. Car. 552, 50 S. E. 220.

of its falsity must be proved.²⁴ If the accused is alleged to have sworn falsely to several facts, proof that he swore falsely to one is insufficient.²⁵ A conviction will not be sustained unless founded on the evidence of two credible witnesses, or on that of one such witness corroborated strongly by circumstances pointing to the falsity of the statements.²⁶

False swearing is a statutory offense, and is distinct from perjury at common law.²⁷ Neither can be sustained by proving the other, nor can a statute requiring a grand juror to disclose the testimony of a witness on the trial of the latter for perjury before the grand jury be construed to apply to his indictment for false swearing before them.²⁸

§ 450. Embracery—Evidence required.—This crime, which may be regarded as a particular form of bribery, is defined as an attempt to influence a juror or jurors corruptly by gifts, persuasions or threats, or by any other means (except the evidence or argument submitted in open court), by a party or by a stranger, whether the verdict be given or not and whether the verdict, if given, be true or false.²⁹ Proof of giving money to a person to be distributed among jurors is sufficient, though the money never reached them. For proof of an actual tender or offer of the money so as to enable the juror to expressly receive or reject it is not necessary.³⁰ A proposal or expression of a willingness to bribe is sufficient. A mere attempt to bribe a jury is embracery, though it may for any reason have been unsuccessful.³¹

²⁴ *Aguierre v. State*, 31 Tex. Cr. 519, 21 S. W. 256.

²⁵ *Reg. v. Chapman*, 1 Den. C. C. 432.

²⁶ *State v. Miller*, 44 Mo. App. 159, 165; *Aguierre v. State*, 31 Tex. Cr. 519, 520, 21 S. W. 256; *Reg. v. Browning*, 3 Cox C. C. 437, 438. See *post*, § 468.

²⁷ *State v. Coleman*, 117 La. 973, 42 So. 471.

²⁸ *Commonwealth v. Scowden*, 92 Ky. 120, 122, 17 S. W. 205, 13 Ky. L. 404. See *ante*, §§ 192-194.

²⁹ 1 Russell on Cr. (9th Am. Ed.) 264; 4 Bl. Com. 140; *Doan's Case*, 5 Pa. Dist. 211.

³⁰ *State v. Woodward*, 182 Mo. 391, 81 S. W. 857, 103 Am. St. 646n.

^{31a} *State v. Miller*, 182 Mo. 370, 81 S. W. 867; *State v. Davis*, 112 Mo. App. 346, 87 S. W. 33.

³¹ *State v. Williams*, 136 Mo. 293, 38 S. W. 75; *State v. Sales*, 2 Nev. 268; *Rosc. Cr. Ev.* 721. Evidence that defendant has solicited money to use in corruptly influencing the jurors is also sufficient. Mere words may con-

The presence of a criminal intention to corruptly influence the juror must be shown. This is now doubtless the correct rule in this country, though the earlier common law, because of its intense abhorrence of any act savoring of maintenance, punished as embracery a mere exhortation on the part of a stranger that a juror should appear and act according to his conscience.³²

§ 451. Bribery defined—Evidence of circumstances to prove corrupt intention.—The crime may be defined as an attempt, whether successful or the reverse, to influence an officer in his official conduct, either in the executive,³³ legislative³⁴ or judicial department of the government, by the offer of a reward or pecuniary consideration.³⁵ The scope of this definition is as broad as the

stitute an attempt to bribe or influence a juror. Thus evidence that the accused said to a juror "you are the only friend I have on the jury, and I want you to look after my right. How will it go? I will make it all right. It will not be to your loss when we meet again" has been held to constitute an attempt to bribe a juror. *State v. Dankwardt*, 107 Iowa 704, 77 N. W. 495.

³² 1 Russ. on Cr. (9th Am. Ed.) 264. It is not essential to prove that the person to whom the bribe was offered had been drawn as a juror, if it appears that he was summoned as such. And the testimony of other jurors that the defendant tried to bribe them is admissible. *State v. Williams*, 136 Mo. 293, 38 S. W. 75; *State v. Woodward*, 182 Mo. 391, 81 S. W. 857, 103 Am. St. 646n. But in the case of *State v. Williford*, 111 Mo. App. 668, 86 S. W. 570, it was held that a conviction could not be sustained unless it was shown that the juror had been impaneled and sworn in a criminal case then pending.

³³ A police officer is an executive

officer. *Haynes v. Commonwealth*, 104 Va. 854, 52 S. E. 358.

³⁴ *State v. Sullivan*, 110 Mo. App. 75, 84 S. W. 105.

³⁵ The offer of a bribe, though unaccepted, is bribery at common law. *Walsh v. People*, 65 Ill. 58, 59, 61, 16 Am. 569; *Rex v. Plympton*, 2 Ld. Raym. 1377; *State v. Ellis*, 33 N. J. L. 102, 97 Am. Dec. 707n; *People v. Ah Fook*, 62 Cal. 493, 495; *Barefield v. State*, 14 Ala. 603, 607; *State v. Miles*, 89 Me. 142, 36 Atl. 70; *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084, 9 Det. Leg. N. 667. It is not necessary to prove the money was either actually tendered or produced. *Jackson v. State*, 43 Tex. Cr. 260, 64 S. W. 864. See *Glover v. State*, 109 Ind. 391, 401, 10 N. E. 282; *State v. Geyer*, 3 Ohio N. P. 242. As to the solicitation of a bribe, *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176; punishable at common law. *Walsh v. People*, 65 Ill. 58, 16 Am. 569; *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084; *State v. Desforges*, 48 La. Ann. 73, 18 So. 912. The tender and taking of a check is not bribery under U. S. R. S.

duty of the officer who accepts a bribe. If the object of the offering is to influence the officer in any matter which *may*³⁶ come before him, that is, which is within his official jurisdiction and duty, it is immaterial that he fails, or has no opportunity or power to carry out the illegal agreement.³⁷ On the trial of the person giving the bribe, corrupt intent on the part of the recipient need not be proved. If the briber parted with the bribe with an intent to bribe, the offense is proved, though the officer did not know what it was, or its purpose, and kept it solely for the purpose of public justice.³⁸ The corrupt intention of the officer receiving,³⁹ or of the person offering a bribe, must be proved, when necessary, beyond a reasonable doubt.⁴⁰ The briber's intention to influence can be inferred only from his language where no money or other valuable thing is produced. He may show his intoxication at the time to rebut the inference of corrupt intent by proving he did not know what he was saying. But the witness will not be permitted to state that the accused was so drunk as not to know what he was doing.⁴¹

§ 452. Judicial notice of official character and acts.—The courts will take notice that the person who was bribed was a public

5451, as the check is void. *Green v. MacDougall*, 199 U. S. 601, 50 L. ed. 328, 26 Sup. Ct. 748. Defenses in prosecution for bribery, see *Elliott Evidence*, § 2908; what need not be proved, § 2905; confessions and admissions, § 2907; financial standing of parties, § 2904; documentary evidence, § 2903. Evidence of indebtedness, see 116 Am. St. 40, note.

³⁶ *State v. Butler*, 178 Mo. 272, 77 S. W. 560.

³⁷ *Ruffin v. State*, 36 Tex. Cr. 565, 38 S. W. 169; *Newman v. People*, 23 Colo. 300, 47 Pac. 278; *People v. Markham*, 64 Cal. 157, 161, 30 Pac. 620, 49 Am. 700. Cf. *Messer v. State*, 37 Tex. Cr. 635, 40 S. W. 488, as to receipt of bribes by an agent of the accused. *State v. Ames*, 90 Minn. 183, 96 N. W. 330. As to power of officer. *People v. McGarry*, 136 Mich.

316, 99 N. W. 147, 11 Det. Leg. N. 10; *State v. Lehman*, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. 670, 66 L. R. A. 490; *People v. Van de Carr*, 87 App. Div. 386, 84 N. Y. S. 461; *People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871n, 11 Det. Leg. N. 446; *People v. Jackson*, 47 Misc. (N. Y.) 60, 95 N. Y. S. 268.

³⁸ *Commonwealth v. Murray*, 135 Mass. 530, 532.

³⁹ *State v. Pritchard*, 107 N. Car. 921, 926, 12 S. E. 50; *People v. Salisbury*, 134 Mich. 537, 96 N. W. 936; *State v. Ames*, 91 Minn. 365, 98 N. W. 190.

⁴⁰ *White v. State*, 103 Ala. 72, 16 So. 63, 67; *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533n.

⁴¹ *White v. State*, 103 Ala. 72, 16 So. 63; *ante*, § 166.

officer,⁴² of the date of his appointment or accession,⁴³ of his public acts,⁴⁴ and of the date when his term expires by death or limitation.⁴⁵ It suffices if the officer is an officer *de facto*. The regularity and validity of his tenure are irrelevant. The defendant will not be permitted to show that the officer was not appointed in writing, or sworn, or that he was otherwise unqualified under a statute.⁴⁶

§ 453. Necessity for reliance on evidence of accomplices in the bribery—Compulsory examination of accomplice.—As soon as the crime is consummated by the delivery of the money or valuable thing by the briber to the bribed, the latter is an accomplice of the former.⁴⁷ The voluntary testimony of either may be used against the other separately tried.⁴⁸ It is sometimes provided by statute that an accomplice in bribery may be compelled to testify at any trial or investigation, that his evidence thus given cannot be used against him, and that he shall not be liable to indictment or prosecution for the bribery.⁴⁹ Because of the secret nature

⁴² *Rath v. State*, 35 Tex. Cr. 142, 33 S. W. 229; *State v. McDonald*, 106 Ind. 233, 235, 6 N. E. 607.

⁴³ *Hizer v. State*, 12 Ind. 330, 334; *State v. Boyd*, 34 Neb. 435, 437.

⁴⁴ *State v. Gramelspacher*, 126 Ind. 398, 403, 26 N. E. 81, citing cases; *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. 80. As to member of congress, *United States v. Dietrich*, 126 Fed. 676.

⁴⁵ *Doe v. Riley*, 28 Ala. 164, 65 Am. Dec. 334. For civil cases holding that the courts will judicially notice official names, etc., see *Underhill on Ev.*, § 244.

⁴⁶ *Florez v. State*, 11 Tex. App. 102, 104; *State v. Gardner*, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660; *Commonwealth v. Saulsbury*, 152 Pa. St. 554, 558, 25 Atl. 610 (extortion). See *ante*, §§ 446, 447; *Commonwealth v. Wotton*, 201 Mass. 81, 87 N. E. 202; *State v. Haas*, 163 Fed. 908.

⁴⁷ *Ruffin v. State*, 36 Tex. Cr. 565, 38 S. W. 169. One who gives money to a person who solicits a bribe, intending to denounce him, and to procure his arrest, is not an accomplice. It is proper, however, to subject the decoy to a rigid cross-examination as to his motive. *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *Newman v. People*, 23 Colo. 300, 47 Pac. 278. The admission of evidence from witnesses employed to entrap the accused is not contrary to public policy. *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, rehearing denied, 84 Pac. 370. Testimony of accomplices, decoys and conspirators, see *Elliott Evidence*, § 2906. Testimony of accomplices in prosecution for bribery, see 98 Am. St. 176, note.

⁴⁸ See *ante*, § 71, *et seq.*

⁴⁹ Penn. Const., § 32, Art. III, N. Y. Penal Code, § 79.

of the crime, and the necessity that there should always be at least two participants, it is both necessary and customary to rely largely on accomplice evidence. When an accomplice is used as a witness, the utmost good faith should be observed in dealing with him. The spirit as well as the letter of the statute should be regarded.⁵⁰

§ 454. Proving other acts of bribery.—The giving or the receipt of other bribes, remote in time, differing in purpose and distinct from the act charged, is inadmissible.⁵¹ Where defendant was indicted for receiving a bribe to permit gambling, and it was agreed that other bribes should be paid in the future, separate acts of bribery are relevant as part of a system and to show the intent, purpose and understanding with which the money was received.⁵² The declarations of the accused before the commission of the crime to the person from whom he is charged with soliciting a bribe are admissible on the question of his intent. The objection that they tend to show a separate crime will not cause their rejection.⁵³ The rule that the acts and declarations of one of several conspirators during the conspiracy and intended to carry it into effect are admissible against the others, is applicable to a prosecution for bribery where it appears from the evidence that there was a conspiracy to bribe and the accused is connected with it.⁵⁴ Everything the accused said to his confederates and did to carry out the plan to bribe is admissible.⁵⁵

A witness for the prosecution may testify what he did after a conversation with one involved in a conspiracy to bribe on the separate trial of a co-conspirator. This testimony may be admissible on the question whether the witness was or was not an ac-

⁵⁰ *People v. Spencer*, 66 Hun (N. Y.) 149, 151, 21 N. Y. S. 33; *People v. Singer*, 18 Abb. N. Cas. (N. Y.) 96; *People v. Clark*, 14 N. Y. S. 642; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 12 Sup. St. 195; *People v. Clements*, 5 N. Y. Cr. 282, 298, 300; *Commonwealth v. Bell*, 145 Pa. St. 374, 391, 22 Atl. 641, 644.

⁵¹ *People v. Sharp*, 107 N. Y. 427, 457-463, 14 N. E. 319, 1 Am. St. 851. See *ante*, § 87.

⁵² *Guthrie v. State*, 16 Neb. 667, 672, 21 N. W. 455; *State v. Ames*, 90 Minn. 183, 96 N. W. 330; *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123. See *ante*, § 88, *et seq.*

⁵³ *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

⁵⁴ *People v. McGarry*, 136 Mich. 316, 99 N. W. 147, 11 Det. Leg. N. 10.

⁵⁵ *People v. McGarry*, 136 Mich. 316, 99 N. W. 147, 11 Det. Leg. N. 10.

complice, in a case where the prosecution alleges that the witness was employed to entrap the accused.⁵⁶ So conversations between third persons may be admitted where it appears that the money was obtained from them for the purposes of bribery, in order that the jury may see the connection between the source from which the money came and the accused.⁵⁷

§ 455. Bribery of voters—Judicial notice of elections.—Bribery, and attempts to influence voters at elections, were in England indictable at common law,⁵⁸ and this rule is generally recognized in the United States.⁵⁹ A conviction of bribing a voter has been sustained on proof of a promise to pay for loss of time,⁶⁰ to pay the traveling expenses of the voters,⁶¹ or by showing that a candidate supplied voters with refreshments,⁶² or that he publicly declared that if he were elected he was willing to perform the duties of the office for a smaller compensation than was allowed by law,⁶³ or promised to appoint an opposing candidate as his deputy if the latter would withdraw from the contest.⁶⁴ But a conviction for receiving a bribe to vote for a particular candidate is not sustained unless the state proves that the vote was cast. This fact must not be left to the jury to infer from the former political convictions of the accused. Under the secret ballot it is extremely difficult for this to be done, unless the voter shall voluntarily lift the veil of secrecy. No one can examine his ballot, or testify to its contents, unless his knowledge was acquired from the voter himself.⁶⁵ The courts will take judicial notice of the

⁵⁶ *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032.

⁵⁷ *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, rehearing denied, 84 Pac. 370.

⁵⁸ *Russell on Crimes* (9th Am. Ed.) 224.

⁵⁹ *State v. Jackson*, 73 Me. 91, 94, 40 Am. 342 (attempt); 2 Bish. Cr. L. (7th Ed.), § 86; *Commonwealth v. Hoxey*, 16 Mass. 385; *Commonwealth v. McHale*, 97 Fa. St. 397, 39 Am. 808, 24 Albany L. J. 412. See *Doyle v. Kirby*, 184 Mass. 409, 68 N. E. 843.

⁶⁰ *Simpson v. Yeend*, L. R. 4 Q. B.

626, 38 L. J. Q. B. 313, 21 L. T. (N. S.) 56.

⁶¹ *Bayntun v. Cattle*, 1 Mood. & R. 265.

⁶² *Duke v. Asbee*, 11 Ired. (N. Car.) 112, 114, 115.

⁶³ *State v. Purdy*, 36 Wis. 213, 216, 223, 17 Am. 485; *State v. Dustin*, 5 Ore. 375, 378, 20 Am. 746.

⁶⁴ *Lewis Cr. L.* 126.

⁶⁵ *Johnson v. Commonwealth*, 90 Ky. 53, 58, 13 S. W. 520, 12 Ky. L. 20. Cf. *State v. Minnick*, 15 Iowa 123, 127.

days of holding general elections and of the officers voted for.⁶⁶ that an election has in fact been held,⁶⁷ the whole number of votes cast and the result,⁶⁸ together with the fact that the result is contested.⁶⁹

§ 456. Extortion—Intent and guilty knowledge—Evidence to prove ignorance or mistake of law and fact.—Extortion is an unlawful taking by an officer, under color of his office, of money or other valuable thing not due him, or more than is due him, or before it is due.⁷⁰ Whether a corrupt intention and knowledge are always essential is not positively decided. The majority of the cases require them to be proved, leaving their existence to be determined by the jury,⁷¹ and permit the accused officer to show that he was ignorant of the law, and thought he was entitled to the fee, or that he erred in computing the fees due him. But evidence of a usage among officials to take the illegal fees, or of the construction which is placed upon the statute by officers generally to disprove a criminal intent, has been rejected.⁷² But some authorities hold that corrupt knowledge or intent to extort is not essential, and where this is the rule, evidence to prove official ignorance or mistake is inadmissible.⁷³ This lack of harmony arises from a failure to distinguish between the quality and character of an act done under a mistake or in ignorance of fact, and an act arising from a mistake or ignorance of law. The

⁶⁶ State v. Minnick, 15 Iowa 123.

⁶⁷ Urmston v. State, 73 Ind. 175, 177.

⁶⁸ Thomas v. Commonwealth, 90 Va. 92, 17 S. E. 788; State v. Swift, 69 Ind. 505, 526, 527.

⁶⁹ Lewis v. Bruton, 74 Ala. 317, 49 Am. 816.

⁷⁰ 4 Bl. Com. 141; Commonwealth v. Wilson, 30 Pa. Super. Ct. 26; State v. Cooper, 120 Tenn. 549, 113 S. W. 1048; Commonwealth v. Saulsbury, 152 Pa. St. 554, 559, 25 Atl. 610; United States v. Deaver, 14 Fed. 595; People v. McLaughlin, 2 App. Div. (N. Y.) 419, 37 N. Y. S. 1005; Kirby v. State, 57 N. J. L. 320, 31 Atl. 213. See, under the New York statute,

People v. Summers, 40 Misc. (N. Y.) 384, 82 N. Y. S. 297, 17 N. Y. Cr. 321. Maine statute, State v. Hanna, 99 Me. 224, 58 Atl. 1061.

⁷¹ Commonwealth v. Shed, 1 Mass. 227; Cutter v. State, 36 N. J. L. 125, 127; Cleaveland v. State, 34 Ala. 254, 259; People v. Whaley, 6 Cow. (N. Y.) 661; State v. Pritchard, 107 N. Car. 921, 927, 12 S. E. 50.

⁷² Commonwealth v. Dennie (Mass.). Thach. Cr. Cas. 165.

⁷³ United States v. Harned, 43 Fed. 376, 377; Commonwealth v. Bagley, 7 Pick. (Mass.) 279, 281; State v. Jones, 71 Miss. 872, 15 So. 237; State v. Merritt, 5 Sneed (Tenn.) 67, 69.

rule that a mistake, or misapprehension of fact, may be proved to negative a criminal intent is broad enough to include and exculpate officials accused of extortion. On the other hand the maxim, "ignorance of law excuses no one," will not permit an officer to prove that he did not know the law, and hence that he thought he was taking legal and statutory fees.⁷⁴

§ 457. Value of the thing extorted—Burden of proving exception to statute.—It is absolutely essential to a conviction to prove that the thing extorted had some value,⁷⁵ and that the money or thing taken was unwillingly paid or given.⁷⁶

An allegation of taking higher fees than the officer is entitled to may be sustained by evidence which leaves the exact amount in doubt.⁷⁷ The burden of proof is on a defendant who claims he has a legal right to the fee under an exception in a statute.⁷⁸ If an officer is indicted for extortion for receiving a fee for the pretended service of a writ the truth of his return, showing service, is directly in issue. While the return is *prima facie* evidence of the service, under the presumption that the officer did his duty, it is never conclusive.⁷⁹

§ 458. Compounding offenses—The intent to screen the offender—Mode of proving that a crime was committed.—Compounding a

⁷⁴ *People v. Monk*, 8 Utah 35, 28 Pac. 1115, 1116; *Birney v. State*, 8 Ohio 230. A taking under color of office is of the essence of the offense. It must be proved that the money was taken in right of office, and that the person paying unwillingly yielded to official authority. Money paid for services not official, or to an officer in his private capacity, is not extorted. *Collier v. State*, 55 Ala. 125, 128; *United States v. Deaver*, 14 Fed. 595, 599; *State v. Pritchard*, 107 N. Car. 921, 927, 12 S. E. 50. Evidence of other extortionate acts distinct from that alleged is not, it seems, admissible to raise a presumption of criminal intent. *Commonwealth v. Saulsbury*, 152 Fa. St. 554, 558, 25 Atl. 610. See *ante*, § 87, *et seq.*

⁷⁵ The giving of a promissory note, necessarily void, because of illegality of consideration, does not constitute extortion. *Commonwealth v. Cony*, 2 Mass. 523, 524.

⁷⁶ *United States v. Harned*, 43 Fed. 376, 377.

⁷⁷ *Spence v. Thompson*, 11 Ala. 746.

⁷⁸ *United States v. Rose*, 12 Fed. 576. See *ante*, § 24.

⁷⁹ *Williams v. State*, 2 Sneed. (Tenn.) 160, 163. For the effect and conclusiveness of official returns as evidence, the power of the courts over them and the admissibility of parol evidence to show their invalidity and to contradict their recitals, see *Underhill on Ev.*, § 150a, pages 227-230.

crime consists in taking goods or other amends on an agreement not to prosecute. Compounding a felony is, at common law, equally criminal with the felony, and is also a misdemeanor against public justice.⁸⁰ The material facts are knowledge of the actual commission of a crime, the taking of the money or property of another and the intent to conceal or to compound the felony.⁸¹

The gist or essence of this crime is the intention to screen an offender and to smother a criminal prosecution. Hence evidence of the giving of a note on condition that the promisee would refrain from prosecuting the promisor will sustain a conviction. The note is a valuable consideration. It is voidable only and may never be disputed.⁸² Evidence that no benefit came to the defendant, he having acted as an agent for another, is also irrelevant.⁸³

The felony, which is alleged to have been compounded, must be proved to have been committed by someone beyond a reasonable doubt,⁸⁴ and this may be done *prima facie*, by producing a record of a conviction.⁸⁵ It seems that it is not necessary to prove that any particular person suspected or accused was convicted,⁸⁶ or even tried;⁸⁷ if the jury are satisfied, beyond a reasonable doubt and on all the evidence, that the accused knew the criminal and took the money corruptly, not intending to bring him to justice but to shield him.⁸⁸

⁸⁰ 4 Bl. Com. 136.

⁸¹ *People v. Bryon*, 103 Cal. 675, 677, 37 Pac. 754. As to misprision of felony which is either a criminal neglect to prevent a felony from being committed or to bring the offender to justice after its commission, *State v. Wilson*, 80 Vt. 249, 67 Atl. 533.

⁸² *Commonwealth v. Pease*, 16 Mass. 91, 94.

⁸³ *State v. Ruthven*, 58 Iowa 121, 124, 12 N. W. 235.

⁸⁴ *State v. Hanson*, 69 N. J. L. 42, 54 Atl. 841.

⁸⁵ *State v. Duhammel*, 2 Harr. (Del.) 532. Cf. *ante*, § 195.

⁸⁶ *Fibly v. State*, 42 Ohio St. 205, 206; *State v. Hanson*, 69 N. J. L. 42, 54 Atl. 841.

⁸⁷ *Watt v. State*, 97 Ala. 72, 11 So. 901.

⁸⁸ *Reg. v. Pascoe*, 1 Den. C. C. 456, 458. The person accused of compounding cannot prove the acquittal of the criminal, as it may have been procured by his own corrupt act. *People v. Buckland*, 13 Wend. (N. Y.) 592, 596. As to proof of judicial records, see *Underhill on Ev.*, Chap. XIII.

§ 459. Contempt defined—Inherent judicial power to punish.—

Contempt of court is an offense the essential ingredients of which are disobedience to the court or despising or opposing its authority or dignity. It may consist of disorderly or insolent behavior or language indulged in in the actual presence of the court, in willful disobedience to its mandate, in resisting or evading its process, or in assaulting its officer. So, too, using language which is scornful or reproachful, or which tends to diminish the respect for or authority of the court, or which is likely to obstruct the service or execution of its process or orders, is contempt. And generally to abuse judicial process by willfully executing it in an illegal manner, or making use of it to do wrong under the color or pretense of the authority of the court, is a contempt.⁸⁹

The power to punish for contempt is inherent in every court of justice. And to deny this power, or to abridge it in any material respect, is to deprive the court of the power to protect itself from insult, to render it the mark of insult and obloquy, and to take from it the ability to enforce its mandates and decrees, or to perform the functions and powers with which it is invested by the law.⁹⁰

§ 460. Direct and constructive contempt distinguished—Court may take notice of without evidence.—A contempt is direct where it is the doing of any improper act in the presence of the court while in session, tending directly to disturb the proceedings, as, for example, noisy or tumultuous conduct on the part of a person

⁸⁹ 4 Bl. Com. 283; Cohen, *Ex parte*, 5 Cal. 494. Criminal contempts embrace all acts committed against the majesty of the law, and the primary purpose of their punishments is the vindication of public authority. Clark, *Ex parte*, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389n. A proceeding for contempt is not a criminal prosecution though of that nature; courts without criminal jurisdiction having jurisdiction to punish for contempt, and contempt being an offense against the court as an organ of public justice, is not strictly a violation of the criminal law. State v.

Howell, 80 Conn. 668, 69 Atl. 1057, 125 Am. St. 141.

⁹⁰ State v. Morrill, 16 Ark. 384, 389; State v. Howell, 80 Conn. 668, 69 Atl. 1057; Cossart v. State, 14 Ark. 538; United States v. Hudson, 7 Cranch (U. S.) 32, 34, 3 L. ed. 259; Adams, *Ex parte*, 25 Miss. 883, 885, 59 Am. Dec. 234; Cartwright's Case, 114 Mass. 230, 238; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. ed. 242; Tenney's Case, 23 N. H. 162; State v. Copp, 15 N. H. 212; State v. Matthews, 37 N. H. 450, 453; Middlebrook v. State, 43 Conn. 257, 268, 21 Am. 650.

present in the courtroom or tending to defeat, to disturb, or to impair the administration of justice, as, for example, open defiance of the powers of the court or disrespectful behavior or language to the judge. It may also consist in the refusal to do a proper act required to be done in open court; where the refusal directly tends to disturb the proceedings or to defeat the interests of justice.⁹¹ As soon as the contempt is committed, the court may act at once, for though the guilty party immediately withdraws and goes beyond the reach of the court, the jurisdiction remains. It is not necessary that he should be brought into court. He may be sentenced for contempt, though absent.⁹² The power to commit for a direct contempt must of necessity be arbitrarily and summarily exercised, that disorder may be quelled without delay and the dignity of the court maintained. The facts of the contempt, together with the judgment, are usually entered upon the record, which is conclusive as evidence of all facts which it contains.⁹³ Because of this difference in the nature of the contemptuous act, two methods of procedure and of proof have been adopted. The court will of its own motion notice and punish a direct contempt. The judge acts upon knowledge which he has acquired by his own organs of hearing and sight. The judicial power may act summarily to punish the contempt which the judicial eye has seen and the judicial mind has apprehended.⁹⁴ There need be no charge, no plea, no issue, no trial, no examination, no proof and no record.⁹⁵

⁹¹ *Stuart v. People*, 4 Ill. 395; *Ferri-man v. People*, 128 Ill. App. 230; *Clark, Ex parte*, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389n.

⁹² *Middlebrook v. State*, 43 Conn. 257, 269, 21 Am. 650.

⁹³ *State v. Woodfin*, 5 Ired. (N. Car.) 199, 200, 42 Am. Dec. 161; *Mahoney v. State*, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. 276. It has been held that a prosecution for a contempt is a criminal proceeding and the accused is entitled to the benefit of every reasonable doubt. *Connell v. State*, 80 Neb. 296, 114 N. W. 294; *United States v. Carroll*, 147 Fed. 947.

⁹⁴ *Mahoney v. State*, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. 276.

⁹⁵ *People v. Turner*, 1 Cal. 152, 155; *State v. Matthews*, 37 N. H. 450, 453; *Clarke Ex parte*, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389n; *Connell v. State*, 80 Neb. 296, 114 N. W. 294. The court says in *Wright, Ex parte*, 65 Ind. 504, 508: "A contempt of court is either direct or constructive; or, as the latter was anciently called, consequential. A direct contempt is an open insult, in the face of the court, to the person of the judges while presiding, or a resistance to its powers in their presence. A constructive contempt is an

§ 461. Procedure in receiving evidence of constructive contempt.

—The contempt is constructive when it is committed out of the actual presence and hearing of the court, so that the court has no personal knowledge of it.⁹⁶

The contempt must be proved by the affidavits⁹⁷ of eye-witnesses,⁹⁸ upon which an order to show cause may issue.⁹⁹ It is only when the contempt is flagrant and clearly shown that an attachment will issue in the first instance.¹⁰⁰ The proceedings on the return of the writ are regarded as criminal,¹ and the accused has the right to be heard and to defend himself.² He may file counter affidavits, or demand that the prosecutor shall file interrogatories for him to answer. These are usually filed with the clerk,³ and, with the answers of the accused thereto, may be taken down by the clerk, or by a commissioner appointed for the purpose, and referred to the court.⁴ Where the statute provides for

act done, not in the presence of the court, but at a distance, which resists their authority, as disobedience to process, or an order of the court, such as tends in its operation to obstruct, interrupt, prevent or embarrass the administration of justice." *Hamma v. People*, 42 Colo. 401, 94 Pac. 326, 15 L. R. A. (N. S.) 621n; *Ferriman v. People*, 128 Ill. App. 230.

⁹⁶ *State v. Matthews*, 37 N. H. 450, 454; *Clarke, Ex parte*, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389n; *People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912; *Snyder v. State*, 151 Ind. 553, 52 N. E. 152. In a contempt proceeding for the violation of an injunction guilt need not be proved beyond a reasonable doubt. *Flannery v. People*, 225 Ill. 62, 80 N. E. 60.

⁹⁷ *Snyder v. State*, 151 Ind. 553, 52 N. E. 152.

⁹⁸ *State v. Newton*, 16 N. Dak. 151, 112 N. W. 52; *Saunderson v. State*, 151 Ind. 550, 52 N. E. 151.

⁹⁹ *Jordan v. Circuit Court*, 69 Iowa 177, 28 N. W. 548; *French v. Com-*

monwealth (Ky.), 97 S. W. 427, 30 Ky. L. 98, holding that the order in criminal contempt need not be as precise as an indictment.

¹⁰⁰ *State v. Mathews*, 37 N. H. 450, 454; *Judson, In re*, 3 Blatch. (U. S.) 148, 14 Fed. Cas. 7553.

¹ *Langdon, Ex parte*, 25 Vt. 680; *United States v. Wayne*, Wall. C. C. (U. S.) 134, 28 Fed. Cas. 16654; *United States v. Richards*, 1 Alaska 613; *State v. Matthews*, 37 N. H. 450, 455. *Contra*, *Flannery v. People*, 225 Ill. 62, 80 N. E. 60.

² *People v. Wilson*, 64 Ill. 195, 16 Am. 528; *Jordan v. Circuit*, 69 Iowa 177, 28 N. W. 548.

³ If not filed as required by a statute the commitment is void. *Walker v. Kennedy*, 133 Iowa 284, 110 N. W. 581.

⁴ *Commonwealth v. Snowden*, 1 Brew. (Pa.) 218, 219; *State v. Mathews*, 37 N. H. 450, 453; *People v. Brown*, 6 Cow. (N. Y.) 41; *Hollingsworth v. Duane*, Wall. C. C. (U. S.) 77, 12 Fed. Cas. 6616.

a rule to show cause based on duly verified information by an officer of the court or some responsible person the prosecution cannot be by indictment.^{4a}

One charged with criminal or quasi contempt, committed out of the presence of the court, enjoyed at common law the right to purge himself if possible, by his oath, and all evidence which would controvert his sworn answer on any matter of fact was rigidly excluded.⁵ The rule in equity was otherwise,⁶ and doubtless the modern practice would be to receive proofs on both sides, including the sworn answers of the respondent, admitting them as evidence in his favor, to be considered and weighed as part of the evidence.⁷ The accused is not confined to his answers, but may examine witnesses in his own favor.⁸ If from his answers it appears that he was not intentionally contumacious, but was acting in good faith, he should be discharged.⁹ The contempt must be proved to the satisfaction of the court either by the respondent's answers or by other witnesses in addition to the affidavits.¹⁰ It must appear to the satisfaction of the court that the ac-

^{4a} *Saunderson v. State*, 151 Ind. 550, 52 N. E. 151.

⁵ *Ex parte Pitman, In re*, 1 Curtis (U. S.) 186, 190, 19 Fed. Cas. 11184; *United States v. Dodge*, 2 Gall (U. S.) 313, 25 Fed. Cas. 14975; *State v. Tipton*, 1 Blackf. (Ind.) 166; *Murdock's Case*, 2 Bland. (Md.) 461; *Burke v. State*, 47 Ind. 528; *State v. Earl*, 41 Ind. 464; *People v. Compton*, 1 Duer (N. Y. Super.) 512; *Rex v. Wheeler*, 1 W. Bl. 311, 3 Burr 1256; *People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912; *Christensen v. People*, 114 Ill. App. 40; *Longenbook v. People*, 130 Ill. App. 320; *Coleman v. State* (Tenn., 1908), 113 S. W. 1045.

⁶ 4 Bl. Com. 288; *Rex v. Vaughan*, 2 Doug. 516; *Cartwright's Case*, 114 Mass. 230, 239; *Employers' Teaming Co. v. Teamsters' Joint Council*, 141 Fed. 679.

⁷ *Coleman v. State* (Tenn., 1908), 113 S. W. 1045.

⁸ *Magennis v. Parkhurst*, 4 N. J. Eq. 433; *Whittem v. State*, 36 Ind. 196, 213; *Commonwealth v. Dandridge*, 2 Va. Cas. 408; *State v. Matthews*, 37 N. H. 450, 455. The accused is entitled to reasonable notice of the proceedings sufficient to prepare his defense. *Clark, Ex parte*, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389n. As to rule in United States Supreme Court, see *United States v. Shipp*, 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. 165; *United States v. Carroll*, 147 Fed. 947.

⁹ *People v. Few*, 2 Johns. (N. Y.) 290; *State v. Trumbull*, 4 N. J. L. 139; *Beebees, Ex parte*, 2 Wall. Jr. C. (N. S.) 127, 3 Fed. Cas. 1220; *Meeks v. State*, 80 Ark. 579, 98 S. W. 378; *McHenry v. State*, 91 Miss. 562, 44 So. 831, 16 L. R. A. (N. S.) 1062n.

¹⁰ *Commonwealth v. Davis*, 1 W. N. C. (Pa.) 18; *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. Dec. 551n; *State v. Mat-*

cused willfully and maliciously intended to lower or assail the dignity of the court or to interfere in the administration of justice.¹¹ Where the respondent fails to appear, or, if he appears and admits his guilt, the court may at once render its decision and inflict summary punishment. He is not entitled to a jury trial.¹²

The determination by the court that the accused is in contempt may be regarded as a conviction of a crime.¹³ Whether an appeal may be taken depends upon the statutes. Usually the proceedings may be reviewed on habeas corpus.¹⁴ In the United States supreme court a writ of error may be brought to review a judgment for contempt. Where the contempt consists of a refusal of a witness to testify, the court will not consider, on the writ of error whether the testimony to be given was or was not material.¹⁵ The presumption of innocence should be considered by the court even where a proceeding to punish for contempt is not strictly a criminal proceeding; it is enough, usually, that the contempt is shown to the satisfaction of the court by a preponderance of the evidence.¹⁶ If the proceedings for punishment for contempt be regarded as criminal the rule that there can be no conviction on the uncorroborated testimony of an accomplice may apply.¹⁷

To show the motive of the accused in publishing certain articles in a newspaper which tended to bring the court in contempt it may be shown that on other occasions he had published similar articles relating to the same case and these articles are admissible in evidence to show his intention.¹⁸

Contemptuous language may be proved by anyone who heard it and the meaning is for the court to determine. The accused will

thews, 37 N. H. 450, 455; State v. Small, 49 Ore. 595, 90 Pac. 1110.

¹¹ Powers v. People, 114 Ill. App. 323.

¹² State v. Matthews, 37 N. H. 450, 456; Neel v. State, 9 Ark. 259, 270, 50 Am. Dec. 209; State v. Becht, 23 Minn. 411, 412.

¹³ Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. 276.

¹⁴ Clark, *Ex parte*, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389n.

¹⁵ Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. 358.

¹⁶ McCormick, *In re*, 132 App. Div. (N. Y.) 921, 117 N. Y. S. 70.

¹⁷ French v. Commonwealth (Ky.), 97 S. W. 427, 30 Ky. L. 98.

¹⁸ State v. Howell, 80 Conn. 668, 69 Atl. 1057, 125 Am. St. 141.

not be permitted to prove the truth of statements made by him as a justification.¹⁹

§ 462. Escape—Distinct from prison breach.—A person who, being a prisoner in lawful confinement or custody, regains his liberty with or without force, prior to his legal discharge, or who, having a prisoner lawfully in his custody, suffers him to regain his liberty before his legal discharge, is guilty of an escape.²⁰ The flight of a prisoner while being worked on the highway from the custody of a jailer is an escape to the same extent as though from jail.²¹

§ 463. Intention of permitting escape—Negligence of officer.—A sheriff or other officer is guilty of a misdemeanor if through his negligence a prisoner escapes from his custody without his consent and is not recaptured before he is out of sight. The defendant may offer evidence to show the escape was the result of the act of God, or of the public enemy; but not to show that the place of custody was defectively constructed.²² Whether the defendant was negligent in permitting an escape is for the jury. Omitting to handcuff a prisoner and letting him go out of sight does not constitute negligence in law, but are facts from which it may be inferred.²³ Actual negligence need not be proved. It may be inferred from the fact of the escape alone. The defendant then has the burden of proof to show due diligence, the use of all law-

¹⁹ *Stewart v. Reid*, 118 La. 827, 43 So. 455.

²⁰ 2 Hawk's P. C., chaps. 18, 19; 2 Bish. Cr. L., §§ 1064-1066; 2 Whart. Cr. L., § 1667. An escape is distinguished from prison breach and rescue in that the latter offenses are necessarily accomplished by force exerted by the prisoner himself in the case of prison breach and by others in the case of rescue. An actual breaking is not necessary to constitute prison breach. A constructive breaking is enough. *Randall v. State*, 53 N. J. L. 488, 490, 22 Atl. 46. An escape from the lawful custody of

an officer *de facto*, capable of making an arrest, is an offense and it cannot be proved that his appointment was conditional when he has actually served as an officer. *Robinson v. State*, 82 Ga. 535, 547, 9 S. E. 528.

²¹ *Saylor v. Commonwealth*, 122 Ky. 776, 93 S. W. 48, 29 Ky. L. 337.

²² *Shattuck v. State*, 51 Miss. 575, 580, 584; *State v. Halford*, 6 Rich. (S. Car.) 58.

²³ *State v. Hunter*, 94 N. Car. 829, 835; *Shattuck v. State*, 51 Miss. 575, 580.

ful means to prevent the escape, and that it was caused by the act of God, or by some irresistible force.²⁴

A material and important distinction is made between the voluntary act of an officer, who knowingly and voluntarily gives a prisoner his liberty, and one who suffers his prisoner to escape because of his negligence in guarding him. In the former case, the intention to do a wrong is an essential and fundamental fact, but may be inferred from the facts in the case.²⁵ At common law an official who permitted a voluntary escape involves himself in the guilt of the crime charged against his prisoner.²⁶ But a negligent escape is at most a misdemeanor only.²⁷ The accused custodian may always show, to rebut the intention of allowing a voluntary escape, that he acted *bona fide* in discharging a prisoner or that he did not know that a discharge regular on its face was invalid and illegal.²⁸

§ 464. Aiding prisoner to escape.—At common law, and frequently by statute, a person who conveys disguises, instruments, weapons or any information,²⁹ etc., into a jail with the intent to facilitate the escape of a prisoner, or in any other way assists in an escape, is guilty of felony.³⁰ A general intent to aid some prisoner to escape must be proved and may be inferred from proof of an intentional prison-breaking by the accused. But an

²⁴ See cases in last note. So strongly does the law incline to presume negligence in the officer, where an escape occurs, that, though such prisoner should break jail, yet it seems that it will be deemed a negligent escape in the jailer, because it will be attributed to a want of due vigilance on the part of the jailer or his officers. 2 Bish. Cr. L., § 1096.

²⁵ In order to constitute the crime of voluntary escape, the act must be done by the officer *malo animo*, and if he discharge the prisoner through an erroneous interpretation of the law he is not guilty of that crime, but of the minor offense of negligent escape. Meehan v. State, 46 N. J.

L. 355, 358. See also, Martin v. State, 32 Ark. 124, 126.

²⁶ 2 Hawk's P. C. 192.

²⁷ State v. Sparks, 78 Ind. 166, 167. The intent is immaterial under the statute. Lynch v. Commonwealth, 115 Ky. 309, 73 S. W. 745, 24 Ky. L. 2180.

²⁸ Meehan v. State, 46 N. J. L. 355, 358.

²⁹ People v. Buckley, 91 App. Div. (N. Y.) 586, 87 N. Y. S. 191, 18 N. Y. Cr. 215.

³⁰ Wilson v. State, 61 Ala. 151, 154; Fluty v. Commonwealth (Ky.), 105 S. W. 138, 32 Ky. L. 89; Maxey v. State, 76 Ark. 276, 88 S. W. 1009.

especial intent to liberate or to aid in the escape of any particular prisoner need not be proved.³¹ Expert testimony will be received to show how articles, which are alleged to have been furnished to aid an escape, may be used for that purpose.³²

By statute it is also a crime for a person confined in jail to attempt to escape. The accused under such a statute cannot show as a defense that he was sent out to work without a guard to a certain place and that because he was without a guard he escaped.³³

§ 465. Illegality of arrest, when relevant.—It is generally presumed, in the absence of evidence to the contrary, that courts of general or superior jurisdiction have acted regularly and legally within the boundaries of their powers and jurisdiction,³⁴ and that public officials have obeyed the law and done their duty. But the accused, whether a prisoner under indictment who has escaped or attempted to do so, a person confined under civil process,³⁵ or an official charged with a voluntary escape,³⁶ may show that the detention was without any warrant,³⁷ or under one issued by a court having no jurisdiction.³⁸ If the legality of the custody is attacked the burden of proof to convince the jury of the legality of the custody is upon the state.³⁹ The records of the committing court and the warrant itself are relevant to show the lawfulness of the custody.⁴⁰ If the lawfulness of the custody is proved, evi-

³¹ *Hurst v. State*, 79 Ala. 55, 58; *State v. Hollon*, 22 Kan. 580, 581; *Holland v. State*, 60 Miss. 939; *State v. Clark* (Nev., 1909), 104 Pac. Vaughan v. State, 9 Tex. App. 563; 593.

³² *Simmons v. State*, 88 Ga. 169, 14 S. E. 122.

³³ *Watson v. State*, 32 Tex. Cr. 80, 22 S. W. 46.

³⁴ *State v. Wright*, 81 Vt. 281, 69 Atl. 761.

³⁵ *Underhill on Ev.*, § 232.

³⁶ *Housh v. People*, 75 Ill. 487, 491; *State v. Leach*, 7 Conn. 452, 456, 18 Am. Dec. 118.

³⁷ *Commonwealth v. Barker*, 133 Mass. 399; *Housh v. People*, 75 Ill. 487, 491.

³⁸ *People v. Ah Teung*, 92 Cal. 421, 425, 28 Pac. 577, 15 L. R. A. 1901;

³⁹ *Housh v. People*, 75 Ill. 487, 491; *Martin v. State*, 32 Ark. 124, 129.

⁴⁰ *State v. Hollon*, 22 Kan. 580, 581; *State v. Beebe*, 13 Kan. 589, 593, 595, 19 Am. 93; *State v. Jones*, 78 N. Car. 420, 422; *State v. Baldwin*, 80 N. Car. 390, 393; 2 Bish. C. L., § 1065.

⁴¹ *State v. Whalen*, 98 Mo. 222, 11 S. W. 576. The fact that a person was in lawful custody who was accused of resisting his jailer must be proved by the *mittimus*. *People v. Muldoon*, 2 Park. Cr. (N. Y.) 13. The distinction is very clear between an imprisonment without process, and

dence that the prisoner was subsequently acquitted is irrelevant.⁴¹ Nor can the accused be permitted to introduce evidence of the filthy and unwholesome condition of the jail to show his escape was absolutely necessary to preserve his health unless he shows he had exhausted all lawful means of obtaining relief by complaining to the authorities.⁴² Nor can one who is on trial for an escape prove in his defense that he was a trusty, or that after his escape he paid his fine to the sheriff, or that he escaped to avoid unmerited punishment at the hands of his jailer.⁴³

§ 466. Perjury—The intent to swear to what is false.—This crime may be defined as the taking of a willful false oath by one who, being lawfully required to depose the truth in any judicial proceeding,⁴⁴ swears absolutely in a matter material to the point in question.⁴⁵ Proof of a willful intention to swear falsely is necessary.⁴⁶ It is for the jury to determine whether the accused was

hence wholly illegal, and an imprisonment under process which is substantially legal, but which may be technically irregular. The fact that the imprisonment was without process may always be shown. But the courts rather discourage the practice of attacking process collaterally by rejecting evidence of mere technical irregularities therein. *State v. Murray*, 15 Me. 100, 103; *State v. Armistead*, 106 N. Car. 639, 644, 10 S. E. 872; *Commonwealth v. Morihan*, 4 Allen (Mass.) 585; *People v. Ah Teung*, 92 Cal. 421, 426, 28 Pac. 577, 15 L. R. A. 190n.

⁴¹ *State v. Lewis*, 19 Kan. 260, 265, 27 Am. 113n.

⁴² *State v. Davis*, 14 Nev. 439, 445, 33 Am. 563.

⁴³ *Johnson v. State*, 122 Ga. 172, 50 S. E. 65; *State v. King*, 71 Kan. 287, 80 Pac. 606.

⁴⁴ A prosecution in a municipal court for the violation of an ordinance is within the statute. *Gardner v. State*, 80 Ark. 264, 97 S. W. 48.

⁴⁵ *Commonwealth v. Smith*, 11 Allen (Mass.) 243.

⁴⁶ 1 Hawk's P. C., p. 429, § 2; *McLaren v. State*, 4 Ga. App. 643, 62 S. E. 138; *People v. Martin*, 175 N. Y. 315, 67 N. E. 589, 97 Am. St. 628; affirming 17 App. Div. (N. Y.) 396, 79 N. Y. S. 340; *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116; *State v. Luper* (Ore., 1908), 95 Pac. 811; *Goodwin v. State*, 118 Ga. 770, 45 S. E. 620; *Pilgrim v. State* (Okla. Cr. App., 1909), 104 Pac. 383; *Elliott Evidence*, § 3078. To constitute perjury the party charged must take an oath before some competent tribunal or officer that he will testify, declare, depose or certify truly that his written testimony, declaration or certificate by him submitted was true; when in fact some material matter so testified, declared, or certified by him was false and untrue and known by him at the time of taking such oath to have been false and untrue. *United States v. Richards*, 149 Fed. 443. The elements of the crime of perjury to be alleged and proved are

or was not honestly mistaken in testifying. It is not sufficient to prove that testimony, alleged to be false, has been given, and that it was false. It must also be proved beyond a reasonable doubt that the accused knew its falsity, and that he willfully, corruptly, and with deliberation and consideration, swore to it as true.⁴⁷ Evidence of the conduct and actions of the accused while he was testifying, as, for example, that he was insolent, and had to be rebuked by the court,⁴⁸ and of his manner of speaking when on the witness stand, is relevant to show guilty knowledge and intent. It may also be shown for the same purpose that the accused had tried to induce another witness to give false testimony.⁴⁹ The fact that perjury is the result of a conspiracy to commit some other crime permits the evidence to take a wide range. The facts connected with or growing out of the conspiracy may be shown for the purpose of establishing the guilty intent of the accused, or to show knowledge on his part though such evidence may tend to show that he has committed another crime.⁵⁰

a judicial proceeding or course of justice; the swearing of defendant to give testimony therein; his testimony; its falsity, and its materiality to the issue or point of inquiry. *People v. Tatum*, 60 Misc. (N. Y.) 311, 112 N. Y. S. 36. Circumstantial evidence in prosecution for perjury, see *Elliott Evidence*, § 3087; 103 Am. St. 902, note. Proof of other offenses in prosecution for perjury, see 105 Am. St. 983, note; materiality of evidence, see *Elliott Evidence*, § 3079; presumptions, § 3072; burden of proof, § 3071; materiality, §§ 3080, 3081; the best evidence, § 3083; admissions and confessions, § 3088. Evidence of good character, see 103 Am. St. 902. The *res gestæ*, see *Elliott Evidence*, § 3086. Testimony of accomplice, see 98 Am. St. 175, note. Weight and sufficiency of evidence, see 10 L. R. A. 749, note. Defenses, see *Elliott Evidence*, § 3090; variance, § 3091; questions of law and fact, § 3073.

⁴⁷ *People v. German*, 110 Mich. 244, 68 N. W. 150; *People v. Ross*, 103 Cal. 425, 37 Pac. 379; *Davidson v. State*, 22 Tex. App. 372, 3 S. W. 662; *People v. Stone*, 32 Hun (N. Y.) 41; *McClerkin v. State*, 20 Fla. 879; *Williams v. Commonwealth*, 91 Pa. St. 493; *State v. Brown*, 110 La. 591, 34 So. 698; *Nurnberger v. United States*, 156 Fed. 721, 84 C. C. A. 377; *People v. Van Tassel*, 26 App. Div. (N. Y.) 445, 50 N. Y. S. 53; *United States v. Kenney*, 90 Fed. 257; *Tidwell v. State*, 40 Tex. Cr. 38, 47 S. W. 466, 48 S. W. 184; *Goodwin v. State*, 118 Ga. 770, 45 S. E. 620; *State v. Loos* (Iowa, 1909), 123 N. W. 962.

⁴⁸ *Foster v. State*, 32 Tex. Cr. 39, 22 S. W. 21.

⁴⁹ *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147.

⁵⁰ *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. ed. —.

§ 467. **Materiality of the testimony.**—The materiality of the testimony which is alleged to be false must be established satisfactorily.⁵¹ Where there is no dispute as to what the accused testified whether the testimony was material is for the court.⁵² The opinions of witnesses who heard it that it was or was not material are never received.⁵³

As a rule of law the evidence which is alleged to be false is material if it prove or tend to prove or to disprove any fact which itself was material. Whether evidence is or is not material is not to be determined by the effect which it in fact did have on the case but rather by the effect which it could have had assuming that it were true.⁵⁴ Thus, for example, all the testimony by a witness before the grand jury which might legally affect their find-

⁵¹ *State v. Faulkner*, 175 Mo. 546, 65 N. W. 385; *State v. Swafford*, 98 75 S. W. 116; *State v. Dineen*, 203 Iowa 362, 67 N. W. 284; *Hanscom v. State*, 93 Wis. 273, 67 N. W. 419; *State v. Park*, 57 Kan. 431, 46 Pac. 713; *Powell v. State*, 36 Tex. Cr. 377, 37 S. W. 322; *Grissom v. State*, 88 Ark. 115, 113 S. W. 1011; *State v. Brown*, 128 Iowa 24, 102 N. W. 799; *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *State v. Dineen*, 203 Mo. 628, 102 S. W. 480; *Maroney v. State*, 45 Tex. Cr. 524, 78 S. W. 696; *Saucier v. State* (Miss.), 48 So. 840; *Brooks v. State* (Ark., 1909), 121 S. W. 740; *People v. Bradbury* (Cal., 1909), 103 Pac. 215.

⁵² *Foster v. State*, 32 Tex. Cr. 39, 22 S. W. 21; *Washington v. State*, 23 Tex. App. 336, 5 S. W. 119; *Gordon v. State*, 48 N. J. L. 611, 7 Atl. 476; *Peters v. United States*, 2 Okla. 116, 33 Pac. 1031; *Butler v. State*, 36 Tex. Cr. 444, 37 S. W. 746; *State v. Sutton*, 147 Ind. 158, 46 N. E. 468. The fact that evidence is cumulative does not prevent it from being material. *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116.

⁵³ *State v. Hoel*, 77 Kan. 334, 94 Pac. 267.

⁵⁴ *State v. Caywood*, 96 Iowa 367,

ing or refusing to find an indictment is material.⁵⁵ It is not necessary to show that the accused knew his testimony was material.⁵⁶ Testimony of the accused falsely denying that he had made contradictory statements is material.⁵⁷

§ 468. Number of witnesses required and corroboration of single witness to prove falsity.—According to the earlier cases no conviction of perjury could be had unless the falsity of the evidence given under oath was proved by the direct evidence of two credible witnesses, the evidence of the second witness being required to overcome the presumption of innocence which the law indulged in favor of the accused.⁵⁸ Such is not now the law. The accused may be convicted on the evidence of one witness, which, however, must in all cases be corroborated. The corroboration by circumstances must be strong, though it need not be equivalent or tantamount to another witness.⁵⁹ But it must be clear and positive and so strong that, with the evidence of the witness who testifies directly to the falsity of the defendant's testimony, it will convince the jury beyond a reasonable doubt.⁶⁰

⁵⁵ *State v. Sargood*, 80 Vt. 415, 68 Atl. 49.

⁵⁶ *State v. Sargood*, 80 Vt. 415, 68 Atl. 49.

⁵⁷ *Brown v. State*, 47 Fla. 16, 36 So. 705.

⁵⁸ 1 Greenl. on Ev., § 257; 4 Bl. Com. 358; 3 Russell on Crimes (9th Am. Ed.) 78.

⁵⁹ 1 Greenl. on Ev., § 257; *State v. Peters*, 107 N. Car. 876, 12 S. E. 74; *Sweat v. Commonwealth* (Ky.), 96 S. W. 843, 29 Ky. L. 1067; *Saucier v. State* (Miss.), 48 So. 840; *Kelley v. State*, 51 Tex. Cr. 507, 103 S. W. 189; *Parham v. State*, 3 Ga. App. 468, 60 S. E. 123; *Stamper v. Commonwealth* (Ky.), 100 S. W. 286, 30 Ky. L. 992; *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123; *Brooks v. State* (Ark., 1909), 121 S. W. 740. See Elliott Evidence, § 3089.

⁶⁰ *Commonwealth v. Butland*, 119 Mass. 317; *State v. Blize*, 111 Mo.

464, 20 S. W. 210; *State v. Miller*, 44 Mo. App. 159; *State v. Gibbs*, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749n; *People v. Stone*, 32 Hun (N. Y.) 41; *Waters v. State*, 30 Tex. App. 284, 17 S. W. 411; *McClerkin v. State*, 20 Fla. 879; *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147; *United States v. Wood*, 14 Pet. (U. S.) 430, 10 L. ed. 527; *United States v. Hall*, 44 Fed. 864, 10 L. R. A. 324; *Harris v. People*, 64 N. Y. 148; *People v. Hayes*, 70 Hun (N. Y.) 111, 24 N. Y. S. 194; *Reg. v. Braithwaite*, 8 Cox C. C. 254; *Reg. v. Shaw*, 10 Cox C. C. 66; *Commonwealth v. Parker*, 2 Cush. (Mass.) 212; *State v. Pratt*, 21 S. Dak. 305, 112 N. W. 152; *Grady v. State*, 49 Tex. Cr. 3, 90 S. W. 38; *Stamper v. Commonwealth* (Ky.), 100 S. W. 286, 30 Ky. L. 992; *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123; *State*

The rule as to the corroboration of the evidence of an accomplice applies to a prosecution for a perjury. If the statute requires corroboration, the corroboration cannot be furnished by the testimony of an accomplice and usually whether the witness is or is not an accomplice is for the jury to determine.⁶¹

The direct evidence of the witness may be corroborated by circumstantial evidence. All relevant evidence which, if true, tends to corroborate him, should go to the jury, and it is for them to determine whether the corroboration is sufficient to convince them of the falsity of the defendant's testimony beyond a reasonable doubt.⁶² It has been repeatedly held that while corroboration is essential the additional evidence need not be such as, standing by itself, would justify a conviction in case where the testimony of a single witness is sufficient for a conviction.⁶³ And the written or oral admissions of the accused,⁶⁴ or documentary evidence found in his possession, or in the possession of those who may be criminally associated with him, may be received as corroborative, and these, if believed by the jury, will be equivalent to another witness.⁶⁵

v. Hunter, 181 Mo. 316, 80 S. W. 955; Nance v. State, 126 Ga. 95, 54 S. E. 932; Howell v. Commonwealth (Ky.), 104 S. W. 685, 31 Ky. L. 983; Parham v. State, 3 Ga. App. 468, 60 S. E. 123; State v. Pratt, 21 S. Dak. 305, 112 N. W. 152; State v. Faulkner, 175 Mo. 546, 75 S. W. 116; Bell v. State, 5 Ga. App. 701, 63 S. E. 860 (holding that the procuring of one to commit perjury may be proved by the evidence of the person suborned).

⁶¹ People v. Gilhooley, 187 N. Y. 551, 80 N. E. 1116.

⁶² State v. Blize, 111 Mo. 464, 20 S. W. 210; Beach v. State, 32 Tex. Cr. 240, 22 S. W. 976; State v. Swaim, 97 N. Car. 462, 2 S. E. 68; People v. Hayes, 70 Hun (N. Y.) 111, 24 N. Y. S. 194; Maines v. State, 26 Tex. App. 14, 9 S. W. 51; Gartman v. State, 16 Tex. App. 215; Commonwealth v. Parker, 2 Cush. (Mass.) 212; State v. Heed, 57 Mo.

252; People v. Davis, 61 Cal. 536; Williams v. Commonwealth, 91 Pa. St. 493; Maroney v. State, 45 Tex. Cr. 524, 78 S. W. 696. Under a statute requiring a credible witness with corroboration, an accomplice being by law discredited is not a credible witness, so that there must be at least one credible witness aside from the accomplice. Conant v. State, 51 Tex. Cr. 610, 103 S. W. 897.

⁶³ State v. Hunter, 181 Mo. 316, 80 S. W. 955.

⁶⁴ State v. Swafford, 98 Iowa 362, 67 N. W. 284; United States v. De Amador, 6 N. Mex. 173, 27 Pac. 488; Brooks v. State, 29 Tex. App. 582, 16 S. W. 542; United States v. Wood, 14 Pet. (U. S.) 430, 440, 441, 10 L. ed. 527; State v. Hunter, 181 Mo. 316, 80 S. W. 955; Schmidt v. United States, 133 Fed. 257, 66 C. C. A. 389.

⁶⁵ The circumstances in which the corroboration by a living witness may

Where the indictment contains several assignments of perjury, a conviction cannot be had on the direct evidence of a living witness to the falsity of one with circumstantial evidence of the falsity of another. The evidence of the witness and the evidence of circumstances must both bear upon the falsity of the same statement of fact.⁶⁶ But several assignments on material matters may be joined where they all relate to the same transaction and if there is sufficient evidence to sustain one or more of them the prosecution need not prove all.⁶⁷ Whether a witness is credible, under a statute requiring corroboration by evidence of a credible witness, is a question for the jury.⁶⁸ In conclusion, it may be said that any fact essential to conviction, except the falsity of the testimony given by the accused, may be proved by the uncorroborated testimony of a single living witness.⁶⁹

§ 469. Falsity of the testimony.—The falsity of the statement, or of the evidence to the truth of which the accused has sworn, must be proved beyond a reasonable doubt.⁷⁰

be dispensed with are thus tersely enumerated in *United States v. Wood*, 14 Pet. (U. S.) 430, on page 440:

1. Where the accused has sworn to a fact which is directly disproved by documentary or written testimony springing from himself (*i. e.*, a written admission) under circumstances showing a corrupt intent.

2. Where the fact sworn to is directly contradicted by a public record with which the accused is proved to have had an actual acquaintance.

3. Where he swears to what he must necessarily have known to be false, and where the truth can be proved by his own letters relating to the fact, or by other written evidence found in his possession, and which has been treated by him as containing a true account of the facts stated.

⁶⁶ *Reg. v. Virrier*, 12 A. & E. 317, 324; *Reg. v. Parker*, 1 C. & M. 639;

Williams v. Commonwealth, 91 Pa. St. 493, 501; *State v. Hascall*, 6 N. H. 352; *Harris v. People*, 64 N. Y. 148; *Commonwealth v. DeCost*, 35 Pa. Super. Ct. 88; *Adellberger v. State* (Tex. Cr., 1897), 39 S. W. 103. "It will not be sufficient to prove by one inadequate line of testimony that one statement made by the defendant is false, and then by another inadequate line of testimony that another statement made by him is false." *Wharton Cr. Ev.*, § 387.

⁶⁷ *State v. Taylor*, 202 Mo. 1, 100 S. W. 41; *McLaren v. State*, 4 Ga. App. 643, 62 S. E. 138.

⁶⁸ *Meeks v. State*, 32 Tex. Cr. 420, 24 S. W. 98; *Kitchen v. State*, 29 Tex. App. 45, 14 S. W. 392.

⁶⁹ *United States v. Hall*, 44 Fed. 864, 10 L. R. A. 324; *People v. Hayes*, 70 Hun (N. Y.) 111, 24 N. Y. S. 194.

⁷⁰ *Howell v. Commonwealth* (Ky.), 104 S. W. 685, 31 Ky. L. 983; *People*

Any fact is relevant which proves or tends to prove or to disprove either its truth or its falsity.⁷¹ Though both at common law and by statute corroboration is required, the falsity of the statement may be proved by circumstantial evidence.⁷²

§ 470. Proof of the testimony alleged to be false.—It must be shown that the accused was sworn,⁷³ by an officer who had legal authority to administer the oath.⁷⁴

The form of the oath is not material. The most important question is, did the accused intend to be sworn and was he sworn in a form and manner which he regarded as binding?⁷⁵ For he must by some unequivocal act consciously take upon himself the obligation of an oath.⁷⁶ All the circumstances connected with the taking of the oath are relevant. The person who has administered the oath or any person who is present must be permitted to testify as to all the facts connected with it upon the

v. Strassman, 112 Cal. 683, 45 Pac. 3; Goslin v. Commonwealth, 121 Ky. 698, 90 S. W. 223, 28 Ky. L. 683; Baker v. State, 87 Ark. 564, 113 S. W. 205; Cook v. United States, 26 App. D. C. 427. See Elliott Evidence, § 3077.

⁷¹ Walker v. State, 107 Ala. 5, 18 So. 393; People v. Macard, 109 Mich. 623, 67 N. W. 968; Rogers v. State, 35 Tex. Cr. 221, 32 S. W. 1044; United States v. Shinn, 8 Saw. (U. S.) 403, 410, 411; United States v. Moore, 2 Low. (U. S.) 232, 235, 238, 26 Fed. Cas. 15803; State v. Smith, 119 N. Car. 856, 25 S. E. 871; State v. Gordon, 196 Mo. 185, 95 S. W. 420. But the fact that the accused was acquitted on the former trial, during which he is charged with having committed the perjury, is not admissible to prove the truth of his testimony then given. Hemphill v. State, 71 Miss. 877, 16 So. 261; Hutcherson v. State, 33 Tex. Cr. 67, 24 S. W. 908.

⁷² Plummer v. State, 35 Tex. Cr. 202, 33 S. W. 228; Gandy v. State, 23 Neb. 436, 36 N. W. 817; People v. Porter, 104 Cal. 415, 38 Pac. 88; State v. Hunter, 181 Mo. 316, 80 S. W. 955.

⁷³ Sloan v. State, 71 Miss. 459, 14 So. 262. A copy of an oath may be received if the original is missing. State v. Matlock, 5 Pen. (Del.) 401, 64 Atl. 259.

⁷⁴ United States v. Curtis, 107 U. S. 671, 27 L. ed. 534, 2 Sup. Ct. 507; People v. Nolte, 19 Misc. (N. Y.) 674, 44 N. Y. S. 443; Markey v. State, 47 Fla. 38, 37 So. 53; Manning v. State, 46 Tex. Cr. 326, 81 S. W. 957; Phillips v. State, 5 Ga. App. 597, 63 S. E. 667; State v. Pratt, 21 S. Dak. 305, 112 N. W. 152. (By clerk in open court is sufficient.)

⁷⁵ State v. Day, 108 Minn. 121, 121 N. W. 611. See Elliott Evidence, § 3074.

⁷⁶ Markey v. State, 47 Fla. 38, 37 So. 53.

question of whether the accused was actually sworn or not.⁷⁷ Thus, it may be shown that the oath was interpreted to the accused.⁷⁸ The authority of the officer to administer the oath may be presumed under some circumstances. The burden is on the state to prove that the officer was authorized to administer an oath, as *e. g.*, where he is a notary public, to show his jurisdiction included the place of the oath and the time when it was taken.⁷⁹ Usually proof of an officer *de facto* will suffice and his written appointment need not be produced.⁸⁰ The official character may always be shown by the production of the written appointment,⁸¹ though, if the original appointment cannot be found secondary evidence is admissible.⁸² The fact that there are irregularities in an appointment of an officer to take testimony or that the order appointing him fails to designate him by any official title,⁸³ or that the officer who administered the oath knew at that time that it was false and that it was made for a fraudulent purpose is not material.⁸⁴

The testimony in giving which the perjury is alleged to have been committed must be shown; the best evidence is the record or a certified copy. A stenographer may read his notes of the testimony given by the accused, and which is alleged to be false, if he is able to swear that the notes contained a true and correct transcript of all the testimony given by the accused.⁸⁵ It has also been held that parol evidence given by one who has heard the alleged false testimony is admissible even though a record may be in existence.⁸⁶ It is not necessary that the witness shall

⁷⁷ Markey v. State, 47 Fla. 38, 37 So. 53.

⁷⁸ Trevino v. State, 48 Tex. Cr. 350, 88 S. W. 356.

⁷⁹ Commonwealth v. Schwieters (Ky.), 93 S. W. 592, 29 Ky. L. 417.

⁸⁰ State v. Geer, 48 Kan. 752, 30 Pac. 236.

⁸¹ Mahon v. State, 46 Tex. Cr. 234, 79 S. W. 28, 67 L. R. A. 499n.

⁸² People v. Ellenbogen, 186 N. Y. 603, 79 N. E. 1112; State v. Horin, 70 Kan. 256, 78 Pac. 411.

⁸³ Markey v. State, 47 Fla. 38, 37 So. 53.

⁸⁴ Thompson v. State, 120 Ga. 132, 47 S. E. 566.

⁸⁵ State v. Vandemark, 77 Conn. 201, 58 Atl. 715; People v. Macard, 109 Mich. 623, 67 N. W. 968; State v. Camley, 67 Vt. 322, 31 Atl. 840; Leaptrot v. State, 51 Fla. 57, 40 So. 616; State v. Pratt, 21 S. Dak. 305, 112 N. W. 152.

⁸⁶ State v. Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749n; State v.

testify to the identical language which it is alleged in the indictment was used by the accused, or that he should recollect all that the accused said, if he can repeat in substance that which was alleged to be false.⁸⁷ One who was present may testify to oral statements made by the accused corresponding in substance to the contents of the alleged false affidavit,⁸⁸ and the fact that the signature to an affidavit was in the handwriting of the accused need not be proved, but will be presumed where the affidavit was actually used for him in court.⁸⁹ It must usually be proved that the perjury was committed in a judicial proceedings. Proof that the perjury was committed in a judicial proceedings usually consists of the record of such proceedings with oral evidence to identify the accused as the witness who testified falsely.⁹⁰ The object of the introduction of such evidence is to show the jurisdiction of the court, the regularity of the proceedings and the materiality of the evidence.⁹¹ Jurisdiction will usually be presumed where the record is apparently regular in the absence of proof to the contrary. The fact that the proceedings are avoidable only does not destroy jurisdiction and perjury may be committed.⁹² Nor can the fact that the accused was not warned that any statements made by him might be used against him, authorize the court to exclude his evidence given in a former trial or in some other prior proceedings where he is subsequently tried for perjury committed under such circumstances.⁹³

Woolridge, 45 Ore. 389, 78 Pac. 333; Stanley v. State (Tex. Cr.), 74 S. W. 318. Stenographer's notes, see Elliott Evidence, § 3084; records of former proceedings, § 3082.

⁸⁷ McLaren v. State, 4 Ga. App. 643, 62 S. E. 138.

⁸⁸ Simpson v. State, 46 Tex. Cr. 77, 79 S. W. 530.

⁸⁹ Markey v. State, 47 Fla. 38, 37 So. 53.

⁹⁰ Heflin v. State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147; King v. State, 32 Tex. Cr. 463, 24 S. W. 514; Par-

tain v. State, 22 Tex. App. 100, 2 S. W. 854; Washington v. State, 23 Tex. App. 336, 5 S. W. 119; State v. Howard, 137 Mo. 289, 38 S. W. 908.

⁹¹ State v. Brown, 111 La. 170, 35 So. 501; State v. Justesen (Utah), 99 Pac. 456.

⁹² Markey v. State, 47 Fla. 38, 37 So. 53; State v. Brown, 68 N. H. 200, 38 Atl. 731.

⁹³ Stanley v. State (Tex. Cr.), 74 S. W. 318; People v. Cahill, 193 N. Y. 232, 86 N. E. 39, 20 L. R. A. (N. S.) 1084.

CHAPTER XXXI.

CRIMES AGAINST PUBLIC POLICY, PUBLIC PEACE AND PUBLIC HEALTH.

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| <p>§ 471. Lotteries and gaming or gambling—What constitutes.</p> <p>472. Evidence to prove manner of playing.</p> <p>473. The bet or wager—Playing in public.</p> <p>474. Accomplice evidence.</p> <p>475. Keeping gambling houses.</p> <p>476. Presumptions and burden of proof.</p> <p>477. Gambling instruments as evidence.</p> <p>478. Mailing obscene literature, etc.</p> <p>479. Evidence obtained by decoy letters.</p> <p>480. Adulteration of food, drugs, etc.</p> <p>481. Evidence furnished by analysis.</p> <p>482. Keeping disorderly house.</p> | <p>§ 483. Dueling—Sending a challenge to fight a duel.</p> <p>484. Carrying concealed weapons—How concealment may be proved—Intent.</p> <p>485. Apprehension of danger as a defense.</p> <p>486. Character of the defendant as an officer or traveler.</p> <p>487. Forcible entry and detainer.</p> <p>488. Affray.</p> <p>489. Riot.</p> <p>490. Conspiracy.</p> <p>491. Circumstantial evidence.</p> <p>492. Admissibility of acts and declarations of fellow-conspirators.</p> <p>493. Must be made during existence of and in furtherance of the conspiracy.</p> <p>494. Order of proving conspiracy to let in declarations.</p> |
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§ 471. **Lotteries and gaming or gambling—What constitutes.**—Gaming or gambling is a misdemeanor by statute in many states. Under such statutes it is, of course, always necessary, in order to sustain a conviction, to prove the necessary constituents of the crime, *i. e.*, the element of chance in the game itself, and that a wager was actually made. A game of chance may be defined as one in which the result is determined by luck or lot, and not by adroitness, practice, skill, or judgment in play, such as, for example, cards,¹ dominoes,² bagatelle,³ bowls,⁴ baseball,⁵ dice throwing.⁶

¹ Drawpoker, *Shreveport v. Bowen*, 116 La. 522, 40 So. 859; *State v. Mathias*, 206 Mo. 604, 105 S. W. 604, 121 Am. St. 687n.

² *Harris v. State*, 31 Ala. 362.

³ *Neal's Case*, 22 Gratt. (Va.) 917, 919.

⁴ *Commonwealth v. Goding*, 3 Mc. (Mass.) 130.

⁵ *Mace v. State*, 58 Ark. 79, 22 S. W. 1108; *People v. Weithoff*, 51 Mich. 203, 209, 212, 16 N. W. 442, 47 Am.

557.

⁶ *State v. DeBoy*, 117 N. Car. 702, 23 S. E. 167; *Jones v. State*, 26 Ala. 155

or keno.⁷ Such games are gambling when played for money or other valuable thing. And generally, betting on elections,⁸ horse races,⁹ a coin in the slot machine,¹⁰ shooting matches,¹¹ billiards, or other game of skill, is gambling under the statute.¹²

§ 472. **Evidence to prove manner of playing.**—The jury are not presumed to know how an unlawful game is played, and the mode of playing may be explained to them by professional players as expert witnesses.¹³ Such testimony is not indispensable. Any witness may describe a game he has seen, though he has only played it twice, and seldom seen it played,¹⁴ and the depth and extent of his knowledge and experience are relevant to diminish or increase the value of his evidence.¹⁵

⁷ *Miller v. State*, 48 Ala. 122.

⁸ *Sharkey v. State*, 33 Miss. 353, 355; *Commonwealth v. Kennedy*, 15 B. Mon. (Ky.) 531, 533; *Commonwealth v. Wells*, 110 Pa. St. 463, 467, 1 Atl. 310. *Contra*, *Hickerson v. Benson*, 8 Mo. 8, 40 Am. Dec. 115.

⁹ *State v. Falk*, 66 Conn. 250, 33 Atl. 913; *Debardelaben v. State*, 99 Tenn. 649, 42 S. W. 684; *People v. Weithoff*, 51 Mich. 203, 16 N. W. 442, 47 Am. 557; *Watson v. State*, 3 Ind. 123, 124; *Redman v. State*, 33 Ala. 428. A horse race is not a game under a statute making it criminal to bet on a game. *State v. Vaughan*, 81 Ark. 117, 98 S. W. 685, 118 Am. St. 29, 7 L. R. A. (N. S.) 889n; as to bookmakers' booth, *Miller v. United States*, 6 App. D. C. 6.

¹⁰ *Lang v. Merwin*, 99 Me. 486, 59 Atl. 1021, 105 Am. St. 293.

¹¹ *Myers v. State*, 3 Sneed (Tenn.) 98, 106, 107.

¹² The charge of selling lottery tickets is sufficiently proved by evidence that the defendant received money for them, sent for them and received a commission for his trouble. The ticket itself ought to be produced or its ab-

sence satisfactorily accounted for. *Anderson v. State* (Tex., 1897), 39 S. W. 109. A poolroom where betting is done on horse races is a gaming house and a nuisance at common law. *State v. Nease*, 46 Oreg. 433, 80 Pac. 897; though not productive of any disorder. *Commonwealth v. Huber*, 126 Ky. 456, 104 S. W. 345, 31 Ky. L. 929.

Evidence of sale of lottery ticket. 3 L. R. A. 404.

¹³ *State v. Behan*, 113 La. 701, 37 So. 607; *Commonwealth v. Adams*, 160 Mass. 310, 312, 35 N. E. 851.

¹⁴ *Nuckolls v. Commonwealth*, 32 Gratt. (Va.) 884, 887; *Miller v. Commonwealth*, 117 Ky. 80, 77 S. W. 682, 25 Ky. L. 1236.

¹⁵ One witness may testify he saw the defendant conduct a game for money, describing it in detail, and another may then state it was a certain game, though the latter may have seen the game played only two or three times. *People v. Sam Lung*, 70 Cal. 515, 517, 518, 11 Pac. 673. The courts will take judicial notice of the meaning of the words "gift enterprise," *Lohman v. State*, 81 Ind. 15, 18, and of the use of billiard tables for

§ 473. **The bet or wager—Playing in public.**—It must be proved that a bet or wager was made, whether the game be one of chance or of skill,¹⁶ and that the stake had value intrinsically; or that, by agreement among the bettors, it represented value.¹⁷ The amount and character of the articles wagered are immaterial. A conviction of gambling will be sustained by proof of playing for chips or checks,¹⁸ for the price of refreshments,¹⁹ or for the hire of the table or other apparatus.²⁰ The making of the wager may be inferred from an offer and acceptance, and neither of these need be proved to have been made orally or in express terms.²¹ Both may be inferred by the jury from evidence that the accused placed money or chips upon a table where a game was in progress, without objection from other players,²² or stated he would pay the amount wagered after the game was ended,²³ and even from evidence that the accused was sitting and playing at a table or in a circle around a box²⁴ upon which money and gambling devices, such as cards and a faro box, were lying.²⁵

gambling purposes, *State v. Price*, 12 Gill & J. (Md.) 260, 37 Am. Dec. 81; that "craps" is a game played with dice, *Sims v. State*, 1 Ga. App. 776, 57 S. E. 1029; but not of the fact that policy is a game of chance, *State v. Sellner*, 17 Mo. App. 39.

Prima facie evidence of gaming, 36 Am. St. 685; illegality of contract for future delivery, 1 Am. St. 764; common gamblers, *Elliott Evidence*, § 3008; minors playing, § 3010; lotteries, § 3011; variance, § 3007.

¹⁶ *Middaugh v. State*, 103 Ind. 78, 80, 2 N. E. 292; *Jackson v. State* (Tex., 1894), 25 S. W. 773; *Jackson v. State*, 117 Ala. 155, 23 So. 47; *Proctor v. Territory*, 18 Okla. 378, 92 Pac. 389; *Barker v. State*, 127 Ga. 276, 56 S. E. 419.

¹⁷ *Oder v. State*, 26 Fla. 520, 522, 7 So. 856; *State v. Bishel*, 39 Iowa 42.

¹⁸ *Porter v. State*, 51 Ga. 300, 301; *Ransom v. State*, 26 Fla. 364, 7 So. 860.

¹⁹ *People v. Cutler*, 28 Hun (N. Y.)

465, 466; *Hitchins v. People*, 39 N. Y. 454, 456; *Walker v. State*, 2 Swan (Tenn.) 287, 290, 291; *Hopkins v. State*, 122 Ga. 583, 50 S. E. 351, 69 L. R. A. 117.

²⁰ *Hall v. State* (Tex., 1896), 34 S. W. 122; *Alexander v. State*, 99 Ind. 450, 451; *Hamilton v. State*, 75 Ind. 586, 587; *Bachellor v. State*, 10 Tex. 258, 261; *Middaugh v. State*, 103 Ind. 78, 79, 2 N. E. 292.

²¹ *Rainbolt v. State*, 51 Tex. Cr. 153, 101 S. W. 217; *Elliott Evidence*, § 3004.

²² *Thompson v. State*, 99 Ala. 173, 13 So. 753; *Goslin v. Commonwealth*, 121 Ky. 698, 90 S. W. 223, 28 Ky. L. 683.

²³ *State v. Leicht*, 17 Iowa 28.

²⁴ *Butler v. State*, 2 Ga. App. 623, 58 S. E. 1114.

²⁵ *State v. Andrews*, 43 Mo. 470, 471; *State v. Boyer*, 79 Iowa 330, 44 N. W. 558; *St. Louis v. Sullivan*, 8 Mo. App. 455, 457, 458; *Cohen v. State*, 17 Tex. 142. Cf. *Middaugh v. State*, 103 Ind. 78, 80, 2 N. E. 292; *Harmon v. State*,

Publicity is often by statute essential to make it a crime to bet on a game or sport, and must be shown. The court cannot take notice that certain places are public, under a statute which forbids gambling in public places.²⁶ Whether a game is public, or whether it is carried on in a building or place which is within the prohibition of the statute²⁷ is a question for the jury to determine²⁸ on all the circumstances.²⁹ Evidence that a game was carried on in a shop,³⁰ or public road,³¹ in the office of a physician,³² magistrate,³³ or broker,³⁴ aboard a steamboat in a navigable stream,³⁵ or in a barn,³⁶ will sustain an allegation that a game was played in public.³⁷ Where the place where the gambling took place is not *per se* a public place, the burden of proof is upon the prosecution to prove that it is a public place. Proof that prior to the occasion in question other games had been played in that place is relevant to show that it is a public place.³⁸

120 Ga. 197, 47 S. E. 547. Evidence that other persons, present with the accused in the room where gambling is alleged to have taken place, were playing or betting, is relevant; and perhaps indispensable, as the defendant could not play a game alone or bet with himself. *Thompson v. State*, 99 Ala. 173, 13 So. 753, 754. See *Griffin v. State*, 2 Ga. App. 534, 58 S. E. 781.

²⁶ *Grant v. State*, 33 Tex. Cr. 527, 27 S. W. 127.

²⁷ In Texas the playing of cards at any place not a private residence is prohibited, *Fallwell v. State*, 48 Tex. Cr. 35, 85 S. W. 1069, as for example in a schoolhouse, *Mapes v. State* (Tex. Cr.), 85 S. W. 797. See also, *Waggoner v. State*, 49 Tex. Cr. 260, 92 S. W. 38.

²⁸ *Lewis v. State*, 140 Ala. 126, 37 So. 99; *Ferrell v. Opelika*, 144 Ala. 135, 39 So. 249. The yard of a boarding house. *Walker v. State* (Ala.), 41 So. 176; a lodging house, *Winston v. State*, 145 Ala. 91, 41 So. 174; or a

room occupied in a jail by the keeper. *Lewis v. State*, 140 Ala. 126, 37 So. 99, is not a public place.

²⁹ The burden is upon the prosecution to prove beyond a reasonable doubt that the place is public. *Bradford v. State*, 147 Ala. 118, 41 So. 1024.

³⁰ *Bentley v. State*, 32 Ala. 596; *Tatum v. State*, 156 Ala. 144, 47 So. 339.

³¹ *Mills v. State*, 20 Ala. 86.

³² *Williams v. State* (Tex., 1896), 34 S. W. 271; *Redditt v. State*, 17 Tex. 610.

³³ *Burnett v. State*, 30 Ala. 19.

³⁴ *Wilson v. State*, 31 Ala. 371.

³⁵ *Dickey v. State*, 68 Ala. 508.

³⁶ *Huffman v. State*, 29 Ala. 40.

³⁷ *Nickols v. State*, 111 Ala. 58, 20 So. 564. See, also, *Downey v. State*, 110 Ala. 99, 20 So. 439; *Gomprecht v. State*, 36 Tex. Cr. 434, 37 S. W. 734.

³⁸ *Winston v. State*, 145 Ala. 91, 41 So. 174; *Dennis v. State*, 139 Ala. 109, 35 So. 651; *Lee v. State*, 136 Ala. 31, 33 So. 894; *Elliott Evidence*, § 3004.

§ 474. **Accomplice evidence.**—The rules governing the introduction and employment of this species of evidence³⁹ have been often modified by statute, so far as the offense of gambling is concerned. Thus it has been enacted that a conviction may be had upon the uncorroborated evidence of an accomplice,⁴⁰ and that he shall not be excused from testifying because his evidence may incriminate him.⁴¹ No person is an accomplice unless proved to have actually taken part in the game or to have had a bet depending on its result.⁴²

§ 475. **Keeping gambling houses.**—Keeping a public gambling or gaming house, or keeping or exhibiting implements for gambling was indictable as a nuisance at common law. It is now generally a statutory misdemeanor. The statutes differ greatly in their details and should invariably be consulted to ascertain what facts are essential to be proven.⁴³ That a certain house or other place was maintained or kept as a public gaming house may be shown by proof of its general reputation in the community by the reputation of its inmates and frequenters as professional gamblers and by the fact that gambling paraphernalia were found there.⁴⁴ Proof that the accused had actual custody, control or possession of a public gambling house, that he presided over a gambling table and admitted persons to the house,⁴⁵ or the fact that he derived or expected to derive gain or profit from it, is always relevant and may justify an inference that he was keeping it in the statutory sense.⁴⁶ Proof of a single act of possession

³⁹ See *ante*, §§ 60–75.

⁴⁰ *Wright v. State*, 22 Tex. App. 670, 3 S. W. 346; *Elliott Evidence*, § 3006.

⁴¹ *Cheesum v. State*, 8 Blackf. (Ind.) 332, 44 Am. Dec. 771. See *Moore v. State*, 97 Ga. 759, 25 S. E. 362. See *ante*, § 72.

⁴² *Commonwealth v. Baker*, 155 Mass. 287, 29 N. E. 512.

⁴³ *Cox v. State*, 95 Ga. 502, 20 S. E. 260; *Commonwealth v. Blankinship*, 165 Mass. 40, 42 N. E. 115; *State v. Metcalf*, 2 Mo. App. 1269; *Copeland v. State*, 36 Tex. Cr. 576, 38 S. W. 189; *Coleman v. State*, 48 Tex. Cr.

202, 87 S. W. 152; *State v. Oswald*, 39 Kan. 508, 53 Pac. 525; *Strong v. State*, 52 Tex. Cr. 133, 105 S. W. 785; *State v. Oldham*, 200 Mo. 538, 98 S. W. 497; *Elliott Evidence*, § 3009.

⁴⁴ *State v. Hoyle*, 98 Minn. 254, 107 N. W. 1130.

⁴⁵ *Groves v. State*, 123 Ga. 570, 51 S. E. 627.

⁴⁶ *Lettz v. State* (Tex., 1893), 21 S. W. 371; *Harman v. State* (Tex.), 22 S. W. 1038; *Wren v. State*, 70 Ala. 1. 4; *Nelson v. United States*, 28 App. D. C. 32; *Robbins v. People*, 95 Ill. 175, 178; *Commonwealth v. Clancy*.

or supervision may not be enough to sustain a conviction of keeping, for the offense is continuous.⁴⁷ Nor can the fact that the house where gambling was going on was owned or conducted by the accused be proved by the declarations of third persons which are hearsay merely.⁴⁸ Under a statute prohibiting generally the keeping of gambling houses, the particular game which was played need not be alleged,⁴⁹ or proved.⁵⁰ The reputation of those who frequent a particular house, including the defendant, as being gamblers, may always be shown.⁵¹ Under a prosecution for being a common gambler, it may be shown that the defendant visited the house named in the indictment and then, to show he did so for the purpose of gaming, his visits to other gaming houses may be shown.⁵²

A charge of frequenting gaming houses is not sustained by showing that the defendant was in such a place on one occasion only.⁵³ So in order to sustain a conviction for leasing premises

154 Mass. 128, 27 N. E. 1001; Hamilton v. State, 75 Ind. 586, 591; Ford v. State, 86 Miss. 123, 38 So. 229; Groves v. State, 123 Ga. 570, 51 S. E. 627; State v. Mathis, 206 Mo. 604, 105 S. W. 604, 121 Am. St. 687n.

⁴⁷ United States v. Smith, 4 Cranch C. C. (U. S.) 659, 27 Fed. Cas. 16329; Jessup v. State, 14 Ind. App. 230, 42 N. E. 948. *Contra*, State v. Crogan, 8 Iowa 523, 524; Bryan v. State, 120 Ga. 201, 47 S. E. 574; Nelson v. United States, 28 App. D. C. 32.

⁴⁸ Machen v. State, 53 Tex. Cr. 115, 109 S. W. 126.

⁴⁹ State v. Dole, 3 Blackf. (Ind.) 294.

⁵⁰ When alleged it must be strictly proved. Dudley v. State, 22 Ark. 251, 252. The same rule is applicable where the statute forbids the playing of games specified and the games are expressly mentioned in the indictment. Webb v. State, 17 Tex. App. 205.

⁵¹ State v. Mosby, 53 Mo. App. 571, 577; Bashinski v. State, 122 Ga. 164,

50 S. E. 54; State v. Behan, 113 La. 701, 37 So. 607.

⁵² Courtney v. State, 5 Ind. App. 356, 367, 32 N. E. 335; White v. State, 127 Ga. 273, 56 S. E. 425.

⁵³ Green v. State, 109 Ind. 175, 176, 9 N. E. 781; DeHaven v. State, 2 Ind. App. 376, 380, 28 N. E. 562. § 2128, Burns' R. S. 1908, of Indiana, provides that it shall be sufficient evidence that a room or house was rented for gaming, if gaming is carried on to the knowledge of the owner or under such circumstances that he has good reason to believe his property is so used. Any evidence is relevant to show the use of the room, and the owner's knowledge, as, for example, the general reputation of the room, the fact that the lessee had been convicted of gambling, and that the lessor resided near by. It need not be shown that there was any specific agreement as to the use of the room. Voght v. State, 124 Ind. 358, 362, 24 N. E. 680; Fisher v. State, 2 Ind. App. 365, 369, 28 N. E. 565.

for gambling purposes it must always be proved beyond a reasonable doubt that at the date that the landlord executed the lease he actually knew that the premises were to be used for gambling purposes.⁵⁴

§ 476. Presumptions and burden of proof.—The owner of a house is not presumed, as matter of law, to know that gambling is carried on there. His knowledge must be shown.⁵⁵ But the occupant of a house or room is conclusively presumed to know while he occupies it that gambling is going on therein,⁵⁶ though not subsequently.⁵⁷

The burden of proof is always on the state to show beyond a reasonable doubt, by direct or circumstantial evidence, the essential elements of the offense,⁵⁸ including the want of consent, where a statute makes it a misdemeanor to permit a minor to play without his guardian's consent.⁵⁹ Under a statute making it a misdemeanor for one to visit a gambling house, it is not necessary to prove or to allege one went there to gamble, though if the accused had a legitimate reason for visiting the house the burden is on him to show it.⁶⁰

§ 477. Gambling instruments as evidence.—On a trial for keeping a gambling house, implements employed in playing illegal games are always admissible, if found in his possession or properly identified and connected with the accused.⁶¹ Sometimes the police are authorized by statute to seize articles which may be

⁵⁴ Flynn v. People, 123 Ill. App. 591.

⁵⁵ Harris v. State, 5 Tex. 11.

⁵⁶ Robinson v. State, 24 Tex. 152.

⁵⁷ Barnaby v. State, 106 Ind. 539, 543, 7 N. E. 231.

⁵⁸ Rodifer v. State, 74 Ind. 21, 23; Fleming v. State, 125 Ga. 17, 53 S. E. 579; Ables v. State, 49 Tex. Cr. 292, 92 S. W. 414; Herr v. Commonwealth (Ky.), 91 S. W. 666, 28 Ky. L. 1131; 3 Elliott Evidence, § 1 Am. St. 764.

⁵⁹ Conyers v. State, 50 Ga. 103, 106, 107, 15 Am. 1686. Under an indictment for permitting a minor to play without the consent of his guardian,

the accused may show that he used care to ascertain the age of the player, and for this purpose may introduce in evidence facts descriptive of his personal appearance and his replies to questions put to him. Stern v. State, 53 Ga. 229, 21 Am. 266; Goetz v. State, 41 Ind. 162.

⁶⁰ State v. Bridgewater, 171 Ind. 1, 85 N. E. 715.

⁶¹ People v. Sam Lung, 70 Cal. 515, 517, 11 Pac. 673; State v. Harmon, 70 Kan. 476, 78 Pac. 805; Elliott Evidence, § 3005.

used for gambling purposes, as tables, cards, etc.⁶² While they cannot be confiscated or destroyed without due notice to their owner and an opportunity for him to be heard and to prove their lawful character in judicial proceedings,⁶³ the summary methods by which the prosecution has acquired them does not prevent their use as evidence upon the grounds that the accused is protected by constitutional provisions from being compelled to furnish evidence against himself.⁶⁴ And a statute which makes the possession of certain gambling instruments presumptive evidence of an unlawful possession contrary to the statute is constitutional and simply prescribes a rule of evidence.⁶⁵

§ 478. **Mailing obscene literature, etc.**—It is provided by statute⁶⁶ that all printed matter which is obscene in its character, and everything which is designed to prevent conception or procure an abortion, or for any immoral or indecent purpose, with all advertisements giving information where such printed matter may be obtained, are not mailable, and the act of mailing them is punishable. To sustain a conviction under this statute the following facts must be proved: First, that the article or printed matter was obscene or intended for an immoral use.⁶⁷ Second, that the defendant was cognizant of the fact. Third, that he or his agent

⁶² *Ridgeway v. West*, 60 Ind. 371; *Commonwealth v. Gaming Implements*, 119 Mass. 332.

⁶³ *State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. 420.

⁶⁴ *Commonwealth v. Smith*, 166 Mass. 370, 44 N. E. 503; *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002.

⁶⁵ *People v. Adams*, 176 N. Y. 351, 68 N. E. 636, 98 Am. St. 675n, 63 L. R. A. 406, affg 85 App. Div. (N. Y.) 390, 83 N. Y. S. 481.

⁶⁶ U. S. R. S. § 3893 (U. S. Comp. St. 1901, p. 2658).

⁶⁷ *Hanson v. United States*, 157 Fed. 749, 85 C. C. A. 325. The obscenity of a writing, or the intention with which it is to be used, is a question

for the jury on all the evidence. The court may instruct as to the meaning of the words used. *Dunlop v. United States*, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. 375; *Swearingen v. United States*, 161 U. S. 446, 40 L. ed. 765, 16 Sup. Ct. 562; *United States v. Davis*, 38 Fed. 326, 328; *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 S. Ct. 434. The test of obscenity is the tendency to corrupt or deprave the minds of those who are open to such influences. *MacFadden v. United States*, 165 Fed. 51, 91 C. C. A. 89. The newspaper or other printed matter which is alleged to be obscene may be admitted in evidence. *Dunlop v. United States*, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. 375.

deposited in the mail,⁶⁸ or that it was deposited in the mail as a natural consequence of some intentional act by the accused.⁶⁹ The gist of the crime is the mailing. If this be not shown, evidence that the defendant wrote the article is irrelevant.⁷⁰

If upon an examination of a book it is apparent upon the whole that its contents are calculated to deprave the morals of the reader by exciting sexual desires and licentious thoughts, it is obscene under the statute. This is a question for the court to determine as it is usually held upon the language of the book, though in some cases the question of obscenity has been permitted to go to the jury under proper instructions. It has been held that evidence to show that the information conveyed by the book is accurate and scientific, that such information tends to prevent disease by dispelling ignorance on such topics, and that the book would be of value to men in the medical profession and to persons in the marriage relation was irrelevant.⁷¹

§ 479. Evidence obtained by decoy letters.—From the very necessity of the case, evidence obtained by the use of decoy letters is received. The deceit and underhand methods employed do not, in law, discredit such testimony, though of course these may be shown to enable the jury to ascertain the motives prompting the prosecution.⁷² The action of agents of the postoffice department

⁶⁸ *United States v. Clark*, 37 Fed. 106, 108; *United States v. Bebout*, 28 Fed. 522, 523. The government may, to prove the mailing, give evidence showing the usual course of business in the post-office and the methods used in collecting and distributing the mail. So it may be shown that on the same day that a certain newspaper was mailed which is proved or admitted to have been received, other copies of the same newspaper were mailed which have not been shown to have been received. *Dunlop v. United States*, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. 375.

⁶⁹ *Demolli v. United States*, 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424n.

⁷⁰ *Thomas v. State*, 103 Ind. 419, 2 N. E. 808. If, however, it appears that he mailed it, evidence to show that he also wrote it is relevant to show guilty knowledge. The fact that he wrote it may be shown by any of the methods employed in proving handwriting. *United States v. Mathias*, 36 Fed. 892. As to proof of handwriting, see *Underhill on Ev.*, §§ 131-141, pp. 185-205.

⁷¹ *Burton v. United States*, 142 Fed. 57, 73 C. C. A. 243.

⁷² *United States v. Whittier*, 5 Dill. C. C. (U. S.) 35, 39, 45, 28 Fed. Cas. 16688; *United States v. Wightman*, 29 Fed. 636; *United States v. Slenker*, 32 Fed. 691; *United States v. Bott*, 11 Blatchf. C. C. (U. S.) 346, 24 Fed.

in writing decoy letters by which the accused is led to commit a criminal act does not make the agents parties to the offense so as to render their testimony subject to the rule relating to accomplices.⁷³

Sealed mail matter cannot legally be opened except by the addressee. If it is sought to discover whether a package contains obscene articles or writings, a search warrant must be procured.⁷⁴ When the matter inclosed is admitted in evidence, the wrapper or envelope should also be received as a part of the *res gestæ* to show how it reached the party addressed.⁷⁵

If the meaning of the language of an alleged obscene writing is not clear to the casual reader, parol evidence is admissible to show that it was intended to give, and, in fact, does give, information regarding obscene literature.⁷⁶

§ 480. Adulteration of food, drugs, etc.—By the common law, and also frequently by statute, the mingling of unwholesome ingredients with food, or the selling or offering for sale of adulterated or impure articles of food is a misdemeanor. A criminal intent need not be proved under a statute making the mere act of selling food adulterated below a certain standard a misdemeanor.⁷⁷ Nor need it be shown that the accused knew

Cas. 14626; *Bates v. United States*, 10 Fed. 92, 97, 100; *Price v. United States*, 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. 366; *Goode v. United States*, 159 U. S. 663, 40 L. ed. 297, 16 S. Ct. 136. For other cases bearing on the general principles of evidence obtained by artifice, see *Underhill on Evidence*, § 127, p. 177.

⁷³ *Shepard v. United States*, 160 Fed. 584, 87 C. C. A. 486.

⁷⁴ *Jackson, Ex parte*, 96 U. S. 727, 24 L. ed. 877.

⁷⁵ *United States v. Noelke*, 17 Blatchf. C. C. (U. S.) 554.

⁷⁶ *United States v. Grimm*, 50 Fed. 528. Where the fact of the delivery of obscene printed matter rests for proof largely upon the presumption of law that public officials in the post-office department properly performed

their duties, the accused is not entitled an instruction that, as a rule of law, the presumption of innocence is to be given greater weight than the presumption of the proper performance of duty. *Dunlop v. United States*, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. 375.

Evidence of other crimes to show intent, 62 L. R. A. 239.

⁷⁷ *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *Commonwealth v. Wheeler* (Mass., 1910), 91 N. E. 415. A statute making proof of sale and false representation presumptive evidence of guilt is constitutional. And such an inference of guilt, when created, cannot be overcome by proof of actual ignorance and absence of an intent to deceive. "Whether or not the seller knows his representations to

of the adulteration, unless the statute expressly requires him to know of it.⁷⁸ If by statute it is essential that the accused should know of the adulterated condition of the article, it must be proved.⁷⁹ If actual adulteration is proved it may be presumed to have been done for a fraudulent purpose, particularly if the article sold was, either expressly or by implication of law (as is the case in the sale of provisions), represented to be adulterated or of standard quality.⁸⁰ When the crime is alleged with extreme particularity, it must be proved as laid.⁸¹ Thus, evidence that the accused had impure milk in his possession, or that he brought it to market, will not sustain an indictment for selling it or exposing it for sale.⁸²

§ 481. Evidence furnished by analysis.—The evidence contained in a certificate of a milk inspector,⁸³ or that resulting from a test made with a lactometer, while not irrebutable or conclusive of the guilt of the accused⁸⁴ charged with selling watered milk, is always

be false, or intends to deceive, is immaterial. He subjects himself to the penalties of the statute by making the representation, not knowing it to be true." *People v. Mahaney*, 41 Hun (N. Y.) 26. See *Elliott Evidence*, § 3165.

⁷⁸ *Commonwealth v. Evans*, 132 Mass. 11; *Commonwealth v. Vieth*, 155 Mass. 442, 29 N. E. 577; *Bissman v. State*, 9 Ohio Cir. Ct. 714; *Myer v. State*, 10 Ohio Cir. Ct. 226; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Chicago v. Bowman Dairy Co.*, 234 Ill. 294, 84 N. E. 913, 123 Am. St. 100, 17 L. R. A. (N. S.) 684. The courts will take notice of scientific facts of an elementary character, and of the meaning of words. The nature and quality of various articles of food in common use, as butter, milk, bread and the like, need not be shown. It is otherwise with drugs and substances not in ordinary use. *State v. Hutchinson*, 56 Ohio St. 82, 46 N. E. 71.

⁷⁹ *Cantee v. State* (Tex., 1889), 10 S.

W. 757. Such knowledge will not be presumed from the fact of possession alone. *Sanchez v. State*, 27 Tex. App. 14, 10 S. W. 756. Evidence that defendant was seen on a wagon, containing cans of milk, that his name was painted on the wagon, and that he gave samples of milk taken from the cans to the inspector, is relevant to show that he had adulterated milk in his possession. *Commonwealth v. Rowell*, 146 Mass. 128, 15 N. E. 154. The possession of a servant is the possession of his master. *Commonwealth v. Proctor*, 165 Mass. 38, 42 N. E. 335.

⁸⁰ *People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. 452; *State v. Hutchinson*, 55 Ohio St. 573, 45 N. E. 1043.

⁸¹ *Commonwealth v. Luscomb*, 130 Mass. 42.

⁸² *Polinsky v. People*, 73 N. Y. 65. See also, *People v. Wright*, 19 Misc. (N. Y.) 135, 43 N. Y. S. 290.

⁸³ *Commonwealth v. Waite*, 11 Allen (Mass.) 264, 87 Am. Dec. 711.

⁸⁴ *People v. Salisbury*, 2 App. Div. (N. Y.) 39, 37 N. Y. S. 420. As to

relevant,⁸⁵ if it appears that the test was not too remote in point of time from the violation complained of. The defendant may introduce evidence to discredit the results of an analysis made by an official. He may show that there has been no physical interference with the milk since it was taken from the cows,⁸⁶ that the chemist was inefficient or inexperienced, that the test was made inaccurately,⁸⁷ or under unfair conditions, as when the sample taken does not fairly represent the article whose quality is in question.⁸⁸

The facts ascertained by a test or analysis may by statute be made conclusive. Such a statute is not unconstitutional as depriving one of liberty or property without due process of law provided it is also enacted that the accused, as well as the prosecution may offer in evidence the result of an analysis.⁸⁹ In the absence of express provision a statutory mode of procuring a sample by a food inspector is not exclusive. In New York the statute provides that the accused shall be furnished with a sample of the milk taken by the inspector which shall be placed in a sealed jar and given to the person who delivers the adulterated milk. The question whether the sample given by the inspector fairly represents the milk is for the jury on all the facts.⁹⁰ The evidence against the prisoner arising from an analysis of a sample cannot be rejected because the sample was obtained by purchase rather than by a taking under the statute.⁹¹ A food inspector is

skimmed milk, see *People v. Koster*, 121 App. Div. (N. Y.) 852, 106 N. Y. S. 793.

⁸⁵ It may be dispensed with and adulteration otherwise proved. *Copeland v. Boston Dairy Co.*, 189 Mass. 342, 75 N. E. 704; *Commonwealth v. Nichols*, 10 Allen (Mass.) 199. See as to analysis of oleomargarine, *People v. Wahle*, 124 App. Div. (N. Y.) 762, 109 N. Y. S. 629.

⁸⁶ *People v. Salisbury*, 2 App. Div. (N. Y.) 39, 37 N. Y. S. 420.

⁸⁷ *State v. Groves*, 15 R. I. 208.

⁸⁸ *People v. Hodnett*, 68 Hun (N. Y.) 341, 22 N. Y. S. 809. The ac-

cused may prove that some statutory requirement, as delivering to him a sealed bottle containing a duplicate sample of the article, has not been complied with. *Commonwealth v. Lockhardt*, 144 Mass. 132, 10 N. E. 511.

⁸⁹ *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; following *People v. Eddy*, 59 Hun (N. Y.) 615, 12 N. Y. S. 628. Compare *St. Louis v. Bippen*, 201 Mo. 528, 100 S. W. 1048.

⁹⁰ *People v. Weaver*, 116 App. Div. (N. Y.) 594, 101 N. Y. S. 961.

⁹¹ *Commonwealth v. Coleman*, 157 Mass. 460, 32 N. E. 662.

not the only proper witness to prove adulteration. Any person having competent knowledge may testify.⁹²

§ 482. Keeping disorderly house.—A disorderly house is one where lewd, drunken, idle and dissolute persons resort; or whose inmates behave themselves so badly that it is a nuisance to the neighbors;⁹³ as a bawdy house, gambling house,⁹⁴ or liquor saloon carried on so as to violate the law,⁹⁵ or any habitation which is obnoxious by reason of the habitual disturbance, noise or violent conduct which prevails there. Proof that a house was resorted to by persons for the purpose of prostitution is, at common law, sufficient to sustain the charge of keeping a disorderly house.⁹⁶ It is not usually necessary to show that the house was kept for gain. And specific acts of immorality committed elsewhere by persons who frequent the house are admissible to establish the reputation of such persons.⁹⁷ The evidence of those who have gone to the house for such purpose is always competent, though not indispensable, for any witness having a knowledge of the circumstances may relate what he knows. And the commission of an act of prostitution may be inferred from circumstances that would ordinarily justify an inference of sexual intercourse in a trial for adultery or fornication.⁹⁸ Direct evidence is not necessary.⁹⁹

⁹² Commonwealth v. Spear, 143 Mass. 172, 9 N. E. 632; People v. Bailey, 120 N. Y. S. 618; People v. Jones, 195 N. Y. 547, 88 N. E. 1127; State v. Martin (N. J., 1909), 73 Atl. 548. It need not be shown that imitation butter or any adulterated article was calculated to deceive the particular person who bought it, if it appears that it was an intentional imitation and calculated to deceive some person. People v. Arnsberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. 483.

⁹³ Cahn v. State, 110 Ala. 56, 20 So. 380; Price v. State, 96 Ala. 1, 11 So. 128; People v. Jones, 129 App. Div. (N. Y.) 772, 113 N. Y. S. 1097; Arenz v. Commonwealth, 125 Ky. 737, 102 S. W. 238, 31 Ky. L. 321; Botts v. United

States, 155 Fed. 50, 83 C. C. A. 646; Hall v. United States, 155 Fed. 52, 84 C. C. A. 215.

⁹⁴ Arenz v. Commonwealth, 125 Ky. 737, 102 S. W. 238, 31 Ky. L. 321.

⁹⁵ People v. Eckman, 63 Hun (N. Y.) 209, 18 N. Y. S. 654.

⁹⁶ Commonwealth v. Goodall, 165 Mass. 588, 43 N. E. 520; State v. Young, 96 Iowa 262, 65 N. W. 160, 59 Am. St. 371; State v. Wilson, 124 Iowa 264, 99 N. W. 1060, 4 L. R. A. 676n.

⁹⁷ State v. Baans (N. J. L.), 71 Atl. 111.

⁹⁸ State v. Price, 115 Mo. App. 656, 92 S. W. 174.

⁹⁹ State v. Steen, 125 Iowa 307, 101 N. W. 96.

In a prosecution for keeping a house of ill fame, evidence that some of the inmates were women of ill fame or reputed to be common prostitutes is admissible¹⁰⁰ to prove that the accused knew the character of the house, and it seems that the character of the house may be inferred from the reputation of those who resort there without direct proof of disorderly acts or proof of a knowledge by the defendant of the purpose of their coming.¹

In a prosecution for keeping a disorderly house the character of the house may be proved by showing its general reputation in the community.² A statute which provides for the introduction in evidence of the general reputation of a house is not unconstitutional.^{2a}

The reputation of the house as given in evidence may extend for two or three years prior to the earliest date alleged in the indictment provided it was during that time occupied by the accused;³ but proof that the premises mentioned in the indictment had possessed for several years past the reputation of being a disorderly house will not alone be sufficient to warrant a conviction for there must be some evidence aside from reputation which corroborates the proof of reputation, and this may be either direct or circumstantial.⁴ A statute providing that the character of the

¹⁰⁰ *People v. Russell*, 110 Mich. 46, 67 N. W. 1099; *State v. Plant*, 67 Vt. 454, 32 Atl. 237, 48 Am. St. 821; *State v. Bresland*, 59 Minn. 281, 61 N. W. 450, 20 L. R. A. 612; *State v. Steen*, 125 Iowa 307, 101 N. W. 96; *Brown v. State* (Tex. Cr. 1898), 48 S. W. 176; *State v. Price*, 115 Mo. App. 656, 92 S. W. 174.

¹ *Weideman v. State*, 4 Ind. App. 397, 30 N. E. 920. Cf. *People v. Russell*, 110 Mich. 46, 67 N. W. 1099; *Callaghan v. State*, 36 Tex. Cr. 536, 38 S. W. 188; *State v. Olds*, 217 Mo. 305, 116 S. W. 1080; *State v. Price*, 115 Mo. App. 656, 92 S. W. 174; *Beard v. State*, 71 Md. 275, 17 Atl. 1044, 17 Am. St. 536, 4 L. R. A. 675n; *Henson v. State*, 62 Md. 230, 50 Am. 204n; *Herzinger v. State*, 70 Md. 278, 17 Atl. 81; *State v. Kelly*, 76 N. J. L. 576, 70 Atl. 342.

² *Sprague v. State* (Tex. Cr. 1898), 44 S. W. 837; *State v. Steen*, 125 Iowa 307, 101 N. W. 96; *Wimberly v. State*, 53 Tex. Cr. 11, 108 S. W. 384; *Marchen v. State*, 53 Tex. Cr. 115, 109 S. W. 126; *McConnell v. State*, 2 Ga. App. 445, 58 S. E. 546; *Owens v. State*, 53 Tex. Cr. 1, 108 S. W. 379; *Moore v. State*, 53 Tex. Cr. 559, 110 S. W. 911; *State v. Anderson* (Conn., 1909), 75 Atl. 81; *Lismore v. State* (Ark., 1910), 126 N. W. 853.

^{2a} *State v. Wilson*, 124 Iowa 264, 99 N. W. 1060.

³ *Sprague v. State* (Tex. Cr. 1898), 44 S. W. 837; *Frazier v. State*, 47 Tex. Cr. 24, 81 S. W. 532; *People v. Wheeler*, 142 Mich. 212, 105 N. W. 607, 12 Det. Leg. N. 684.

⁴ *Botts v. United States*, 155 Fed. 50, 83 C. C. A. 646; *Hall v. United States*, 155 Fed. 52, 84 C. C. A. 215;

house as a disorderly house may be proved by reputation is cumulative and does not exclude evidence of facts and circumstances which may prove the character of the house independently of reputation. Any evidence tending to show what business was carried on in the house, and in what manner, the situation of and furniture in the rooms, the character of persons who went there, how and when they made their visits, what they did at the house, the purpose of their visits and similar facts is admissible. It may be shown that liquor was sold at the house, that prostitution was indulged in and that men came to the house at all hours of the night in cabs and otherwise.⁵ Evidence is always relevant which tends to show the disorderly, lewd,⁶ or boisterous⁷ actions of the occupants, inmates and frequenters of the house; and the noise and uproar which were observed to proceed therefrom. The character of the house, and the purpose for which it is used, are questions for the jury.⁸

A person may be convicted of keeping⁹ a disorderly house, though no direct evidence was offered to show he was a lessee or tenant¹⁰ or that he had power to suppress the disorder; or that he took part therein. Whether the bad character of the defendant for chastity is admissible, depends largely upon the purpose with which the disorderly house is kept. If it is a bawdy house, the previous unchastity of the accused and of the inmates is relevant,¹¹ otherwise not.¹²

§ 483. Dueling—Sending a challenge to fight a duel.—The act of participating in a duel, either as a principal, second or spectator

McConnell v. State, 2 Ga. App. 445, 58 S. E. 546.

⁵ State v. Cambron, 20 S. Dak. 282, 105 N. W. 241; Beard v. State, 71 Md. 275, 17 Atl. 1044, 17 Am. St. 536, 4 L. R. A. 675; Commonwealth v. Cardoze, 119 Mass. 210; Sullivan v. State, 75 Wis. 650, 44 N. W. 647; State v. Williams, 30 N. J. L. 102.

⁶ Beard v. State, 71 Md. 275, 17 Atl. 1044, 17 Am. St. 536, 4 L. R. A. 675n; State v. Cambron, 20 S. Dak. 282, 105 N. W. 241.

⁷ People v. Jones, 129 App. Div. (N. Y.) 772, 113 N. Y. S. 1097.

⁸ People v. Drum, 127 App. Div. (N. Y.) 241, 110 N. Y. S. 1096.

⁹ State v. Schaffer, 74 Iowa 704, 39 N. W. 89; Griffin v. People, 44 Colo. 533, 99 Pac. 321.

¹⁰ Stone v. State, 47 Tex. Cr. 575, 85 S. W. 808.

¹¹ Betts v. State, 93 Ind. 375; Whitlock v. State, 4 Ind. App. 432, 30 N. E. 934.

¹² Gamel v. State, 21 Tex. App. 357, 17 S. W. 158. No actual lease or rental to disorderly persons need be proved. Stratton v. State (Tex. Cr. 1898), 44 S. W. 506, 20 L. R. A. 610n.

is merely a misdemeanor, unless one of the principals is slain, in which case all participants are guilty of murder.¹³ Where one is indicted for taking part in a duel, it is not absolutely necessary to allege and prove the actual sending of a challenge, either spoken or written.¹⁴ If, however, it is alleged that a written challenge was sent, it will be necessary to prove it substantially as alleged, and, *a fortiori*, this is the case where the indictment is merely for sending the challenge.¹⁵ The question whether the accused intended to challenge another person to fight a duel is ordinarily a question of fact for the jury.¹⁶ The written challenge must be proved by producing it as primary evidence, or by secondary evidence, after sufficiently accounting for its absence. If the challenge is set out at full length in the indictment, a failure to prove it in some slight particular is not material.¹⁷ The meaning of the writing purporting to be a challenge and the intent of the sender are for the jury. Whether it was intended for a deliberate challenge to mortal combat or was merely a foolish and idle boast, or the meaningless outpouring of irrepressible passion, is for them to determine.¹⁸ As all who participate in any capacity in the duel are accomplices, the declarations of any one of them, uttered in furtherance of the common undertaking, are admissible against any or all the others.¹⁹

§ 484. Carrying concealed weapons—How concealment may be shown—Intent.—To protect individuals against sudden and deadly violence, inflicted with weapons concealed about or conveniently near the person, whether used on sudden impulse or deliberately, statutes have been passed forbidding the carrying of concealed weapons. Though the open carrying of unusual and dangerous weapons was an offense at common law, because it tended to

¹³ 4 Bl. Com. 199, 145; 2 Bish. Cr. L. §§ 311-315; 1 Russ. Cr. (9th edition) 413; 3 Chitty Cr. Law 728, 848; Bundrick v. State, 125 Ga. 753, 54 S. E. 683.

¹⁴ Daughtry v. State, 54 Tex. Cr. 394, 113 S. W. 14.

¹⁵ Commonwealth v. Hooper, Thatcher C. C. (Mass.) 400; Ward v. Commonwealth (Ky., 1909), 116 S. W. 786.

¹⁶ Ward v. Commonwealth (Ky., 1909), 116 S. W. 786.

¹⁷ State v. Farrier, 1 Hawks (N. Car.) 487.

¹⁸ Ivey v. State, 23 Ga. 576.

¹⁹ State v. Dupont, 2 McCord (S. Car.) 334; State v. Taylor, 3 Brev. (S. Car.) 243; Commonwealth v. Boott, Thatcher Cr. Cas. (Mass.) 390.

terrify and alarm peaceable persons,²⁰ evidence is always admissible, under these statutes, to show that the weapon, though carried, was not concealed on the occasion charged;²¹ but not that the accused was generally in the habit of carrying weapons on his person, openly exposed to view.²² The concealment of the weapon, with an intent to produce the impression of being unarmed, must be shown affirmatively.²³

If concealed, the jury may infer that the weapon, if a pistol, was loaded, and was worn as a weapon. This is a presumption of fact, not of law, and is rebuttable.²⁴ The burden is upon the prosecution to prove beyond a reasonable doubt that the weapon was concealed or carrying in concealment on the person of the accused.²⁵ That the weapon was so hidden that it could not possibly be seen, in whatever posture the accused might be, need not be proved. If it was not visible to those meeting him in the customary and ordinary associations of social and commercial intercourse, the jury will be justified in finding that it was concealed.²⁶ Hence, proof that the weapon was carried in a locked

²⁰ 4 Bl. Com. 149; *State v. Huntly*, 3 Ired. (N. Car.) 418, 421, 40 Am. Dec. 416. It is sometimes by statute made a misdemeanor to point a firearm at another person, whether the weapon be loaded or not. *Herrington v. State*, 121 Ga. 141, 48 S. E. 908; *Elliott Evidence*, § 3166; *Davenport v. State*, 112 Ala. 49, 20 So. 971; *Sturgeon v. Commonwealth (Ky.)*, 37 S. W. 679, 8 Ky. L. 668; *Anderson v. State*, 133 Wis. 601, 114 N. W. 112.

²¹ *Stockdale v. State*, 32 Ga. 225, 227; *State v. Roten*, 86 N. Car. 701, 703; *Smith v. State*, 69 Ind. 140-143; *Plummer v. State*, 135 Ind. 308, 318, 34 N. E. 968; *Brown v. State*, 141 Ala. 80, 37 So. 408.

²² *Washington v. State*, 36 Ga. 242, 244.

²³ *State v. Pigford*, 117 N. Car. 748, 23 S. E. 182; *State v. Gilbert*, 87 N. Car. 527, 528, 42 Am. 518; *Ridenour v. State*, 65 Ind. 411, 413; *Burst v. State*, 89 Ind. 133; *Carr v. State*, 34

Ark. 448, 450, 36 Am. 15; *State v. Johnson*, 16 S. Car. 187; *Martin v. State*, 93 Miss. 764, 47 So. 426; *State v. Miles*, 124 Mo. App. 283, 101 S. W. 671; *Edwards v. State*, 126 Ga. 89, 54 S. E. 809.

²⁴ *Carr v. State*, 34 Ark. 448, 450, 36 Am. 15.

²⁵ *People v. Carvelto*, 123 App. Div. (N. Y.) 822, 108 N. Y. S. 126; *Schroeder v. State*, 50 Tex. Cr. 111, 99 S. W. 1003.

²⁶ *Smith v. State*, 96 Ala. 66, 68, 11 So. 71; *State v. Bias*, 37 La. Ann. 259; *Killet v. State*, 32 Ga. 292, 294; *Sutton v. State*, 12 Fla. 135; *Hainey v. State*, 147 Ala. 146, 41 So. 908. Under the rule that as between witnesses having equal opportunities of observation, the positive testimony of one that an event happened is entitled to more weight than the evidence of another that, though present, he did not see it; a conviction upon the testimony of one who swears he

satchel,²⁷ in a wagon box on which the defendant was seated,²⁸ in a bundle,²⁹ in the pocket,³⁰ in a scabbard,³¹ in a basket on one's arm,³² or standing near by in a railroad car,³³ not as a means of transportation, but for more convenient access and use, is admissible, and will sustain a conviction.³⁴ Evidence that the defendant, when arrested for another offense which is not proved, voluntarily surrendered a weapon, is admissible as a *quasi*-confession of concealment, and will alone sustain a conviction.³⁵ Evidence that he threatened a man with a weapon, or had one in his possession shortly before the act charged, is admissible.³⁶

The accused may show that the concealment involved no criminal intent. He will not usually be permitted to testify in express

saw the weapon will be sustained, though another swears he looked attentively but did not. *Fitzgerald v. State*, 12 Ga. 213, 216; but *contra*, *Haskew v. State*, 7 Tex. App. 107; *Underhill on Ev.*, § 385. As to what evidence is negative, see *Hunter v. State*, 4 Ga. App. 761, 62 S. E. 466. The jury may, in weighing the testimony of a witness who says that he did not see the weapon, consider what opportunity he had to see it in connection with all the evidence. *Newell v. State*, 109 Ala. 5, 19 So. 511. *Cf.*, also, *Howe v. State*, 110 Ala. 54, 20 So. 451. The witness will be permitted to state that he saw "something that looked like a pistol" in the pocket of defendant. *Mayberry v. State*, 107 Ala. 64, 18 So. 219.

²⁷ *Warren v. State*, 94 Ala. 79, 10 So. 838; *Commonwealth v. Sturgeon* (Ky.), 37 S. W. 680, 18 Ky. L. 613.

²⁸ *Barnes v. State*, 89 Ga. 316, 318, 15 S. E. 313.

²⁹ *Edwards v. State*, 126 Ga. 89, 54 S. E. 809.

³⁰ *Scott v. State*, 94 Ala. 80, 81, 10 So. 505. If a weapon was seen in the defendant's hand a few minutes after he had made a manual motion

towards his pocket, concealment in the pocket may be inferred. *State v. Livesay*, 30 Mo. App. 633, 636.

³¹ *Barton v. State*, 7 Baxt. (Tenn.) 105; *Williams v. Commonwealth* (Ky.), 37 S. W. 680, 18 Ky. L. 663.

³² *Boles v. State*, 86 Ga. 255, 257, 12 S. E. 361; *Johnson v. State*, 51 Tex. Cr. 648, 104 S. W. 902.

³³ *Diffey v. State*, 86 Ala. 66, 67, 5 So. 576.

³⁴ *State v. McManus*, 89 N. Car. 555.

³⁵ *Terry v. State*, 90 Ala. 635, 636, 8 So. 664. A person under arrest for any crime may be searched for concealed weapons and disarmed. The facts thus ascertained may be proved against him on his trial for carrying such weapons, and may be sufficient for his conviction. His constitutional rights are not infringed thereby, nor is he required to furnish evidence against himself. *Chastang v. State*, 83 Ala. 29, 30, 3 So. 304; *Springer v. State*, 121 Ga. 155, 48 S. E. 907; *Shields v. State*, 104 Ala. 35, 16 So. 85, 53 Am. St. 17.

³⁶ *O'Neal v. State*, 32 Tex. Cr. 42, 44, 22 S. W. 25; *Dean v. State*, 98 Ala. 71, 13 So. 318; *Etrass v. State*, 88 Ala. 191, 7 So. 49.

terms that he did not intend to carry the weapon.³⁷ He may prove that the weapon was not concealed or carried as arms,³⁸ but for the purpose of having it cleaned,³⁹ or repaired,⁴⁰ or returning it to its owner,⁴¹ or shooting at a mark,⁴² or that he had found it,⁴³ or bought it to sell again,⁴⁴ and was carrying it home, to negative the criminal intent.⁴⁵

§ 485. **Apprehension of danger as a defense.**—The burden is on the defendant to prove, as an affirmative defense, that he feared bodily harm,⁴⁶ but it is not enough for him to show apparent or simulated threats, or those couched in vague and general language,⁴⁷ or made by a person who is under bonds to keep the peace,⁴⁸ or that a criminal, whom the defendant arrested, was

³⁷ *State v. Simmons*, 143 N. Car. 613, 56 S. E. 701.

³⁸ *Page v. State*, 3 Heisk. (Tenn.) 198n, holding, also, that proof of a single act of carrying a weapon will sustain a conviction.

³⁹ *Boissean v. State*, (Tex., 1890), 15 S. W. 118.

⁴⁰ *Pressler v. State*, 19 Tex. App. 52, 53 Am. 383; *Fitzgerald v. State*, 52 Tex. Cr. 265, 106 S. W. 365, 124 Am. St. 1095.

⁴¹ *State v. Brodnax*, 91 N. Car. 543, 544; *State v. Roberts*, 39 Mo. App. 47, 48.

⁴² *State v. Murray*, 39 Mo. App. 127, 130.

⁴³ *Mangum v. State*, 15 Tex. App. 362, 363.

⁴⁴ *State v. Gilbert*, 87 N. Car. 527, 529, 42 Am. 518; *Irvin v. State*, 51 Tex. Cr. 52, 100 S. W. 779.

⁴⁵ *State v. Harrison*, 93 N. Car. 605; *Granger v. State*, 50 Tex. Cr. 488, 98 S. W. 836; *Carr v. State*, 34 Ark. 448, 450, 36 Am. 15; *State v. Chippey*, 9 Houst. (Del.) 583; *Christian v. State*, 37 Tex. 475; but *contra*, *Cutsinger v. Commonwealth*, 7 Bush (Ky.) 392, 393; *State v. Martin*, 31 La. Ann. 849;

Walls v. State, 7 Blackf. (Ind.) 572, 573; *Goldsmith v. State*, 99 Ga. 253, 25 S. E. 624; *State v. Woodfin*, 87 N. Car. 526, 527, holding the intention in concealment immaterial.

⁴⁶ *Skeen v. State*, 34 Tex. Cr. 308, 39 S. W. 554; *State v. Livesay*, 30 Mo. App. 633, 637; *Curlee v. State*, 53 Tex. Cr. 395, 110 S. W. 65.

⁴⁷ *Strother v. State*, 74 Miss. 447, 21 So. 147; *State v. Speller*, 86 N. Car. 697, 699; *Coffee v. State*, 4 Lea (Tenn.) 245, 246; *Shorter v. State*, 63 Ala. 129, 132. A threat, if recent, though unaccompanied by violence, is admissible if communicated to the accused, *State v. Venable*, 117 Mo. App. 501, 93 S. W. 356; but if enough time has elapsed to give the person threatened an opportunity to seek legal protection, it is inadmissible. *State v. Workman*, 35 W. Va. 367, 375, 14 S. E. 9, 14 L. R. A. 600n. The accused ought to convince the jury that he in fact believed the threats would be executed. *State v. Casto*, 119 Mo. App. 265, 95 S. W. 961.

⁴⁸ *O'Neal v. State*, 32 Tex. Cr. 42, 45, 22 S. W. 25.

known to be armed,⁵⁰ or that the accused feared a savage dog.⁵⁰

Evidence that many lawless men lived near the defendant,⁵¹ that he had been shot at two years before,⁵² and that he had been advised to go armed, is inadmissible.⁵³ The fact that the accused was expressly threatened by name by an armed man with whom he had quarreled,⁵⁴ and, *a fortiori*, that his life is in imminent danger,⁵⁵ is enough. He need not prove that an attack was anticipated by him at any particular date,^{56a} or place,⁵⁶ to justify his belief that he is in immediate danger. To establish this defense, the accused must show facts from which the jury may infer that his purpose in carrying a weapon was defense against an attack which he had reason to apprehend. The conduct of the accused and of the prosecuting witness, their altercations and rencontres, specific threats, reported to the defendant as made, though not made in fact, hostile demonstrations or actual preparations for an assault, are all admissible to establish the defense of an apprehended attack.⁵⁷

§ 486. **Character of the defendant as an officer or traveler.**—The peaceable character of the accused is relevant to determine his motives and purpose in carrying the weapon. So it is sometimes provided by statute that he must be acquitted if he shall prove satisfactorily that he is a quiet and peaceable person, of good character in the community, and that he carried the weapon because he believed himself to be in great bodily danger.^{57a} The

⁵⁰ Reach v. State, 94 Ala. 113, 11 So. 414.

⁵¹ State v. Barnett, 34 W. Va. 74, 75, 76, 11 S. E. 735.

⁵² O'Neal v. State, 32 Tex. Cr. 42, 44, 22 S. W. 25. Evidence that lawless men who had once ill used and threatened the defendant were prowling about, armed, and without employment, is relevant. Hardin v. State, 63 Ala. 38, 40.

⁵³ Hopkins v. Commonwealth, 3 Bush (Ky.) 480.

⁵⁴ See Dillingham v. State (Tex., 1895), 32 S. W. 771; Brownlee v. State, 35 Tex. Cr. 213, 32 S. W. 1043;

Commonwealth v. Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606.

⁵⁵ Dooley v. State, 89 Ala. 90, 91, 8 So. 528.

⁵⁶ Coleman v. State, 28 Tex. App. 173, 174, 12 S. W. 590.

^{56a} Sudduth v. State, 70 Miss. 250, 11 So. 680.

⁵⁷ Bailey v. Commonwealth, 11 Bush (Ky.) 688, 692.

^{57a} Shorter v. State, 63 Ala. 129, 133, citing Baker v. State, 49 Ala. 350; State v. Venable, 117 Mo. App. 501, 93 S. W. 356.

^{57a} 103 Am. St. 904n.

official character of the defendant is often by statute relevant as a valid defense, and in such a case evidence is admissible,⁵⁸ to show that he is a sheriff, marshal, deputy marshal,⁵⁹ or other officer charged with the duty of preserving the peace, or serving judicial process,⁶⁰ or a mail carrier.⁶¹ The officer must show that he was actually engaged in executing process,⁶² or searching for or arresting a criminal,⁶³ and of these facts the existence of process is evidence. The process itself or a certified copy is the best evidence of its existence, and must be produced.⁶⁴

A written appointment offered to prove official character need not be technically correct if it was sufficient to cause the defendant to believe that he was exempt.⁶⁵ Persons traveling are sometimes privileged to carry concealed weapons. Whether a person is a traveler is usually for the jury to determine upon all the facts,⁶⁶ as, for example, quitting the neighborhood of one's acquaintances and friends, going among strangers, the distance covered and the purpose and objects contemplated in going, loitering or returning. These facts are, therefore, admissible in evidence.⁶⁷ The

⁵⁸ Including the declarations of the defendant, made while carrying the weapon, as a part of the *res gestæ*. *Irvine v. State*, 18 Tex. App. 51, 52.

⁵⁹ *Lee, In re*, 46 Fed. 59, 62, 63.

⁶⁰ *State v. Williams*, 72 Miss. 992, 18 So. 486; *Irvine v. State*, 18 Tex. App. 51, 53; *Snell v. State*, 4 Tex. App. 171, 172; *Carmichael v. State*, 11 Tex. App. 27, 28; *McIntyre v. State*, 170 Ind. 163, 83 N. E. 1005.

⁶¹ *Lott v. State*, 122 Ind. 393, 395, 24 N. E. 156. A person specially deputized by the court to make an arrest where a constable is not procurable may carry a pistol. *Jenkins v. State*, 47 Tex. Cr. 224, 82 S. W. 1036.

⁶² *Miller v. State*, 6 Baxt. (Tenn.) 449, 450.

⁶³ *State v. Wisdom*, 84 Mo. 177, 190.

⁶⁴ *Beasley v. State*, 5 Lea (Tenn.) 705, 706. The declaration of the accused that he carried a weapon coupled with a statement that he had a right to do so is not a confession.

State v. Abrams, 131 Iowa 479, 108 N. W. 1041.

⁶⁵ *Lyle v. State*, 21 Tex. App. 153, 17 S. W. 425. Evidence that he thought he was still an officer is inadmissible, if it clearly appears that his term had expired. *O'Neal v. State*, 32 Tex. Cr. 42, 22 S. W. 25.

⁶⁶ *Lawson v. State* (Tex., 1895), 31 S. W. 645; *Blackwell v. State*, 34 Tex. Cr. 476, 31 S. W. 380; *Price v. State*, 34 Tex. Cr. 102, 29 S. W. 473; *Dillingham v. State* (Tex., 1895), 32 S. W. 771; *Hathcote v. State*, 55 Ark. 181, 184, 17 S. W. 721; *Impson v. State* (Tex., 1892), 19 S. W. 677; *Wilson v. State*, 68 Ala. 41; *Lott v. State*, 122 Ind. 393, 395, 24 N. E. 156; *Stiwell v. State* (Ark., 1890), 12 S. W. 1014.

⁶⁷ *Davis v. State*, 45 Ark. 359, 361; *Wilson v. State*, 68 Ala. 41; *Carr v. State*, 34 Ark. 448, 449, 36 Am. 15; *Burst v. State*, 89 Ind. 133, 135.

presumption is that the accused is not a traveler and the burden of proof is on him to show this excuse.⁶⁸

§ 487. Forceful entry and detainer.—This is often by statute made a crime and consists of forcibly taking or keeping possession of lands and tenements by menaces, force and arms, and without authority of law.⁶⁹

Evidence to show title in the defendant or in some person for whom he is acting is irrelevant.⁷⁰ The object of the statute is not to determine to whom the premises belong of right, but to discourage a resort to violence and prevent a breach of the peace.

But it may be shown that the accused took possession by virtue of a judicial writ or order, regular upon its face, issuing from a court of competent jurisdiction. It cannot be proved collaterally that the process is void.⁷¹

Evidence tending to show the employment of force by the accused is always relevant. And to sustain a conviction such high-handed proceedings, or such a show of force must be proved as overawed and intimidated the injured party, and either deterred him from defending his possession, or coerced him into surrendering it.⁷² If the evidence shows the taking possession was peaceable and with the consent of all parties the accused must be acquitted.⁷³ It is not necessary, however, to show that the accused actually assaulted the owner or the person in possession.⁷⁴

⁶⁸ *Wiley v. State*, 52 Ind. 516, 519; *Brownlee v. State*, 35 Tex. Cr. 213, 32 S. W. 1043; *Easlick v. United States*, 7 Ind. Ter. 707, 104 S. W. 941; *Colson v. State*, 52 Tex. Cr. 138, 105 S. W. 507; *State v. Miles*, 124 Mo. App. 283, 101 S. W. 671. As to when the accused ceased to be a traveller by reaching his destination, see *Holland v. State*, 73 Ark. 425, 84 S. W. 468; *Rosaman v. Okolona*, 85 Miss. 583, 37 So. 641, 107 Am. St. 257; *Navarro v. State*, 50 Tex. Cr. 326, 96 S. W. 932.

⁶⁹ *Wiley v. State*, 52 Ind. 516, 519; *Brownlee v. State*, 35 Tex. Cr. 213, 32 S. W. 1043; *Easlick v. United States*, 7 Ind. Ter. 707, 104 S. W. 941; *Colson v. State*, 52 Tex. Cr. 138, 105 S. W. 507; *State v. Miles*, 124 Mo. App. 283, 101 S. W. 671. As to when the accused ceased to be a traveller by reaching his destination, see *Holland v. State*, 73 Ark. 425, 84 S. W. 468; *Rosaman v. Okolona*, 85 Miss. 583, 37 So. 641, 107 Am. St. 257; *Navarro v. State*, 50 Tex. Cr. 326, 96 S. W. 932.

⁷⁰ "The entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained

with force, with violence, and unusual weapons." 4 Bl. Com. 148.

⁷¹ *Lasserot v. Gamble* (Cal., 1896), 46 Pac. 917; *Vess v. State*, 93 Ind. 211, 215.

⁷² *Vess v. State*, 93 Ind. 211, 215.

⁷³ *Strong v. State*, 105 Ind. 1, 4, 4 N. E. 293; *State v. Glenn*, 130 Mo. App. 145, 108 S. W. 1073; *State v. Leary*, 136 N. Car. 578, 48 S. E. 570; *State v. Pollok*, 4 Ired. (N. Car.) 305, 42 Am. Dec. 140.

⁷⁴ *Strong v. State*, 105 Ind. 1, 5, 4 N. E. 293.

⁷⁵ *Ellis v. State*, 124 Ga. 91, 52 S. E. 147, in which the court said: "If, at

§ 488. **Affray.**—This offense has been defined as the fighting of two or more persons in some public place to the terror of his majesty's subjects.⁷⁵ If the fighting be private it is not an affray but an assault.⁷⁶ The state must prove as elements of the crime: First, the fighting. Second, the fact that it was in a public place. Third, that it was in terror of the king's subjects, and, fourth, that two or more persons were engaged in it.⁷⁷ Evidence of any fact which shows or tends to show an assault and battery by one person on another is admissible to prove the fighting.⁷⁸ The declarations of any one implicated, uttered during the affray or which are otherwise a part of the *res gestæ*, are admissible against any of the others.⁷⁹ The accused may always prove in justification that he was attacked and that he fought to defend himself.⁸⁰ But he cannot put in evidence his belief that he was in danger to sustain this defense. The burden of proof is on him to show that he fought in self-defense.⁸¹ It must also be proved that the fighting was in public.⁸²

the time the effort to re-enter is made, there be an exhibition, by words, acts, or circumstances, calculated to intimidate the former possessor, and to impress on him an intention on the part of the person unlawfully detaining the premises to hold possession of them by force and violence, the offense is complete."

⁷⁵ 4 Bl. Com. 145; Thompson v. State, 70 Ala. 26; State v. Brewer, 33 Ark. 176; State v. Davis, 65 N. Car. 298; State v. Perry, 5 Jones (N. Car.) 9, 69 Am. Dec. 768; State v. Priddy, 4 Humph. (Tenn.) 429; Simpson v. State, 5 Yerg. (Tenn.) 356; Pollock v. State, 32 Tex. Cr. 29, 22 S. W. 19; State v. Freeman, 127 N. Car. 544, 37 S. E. 206.

⁷⁶ Thompson v. State, 70 Ala. 26; State v. Stanly, 4 Jones (N. Car.) 290; State v. Heflin, 8 Humph. (Tenn.) 84; Simpson v. State, 5 Yerg. (Tenn.) 356.

⁷⁷ Roscoe's Crim. Ev. 270.

⁷⁸ Ohio v. Foy, Tappan (Ohio) 71; Simpson v. State, 5 Yerg. (Tenn.)

⁷⁹ State v. Harrell, 107 N. Car. 944, 12 S. E. 439; McClellan v. State, 53 Ala. 640; Childs v. State, 15 Ark. 204; Commonwealth v. Simmons, 6 J. J. Marsh (Ky.) 614; State v. Warren, 57 Mo. App. 502; State v. Huntly, 3 Ired. (N. Car.) 418, 40 Am. Dec. 416.

⁸⁰ Coyle v. State (Tex. Cr.), 72 S. W. 847; People v. Moore, 3 Wheeler Cr. (N. Y.) 82.

⁸¹ State v. Barringer, 114 N. Car. 840, 19 S. E. 275.

⁸² Skains v. State, 21 Ala. 218; Carwile v. State, 35 Ala. 392; Taylor v. State, 22 Ala. 15; State v. Heflin, 8 Humph. (Tenn.) 84; State v. Warren, 57 Mo. App. 502; State v. Woody, 2 Jones (N. Car.) 335; State v. Sumner, 5 Strobt. (S. Car.) 53; Shelton v. State, 30 Tex. 431; Reg. v. Hunt, 1 Cox. C. C. 177; Gamble v. State, 113 Ga. 701, 39 S. E. 301; State v. Fritz, 133 N. Car. 725, 45 S. E. 957; Piper v. State (Tex. Cr.), 51 S. W. 1118

§ 489. **Riot.**—Where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as, if they beat a man, or do other unlawful act with force, or even a lawful act, as removing a nuisance, in a violent and tumultuous manner,⁸³ it is a riot. There must not only be a common intent to do an unlawful act or some lawful act in a violent manner but also concert of action.⁸⁴ An unlawful assembly must be proved. Then whatever act will constitute a trespass may substantiate a charge of riot.⁸⁵ The defendant's connection with the unlawful assembly must be shown by evidence satisfactory to the jury. His purpose and intent may be inferred from the circumstances.⁸⁶ As soon as it is proved, he will become responsible for all the acts and declarations of the others made during the progress of the riot.⁸⁷ If during the riot some one is killed, it is not necessary to prove that he struck the fatal blow. It is suffi-

⁸³ 4 Bl. Com. 146; *Whitley v. State*, 66 Ga. 656. As by cursing and threatening a man in his house and by repeatedly firing a gun. *Lewis v. State*, 2 Ga. App. 659, 58 S. E. 1070; *Croy v. State*, 4 Ga. App. 457, 61 S. E. 847. If three persons have a common purpose to do an unlawful violent act it is not material that the act of each individual was separate. *State v. Mizis*, 48 Ore. 165, 85 Pac. 611, rehearing denied, 86 Pac. 361. In *Reg. v. Soley*, 11 Modern 115, the court, on p. 116, said: "The books are obscure in the definition of riots. I take it, it is not necessary to say they assembled for that purpose, but there must be an unlawful assembly, * * * such an act as will make a trespass will make a riot. If a number of men assemble with arms, *in terrorem populi*, though no act is done, it is a riot. If three come out of an alehouse and go armed, it is a riot. Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened, for he is in the protection of the law, which is sufficient for his defense."

⁸⁴ *Stanfield v. State*, 1 Ga. App. 532,

57 S. E. 953; *Jemley v. State*, 121 Ga. 346, 49 S. E. 292.

⁸⁵ "A riot is a common-law offense, and is said to be a tumultuous disturbance of the peace, by three or more persons, assembled together, of their own authority, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." *State v. Russell*, 45 N. H. 83, 84; *Commonwealth v. Runnels*, 10 Mass. 518, 6 Am. Dec. 148; *People v. Judson*, 11 Daly (N. Y.) 1; *State v. Cole*, 2 McCord (S. Car.) 117; *State v. Connolly*, 3 Rich. (S. Car.) 337; *State v. Brooks*, 4 Hill (S. Car.) 361; *People v. Gregory*, 120 Cal. 16, 52 Pac. 41; *Hunter v. State*, 127 Ga. 43, 55 S. E. 1044; *Carter v. State* (Ga. App., 1909), 65 S. E. 1072.

⁸⁶ *State v. Seeley*, 51 Oreg. 131, 94 Pac. 37.

⁸⁷ *Shuler v. State*, 126 Ga. 630, 55 S. E. 496.

cient to prove that some one implicated in the unlawful assembly struck the blow, though it may not appear who it was.⁸⁸ All the circumstances attending the riotous assemblage including the facts showing the violence or force employed, the threats, oaths and outcries of those participating, and their other declarations being a part of the *res gestæ* and showing intention are relevant in evidence. It may also be shown what was done by the prosecuting witness or by members of his family or other persons not incriminated with the accused. It may be shown that the prosecuting witness or his wife fainted and was terrified by the action of the rioters, and missiles or arms used by the rioters and identified with the scene of the riot may also be introduced in evidence.⁸⁹

§ 490. Conspiracy.—When two or more persons unite to execute a purpose to injure or destroy the life, or the property, or personal rights of another, a conspiracy exists. The mere combination of persons to do a criminal act is a crime, even though the object of the combination is not consummated. Here the gist of the crime is the conspiracy, and, both at common law and under statute, any participant may be indicted for his share in the illicit transaction. But usually the proof of a conspiracy is merely incidental to proving some other crime in which several have taken part. Thus, where a man has been killed as the result of

⁸⁸ *State v. Jenkins*, 14 Rich. (S. Car.) 215, 94 Am. Dec. 132n. See generally, Hawk. P. C. Ch. 65; 5 Burns Justice 142; 2 Chitty Cr. Law 488; 3 Greenl. Ev., § 216; 2 Wharton Am. Cr. L. (10th ed.), § 1542; Roscoe Cr. Ev., 902; and *State v. Renton*, 15 N. H. 169, 172. "The law does not distinguish between the relative degree of violence used by individuals, but every one who participates is responsible for all that has taken place. * * * It is not necessary that a party should commit personal violence; being armed with offensive weapons, or making use of threatening speeches or turbulent gestures; indeed, any act of assistance or encouragement is sufficient to make him a principal."

"Where many individuals are acting separately, or in small parties distinct from each other, at different times and at different places, but manifestly for the same general purpose, as to break into a theater, or to injure it by the throwing of stones, and missiles, or to resist or attack those who are there in authority to preserve the peace, it is not a series of affrays but a general riot." *People v. Judson*, 11 Daly (N. Y.) 1, 17, 83, 84.

⁸⁹ *Johnson v. State*, 124 Ga. 656, 52 S. E. 880; *Elliott Evidence*, § 3128.

Order of proof, *Elliott Evidence*. § 3124; presumptions and burden of proof, § 3124; number of persons. § 3125; proof of participation, § 3126; proof of terror of the people, § 3127.

a preconcerted assault upon him by several persons, it becomes necessary to prove a conspiracy to show the relations of the accused persons to one another. But generally it is not material that the plan which was carried out differs widely from the original plan, nor will it be required to show the existence of any previous plan if, from the evidence, it seems clear that there had been negotiations to the same end.⁹⁰

§ 491. **Circumstantial evidence.**—Direct evidence is not essential to prove the conspiracy. It need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design.⁹¹ The existence of the assent of minds which is involved in a conspiracy may be, and, from the secrecy of the crime, usually must be, inferred by the jury from proof of facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole.⁹² If

⁹⁰ *Grogan v. State*, 63 Miss. 147, 152; *Spies v. People*, 122 Ill. 1, 229, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320n; *Commonwealth v. Waite*, 11 Allen (Mass.) 264, 87 Am. Dec. 711; *State v. Messner*, 43 Wash. 206, 86 Pac. 636.

At common law the crime of conspiracy is complete without an overt act, *State v. Dalton*, 134 Mo. App. 517, 114 S. W. 1132; but, under the United States statute, there must not only be a combination to commit a crime, but also an overt act done to carry into effect the object of the conspiracy. *United States v. Cole*, 153 Fed. 801. If the object of a conspiracy is criminal, or if the means by which a legal purpose is to be carried out are criminal, the conspiracy is a criminal conspiracy. *State v. Stockford*, 77 Conn. 227, 58 Atl. 769, 107 Am. St. 28; but a conspiracy may be criminal though the purpose to be carried out would not have been criminal if performed by a single individual. The means of accomplishing the purpose or the purpose itself may be-

come criminal by reason of the fact that the combination renders it more easy of accomplishment. *State v. Dalton*, 134 Mo. App. 517, 114 S. W. 1132.

⁹¹ *United States v. Babcock*, 3 Dill C. C. (U. S.) 581, 585, 24 Fed. Cas. 14487; *People v. Miles*, 123 App. Div. (N. Y.) 862, 108 N. Y. S. 510; *Morris v. State*, 146 Ala. 66, 41 So. 274; *McLeroy v. State*, 125 Ga. 240, 54 S. E. 125; *State v. Walker*, 124 Iowa 414, 100 N. W. 354; *People v. Woods*, 147 Cal. 265, 81 Pac. 652.

⁹² *Hunter v. State*, 112 Ala. 77, 21 So. 65; *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *Spies v. People*, 122 Ill. 1, 101-158, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320n; *United States v. Sacia*, 2 Fed. 754, 758; *Mussel Slough Case*, 5 Fed. 680, 683, 684; *State v. Anderson*, 92 N. Car. 732, 747; *Kelley v. People*, 55 N. Y. 565, 576, 14 Am. 342; *United States v. Graff*, 14 Blatchf. C. C. (U. S.) 381; *O'Brien v. State*, 69 Neb. 691, 96 N. W. 649; *Sanderson v. State*, 169 Ind. 301, 82 N. E. 525; *Chapline v. State*, 77 Ark.

it is proved that two or more persons aimed by their acts towards the accomplishment of the same unlawful object, each doing a part so that their acts, though apparently independent, were in fact connected and co-operative, indicating a closeness of personal association and a concurrence of sentiment, a conspiracy may be inferred though no actual meeting among them to concert means is proved.⁹³ Evidence of actual participation, rather than of passive acquiescence, is desirable. But proof of acquiescence in, or consent to, the actions of others is relevant to show the criminal intention of the passive party, and generally the smallest degree of consent or collusion among parties lets in the act or words of one against the others.⁹⁴ The details of the conspiracy need not be proved. If a community of purpose among the parties to do some criminal act or acts is shown, it is not necessary that the acts which are charged, or of which evidence has been given, were specifically contemplated by them or included in the original design. In other words, if some general community of interest and purpose to do some act is shown, the declarations are admissible.

444. 95 S. W. 477; *Brummett v. Commonwealth* (Ky.), 108 S. W. 861, 33 Ky. L. 355; *People v. Simmons*, 125 App. Div. (N. Y.) 234, 109 N. Y. S. 190; *Lawrence v. State*, 103 Ind. 17, 63 Atl. 96; *Collins v. State*, 138 Ala. 57, 34 So. 993; *Butt v. State*, 81 Ark. 173, 98 S. W. 723, 118 Am. St. 42; *Smith v. State*, 46 Tex. Cr. 267, 81 S. W. 936, 108 Am. St. 991; *State v. Lewis*, 51 Ore. 467, 94 Pac. 831; *People v. Moran*, 144 Cal. 48, 77 Pac. 777; *Ripley v. State*, 51 Tex. Cr. 126, 100 S. W. 943; *United States v. Cole*, 153 Fed. 801.

Classification of, 97 Am. St. 773, note; liberality of rule admitting, 97 Am. St. 782; necessity for receiving, 97 Am. St. 772; facts admissible, 97 Am. St. 782; relative value of circumstantial and direct evidence, 97 Am. St. 774; when regarded as secondary, 97 Am. St. 788; to corroborate other

evidence, 97 Am. St. 788; instances of admissibility, 97 Am. St. 782; flight admissible as, 97 Am. St. 784; not admissible when direct evidence is withheld, 97 Am. St. 788; when insufficient to sustain a conviction, 97 Am. St. 774-778; must exclude every reasonable hypothesis except that of guilt, 97 Am. St. 776; failure of to explain suspicious circumstances, 97 Am. St. 783.

⁹³ *Spies v. People*, 122 Ill. 1, 101-158, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320; *Archer v. State*, 106 Ind. 426, 7 N. E. 225; *Lawrence v. State*, 103 Md. 17, 63 Atl. 96. Evidence to show that the conspirators were acquainted with one another, and were endeavoring to meet each other, is relevant. *Reinhold v. State*, 130 Ind. 467, 470, 30 N. E. 306.

⁹⁴ *State v. Anderson*, 92 N. Car. 732, 737, 747.

though a conspiracy to commit the offense in question is not proved.⁹⁵

§ 492. Admissibility of acts and declarations of co-conspirators.—

If a conspiracy is proved *prima facie* the acts or the declarations of any conspirator done in its prosecution and furtherance, or which form a part of the *res gestæ* of any act designed to advance the object of the conspiracy, which is already in evidence are admissible against any or all of the conspirators.⁹⁶ The safest

⁹⁵ State v. Anderson, 92 N. Car. 732, 737, 747; State v. Morton, 27 Vt. 310, 65 Am. Dec. 201.

⁹⁶ People v. McKane, 143 N. Y. 455, 470, 38 N. E. 950; State v. Ford, 37 La. Ann. 443; Card v. State, 109 Ind. 415, 419, 422, 9 N. E. 591; Williams v. State, 81 Ala. 1, 60 Am. 133; Spies v. People, 122 Ill. 1, 224, 228-9, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320n; State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. 23; Commonwealth v. O'Brien, 140 Pa. St. 555, 561, 21 Atl. 385; Horton v. State, 66 Ga. 690, 693; State v. James, 34 S. Car. 49, 53, 12 S. E. 657; People v. Collins, 64 Cal. 293, 295, 30 Pac. 847; McKenzie v. State, 32 Tex. Cr. 568, 25 S. W. 426, 40 Am. St. 795; Commonwealth v. Brown, 14 Gray (Mass.) 419; Williams v. State, 47 Ind. 568, 572; State v. Carson, 36 S. Car. 524, 15 S. E. 588; State v. Green, 40 S. Car. 328, 18 S. E. 933, 42 Am. St. 872; People v. Collins, 64 Cal. 293, 30 Pac. 847; Priest v. State, 10 Neb. 393, 399, 6 N. W. 468; State v. Weasel, 30 La. Ann. 919; State v. Thibau, 30 Vt. 100, 104; Bennett v. State, 62 Ark. 516, 36 S. W. 947; State v. Lewis, 96 Iowa 286, 65 N. W. 295; State v. Byers, 16 Mont. 565, 41 Pac. 708; Hunter v. State, 112 Ala. 77, 21 So. 65; Commonwealth v. Huntor, 168 Mass. 130, 46 N. E. 404; Weisenbach

v. State, 138 Wis. 152, 119 N. W. 843; Price v. State, 1 Okla. Cr. 358, 98 Pac. 447; Van Wyk v. People, 45 Colo. 1, 99 Pac. 1009; Long v. State, 55 Tex. Cr. 55, 114 S. W. 632; Baldwin v. State, 46 Fla. 115, 35 So. 220; Sanderson v. State, 169 Ind. 301, 82 N. E. 525; O'Brien v. State, 69 Neb. 691, 96 N. W. 649; Chadwick v. United States, 141 Fed. 225, 72 C. C. A. 343; State v. Kennard, 74 N. H. 76, 65 Atl. 376; Carter v. State, 106 Ga. 372, 32 S. E. 345, 71 Am. St. 262n; State v. Kenny, 77 S. Car. 236, 57 S. E. 859; Morris v. State, 146 Ala. 66, 41 So. 274; Toliver v. State, 142 Ala. 3, 38 So. 801; United States v. Francis, 144 Fed. 520; People v. Gregory, 120 Cal. 16, 52 Pac. 41; People v. Stokes, 5 Cal. App. 205, 89 Pac. 997; State v. Vaughan, 200 Mo. 1, 98 S. W. 2; State v. Dix, 33 Wash. 405, 74 Pac. 570; Butt v. State, 81 Ark. 173, 98 S. W. 723; Porter v. People, 31 Colo. 508, 74 Pac. 879; Schultz v. State, 133 Wis. 215, 113 N. W. 428; Collins v. State, 138 Ala. 57, 34 So. 993; Eacock v. State, 169 Ind. 488, 82 N. E. 1039; Raymond v. People, 226 Ill. 433, 80 N. E. 996; State v. Arthur, 135 Iowa 48, 109 N. W. 1083; Richards v. State, 53 Tex. Cr. 400, 110 S. W. 432; State v. Dilley, 44 Wash. 207, 87 Pac. 133; State v. White, 48 Ore. 416, 87 Pac. 137; Lawrence v. State, 103 Md. 17, 63

rule is to satisfy the jury by a *prima facie* case that a conspiracy existed and then to offer evidence of the declarations of any conspirator.⁹⁷ However, as will be elsewhere explained, the declarations are often received before there is any proof of a conspiracy, and then, if the conspiracy be not shown, the jury is instructed to disregard the declarations. The rule is applicable where the conspirators are separately tried. The declarations of other conspirators jointly indicted, but separately tried may be received against the accused who is on trial. It is not necessary to show that the accused took part in every act of the conspiracy or that he had actual knowledge of every act.⁹⁸ But mere knowledge by one of the conspirators that the others were involved in some criminal scheme does not necessarily permit the declarations or acts of the others to be received against him. It is only where knowledge and active participation or an express or implied ratification can be proved that one conspirator is bound by the statements or declarations of another.⁹⁹

For illustration, where a conspiracy is proved in substance the state may prove the acts and declarations of one conspirator on the trial of another though the person whose conduct and language are proved has not been arrested.¹⁰⁰ The principle at the

Atl. 96; *Graff v. People*, 208 Ill. 312, 70 N. E. 299; *State v. Stockford*, 77 Conn. 227, 58 Atl. 769, 107 Am. St. 28; *State v. Roberts*, 201 Mo. 702, 100 S. W. 484; *Hanners v. State*, 147 Ala. 27, 41 So. 973; *Marrash v. United States*, 168 Fed. 225; *Cabrera v. State* (Tex. Cr., 1909), 118 S. W. 1054; *Chicago, &c., Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770; *Holt v. State*, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829; *Christensen v. People*, 114 Ill. App. 40; *Snelling v. State* (Tex. Cr. App., 1909), 123 S. W. 610; *State v. Kennedy* (S. Car., 1910), 67 S. E. 152.

Prima facie evidence of conspiracy, *Elliott Evidence*, § 2942; admissibility of declarations of conspirators, *Elliott Evidence*, §§ 2936, 2939, 2940, 2941, 2943, 2944; 1 L. R. A. 273, note, 12 L. R. A. 197, note; 19 L. R. A.

745, note; 3 Am. St. 482, 485; two or more engaged, *Elliott Evidence*, § 2935; order of proof, § 2934; proof of formal agreement not necessary, § 2938; presumptions, 3 Am. St. 843; proof when conspirators are not named, *Elliott Evidence*, § 2945; labor combinations, strikes, boycotts and picketing, *Elliott Evidence*, §§ 2945, 2951; proof of overt acts, §§ 2946, 2947, 2948; weight and sufficiency of circumstantial evidence, 68 L. R. A. 213, note.

⁹⁷ *Schultz v. State*, 133 Wis. 215, 113 N. W. 428.

⁹⁸ *People v. Miles*, 123 App. Div. (N. Y.) 862, 108 N. Y. S. 510, *aff'd* in 192 N. Y. 541, 84 N. E. 1117.

⁹⁹ *Marrash v. United States*, 168 Fed. 225.

¹⁰⁰ *Weisenbach v. State*, 138 Wis. 152, 119 N. W. 843.

basis of this rule is that which regulates the competency of the admissions of partners against each other. When men are associated for a common purpose, and with a common object in view, the law, presuming that the benefits, if any, which may ensue from their accomplishment will be shared by all, impresses upon the conspirators or partners, collectively, the attribute of individuality so far as the common design is concerned. No member of the combination will be permitted to escape the consequences of the actions or words of his associates. But the acts or declarations, in order to be admissible, must have been made in furtherance of the common design, or must accompany and explain such an act or declaration.¹ The fact that declarations were made by a conspirator before the defendant became associated with the conspiracy does not render them inadmissible against him. But his subsequent connection therewith must be shown and knowledge of the existence of the declarations be brought home to him or circumstances shown from which such knowledge and a ratification by him may be implied or inferred.²

§ 493. Must be made during existence of, and in furtherance of, conspiracy.—That the accused was not present when the declaration, which is introduced against him, was uttered by a fellow-conspirator, does not of necessity render it incompetent if it conforms to the rule in other respects.³ But those declarations only

¹ State v. McGee, 81 Iowa 17, 22, 46 N. W. 764; Long v. State, 13 Tex. App. 211; Horton v. State, 66 Ga. 690, 695; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320n; People v. Stanley, 47 Cal. 113, 120, 17 Am. 401; Walton v. State, 88 Ind. 9, 15; Card v. State, 109 Ind. 415, 418, 9 N. E. 591; McKee v. State, 111 Ind. 378, 382, 12 N. E. 510; State v. Melrose, 98 Mo. 594, 12 S. W. 250; Kunde v. State, 22 Tex. App. 65, 3 S. W. 325; People v. McQuade, 110 N. Y. 284, 18 N. E. 156; State v. Larkin, 49 N. H. 39; People v. Irwin, 77 Cal. 494, 20 Pac. 56; State v. Grant, 86 Iowa 216, 53 N. W. 120; Hall v.

Commonwealth (Ky.), 31 Ky. L. 64, 101 S. W. 376; Wallace v. State, 46 Tex. Cr. 341, 81 S. W. 966; Miller v. State, 139 Wis. 57, 119 N. W. 850; O'Brien v. State, 69 Neb. 691, 96 N. W. 649; Dolan v. United States, 123 Fed. 52, 59 C. C. A. 176.

² Lamar v. State, 63 Miss. 265, 272; Cox v. State, 8 Tex. App. 254, 34 Am. 746; Browning v. State, 30 Miss. 656; Avery v. State, 10 Tex. App. 199, 212; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320n; United States v. Babcock, 3 Dill. C. C. (U. S.) 581, 586, 24 Fed. Cas. 14487.

³ State v. McGee, 81 Iowa 17, 22,

are admissible which are made by a conspirator during the existence of the conspiracy and in furtherance of it. The statements of a conspirator, made after the conspiracy has ceased to exist, either by success or failure, and which are merely narrative of past events (though in form a confession, *i. e.*, an admission of the conspiracy), are not receivable against a fellow conspirator,⁴ unless the latter was present when they were made and heard them. and expressly or by implication acquiesced in them.⁵ On the other hand, declarations made after the conspiracy are always admissible against the declarant, the jury being instructed to disregard them as far as they refer to other persons.⁶ A declaration by one conspirator made at any time while the conspiracy exists is not

46 N. W. 764; *State v. Anderson*, 92 N. Car. 732; *Hunter v. State*, 112 Ala. 77, 21 So. 65; *Grogan v. State*, 63 Miss. 147, 151; *Sanderson v. State*, 169 Ind. 301, 82 N. E. 525; *Shiflett v. State*, 51 Tex. Cr. 530, 102 S. W. 1147; *State v. Austin*, 183 Mo. 478, 82 S. W. 5.

⁴ *Bennett v. State*, 62 Ark. 516, 36 S. W. 947; *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *Jenkins v. State*, 35 Fla. 737, 18 So. 182, 48 Am. St. 267; *Schwen v. State*, 37 Tex. Cr. 368, 35 S. W. 172; *State v. Duffy*, 124 Mo. 1, 27 S. W. 358; *Everage v. State*, 113 Ala. 102, 21 So. 404; *State v. Tice*, 30 Ore. 457, 48 Pac. 367; *Logan v. United States*, 144 U. S. 263, 309, 36 L. ed. 429, 12 Sup. Ct. 617; *State v. Dean*, 13 Ired. (N. Car.) 63; *Patton v. State*, 6 Ohio St. 467; *Rowland v. State*, 45 Ark. 132, 135; *State v. McGraw*, 87 Mo. 161, 164; *State v. Thibeaup*, 30 Vt. 100; *State v. Larkin*, 49 N. H. 39; *Heine v. Commonwealth*, 91 Pa. St. 145; *Reg. v. Murphy*, 8 C. & P. 297, 310, 311; *Benton v. State*, 78 Ark. 284, 94 S. W. 688; *Frazier v. Commonwealth* (Ky.), 76 S. W. 28, 25 Ky. 461; *State v. Kennedy*, 177 Mo. 98, 75 S. W. 979; *State v. Myers*, 198 Mo. 225, 94 S. W. 242; *Chicago &c. Coal Co. v.*

People, 214 Ill. 421, 73 N. E. 770; *State v. Dickerhoff*, 127 Iowa 404, 103 N. W. 350; *Choice v. State*, 52 Tex. Cr. 285, 106 S. W. 387; *Gambrell v. Commonwealth*, 130 Ky. 513, 113 S. W. 476; *State v. Horseman*, 52 Ore. 572, 98 Pac. 135; *Miller v. State*, 139 Wis. 57, 119 N. W. 850; *Chapline v. State* (Ark.) 95 S. W. 477; *Berry v. State*, 122 Ga. 429, 50 S. E. 345; *State v. Philips*, 73 S. Car. 236, 53 S. E. 370; *State v. Walker*, 124 Iowa 414, 100 N. W. 354; *Wallace v. State*, 48 Tex. Cr. 318, 87 S. W. 1041; *Nelson v. State*, 48 Tex. Cr. 274, 87 S. W. 143; *Commonwealth v. Ellis* (Ky., 1909), 118 S. W. 973; *Wright v. State*, 40 Tex. Cr. 447, 50 S. W. 940; *Smith v. People*, 38 Colo. 509, 88 Pac. 453; *Wiley v. State* (Ark., 1909), 124 S. W. 249; *State v. Smith* (Ore., 1909), 106 Pac. 797.

⁵ *Holden v. State*, 18 Tex. App. 91; *Shelby v. Commonwealth*, 91 Ky. 563, 16 S. W. 461, 13 Ky. L. 178.

⁶ *Rex v. Clewes*, 4 C. & P. 221, 225; *Crosby v. People*, 137 Ill. 325, 334, 27 N. E. 49; *People v. Arnold*, 46 Mich. 268, 277, 9 N. W. 406; *State v. Dodson*, 16 S. Car. 453, 461; *Van Wyk v. People*, 45 Colo. 1, 99 Pac. 1009; *Baldwin v. State*, 46 Fla. 115, 35 So. 220.

admissible against another merely because the offense for which the latter is on trial preceded it. The several successive crimes committed during the conspiracy are regarded merely as the parts of one indivisible whole.⁷ An exception to the general rule may be mentioned here. At common law proof of the guilt of the principal is required on the trial of a person as an accessory to a crime. Hence of necessity the principal's confession, though in form a declaration made after the conspiracy, is admissible at the trial of a confederate as an accessory, whether tried jointly or separately, but only to show the guilt of the principal as such.⁸

§ 494. **Order of proving conspiracy to let in declarations.**—The general rule is that the existence of the conspiracy must be proved, at least *prima facie*, to the satisfaction of the judge, before the declarations or acts are admitted in evidence.⁹ Many authorities, however, hold that the order of the proof is discretionary with the court, and that the court may, for the sake of convenience, admit the declarations at any time during the trial on the promise to prove the existence of the conspiracy and the connection of the defendant therewith subsequently.¹⁰ This is particularly the case

⁷ Card v. State, 109 Ind. 415, 9 N. E. 591.

⁸ United States v. Hartwell, 3 Cliff. (U. S.) 221, 26 Fed. Cas. 15318.

⁹ Belcher v. State, 125 Ind. 419, 420, 25 N. E. 545; Ford v. State, 112 Ind. 373, 14 N. E. 241; Card v. State, 109 Ind. 415, 418, 9 N. E. 591; Tarbox v. State, 38 Ohio St. 581, 584; Casey v. State, 37 Ark. 67, 85; McGraw v. Commonwealth (Ky.), 20 S. W. 279, 14 Ky. L. 344; Amos v. State, 96 Ala. 120, 125, 11 So. 424; Horton v. State, 66 Ga. 690, 693; Cook v. State, 169 Ind. 430, 82 N. E. 1047; Wallace v. State, 48 Tex. Cr. 318, 87 S. W. 1041; Schultz v. State, 133 Wis. 215, 113 N. W. 428; Schutz v. State, 125 Wis. 452, 104 N. W. 90; Proctor v. State, 54 Tex. Cr. 254, 112 S. W. 770; People v. Carson, 155 Cal. 164, 99 Pac.

970; People v. Donnolly, 143 Cal. 394, 77 Pac. 177; State v. Crofford, 121 Iowa 395, 96 N. W. 889; Ripley v. State, 51 Tex. Cr. 126, 100 S. W. 943; State v. Roberts, 201 Mo. 702, 100 S. W. 484; Wiley v. State (Ark., 1909), 124 S. W. 249.

¹⁰ State v. Mushrush, 97 Iowa 444, 66 N. W. 746; Hall v. State, 31 Fla. 176, 188, 189, 12 So. 449; State v. Ward, 19 Nev. 297, 308, 10 Pac. 133, 7 Crim. L. Mag. 748; State v. Grant, 86 Iowa 216, 53 N. W. 120; Avery v. State, 10 Tex. App. 199, 210; State v. Anderson, 92 N. Car. 732, 748; State v. McGee, 81 Iowa 17, 46 N. W. 764; State v. Cardoza, 11 S. Car. 195, 237; State v. Grant, 76 Mo. 236; Hamilton v. People, 29 Mich. 195, 197; Schultz v. State, 133 Wis. 215, 113 N. W. 428; People v. Bunkers, 2 Cal. App. 197,

where establishing the conspiracy depends upon proving a large number of facts or a vast amount of circumstantial evidence and the existence of the conspiracy be inferred from numerous apparently independent facts and circumstances.¹¹

84 Pac. 364, 370; Cook v. State, 169 691, 96 N. W. 649; State v. Lewis, 51 Ind. 430, 82 N. E. 1047; People v. Ore. 467, 94 Pac. 831; People v. Emmons, 7 Cal. App. 685, 95 Pac. 1032. Miles, 123 App. Div. (N. Y.) 862, 108 N. Y. S. 510; Butt v. State, 81 Ark. 173, 98 S. W. 723; People v. Stokes, 5 305; Spies v. People, 122 Ill. 1, 238, 12 Cal. App. 205, 89 Pac. 997; Cohen v. N. E. 865, 17 N. E. 898, 3 Am. St. United States, 157 Fed. 651, 85 C. 320n. C. A. 113; O'Brien v. State, 69 Neb.

CHAPTER XXXII.

EVIDENCE IN INTERNATIONAL AND INTERSTATE EXTRADITION.

- § 495. International extradition—
Treaties and statutory regulation.
496. Burden of proof and amount of evidence required in international and interstate extradition to show criminality and other essential facts.
497. Fugitive character of the person claimed for extradition.
498. Evidential rules governing interstate extradition.
499. Character, form and authentication of indictments, etc., in interstate extradition.
500. Constitutional and statutory regulation of the mode of proving and effect of records of other states.
501. General rules regulating the taking of evidence in foreign extradition.
502. Authentication by consular certificate of warrants and other papers used as evidence in international extradition.
503. The competency of certified copies as evidence of criminality.
504. Proof of foreign laws and treaties in international extradition.
505. Proof of laws in interstate extradition.

§ 495. International extradition—Treaties and statutory regulations.—The demand and the return of fugitives from justice as between independent nations and states are, in the absence of treaties providing for the reciprocal return of such persons, wholly a matter of international comity. The law of nations imposes no obligation upon the sovereign state in which a person charged with crime has sought an asylum, to return him to the officials of the state against the law of which he has offended.¹ But often because of the principles of international comity, as it is termed, or in other words because of the expectation that the favor granted by the asylum state would be reciprocated by the authorities of the state which demands the return of the fugitive from its criminal jurisdiction, persons have been returned in the

¹ *Ex parte McCabe*, 46 Fed. 363, 12 L. R. A. 589; *In re Cook*, 49 Fed. 833, 836.

absence of treaty to meet criminal charges pending against them in the country of their domicil.² At the present time treaties exist between the United States and nearly all civilized states, by virtue of which all persons charged with certain crimes therein specified may be returned to the country whence they have fled to the United States.³ These treaties provide what evidence shall be necessary in any case to procure the extradition of the accused. The statutes of the United States provide that all hearings in extradition cases shall be held on land, in a room or office which is easily accessible to the public. If the person whose extradition is sought shall file an affidavit that he can not go to trial without the evidence of certain witnesses, showing also what he intends to prove by them, and that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses, the judge or commissioner, before whom the hearing is had, may order that the witnesses shall be subpœnaed, the costs to be paid as similar fees are paid in the case of witness subpœnaed in behalf of the United States.

§ 496. Burden of proof and amount of evidence required in international and interstate extradition to show criminality and other essential facts.—The burden of proof to show criminality, and all other facts which will warrant the return of the alleged

² 1 Kent Com. 36; *In re Metzger*, 5 How. (U. S.) 176, 188, 12 L. ed. 104; *United States v. Rauscher*, 119 U. S. 407, 411, 30 L. ed. 425, 7 Sup. Ct. 234; *United States v. Davis*, 2 Sumner C. C. (U. S.) 482, 25 Fed. Cas. 14932, and see the remarks of Judge Jenkins in 49 Fed. 833, on page 837.

³ The countries with which treaties have been made are as follows: Great Britain, 8 Statutes at L. 576; France, 8 Statutes at L. 582, 617, 741; Hawaiian Islands, 9 Statutes at L. 981; Swiss Confederation, 11 Statutes at L. 587; Prussia, 10 Statutes at L. 964; Austria, 11 Statutes at L. 691, 17 Statutes at L. 835; Sweden and Norway, 12 Statutes at L. 1125; Venezuela, 12 Statutes at L. 143; Mexico,

12 Statutes at L. 199, 15 Statutes at L. 688; Hayti, 13 Statutes at L. 711; Republic of Dominica, 15 Statutes at L. 473; Italy, 11 Statutes at L. 629, 16 Statutes 767, 24 Statutes at L. 1001; Salvador, 18 Statutes at L. 693, 796; Nicaragua, 17 Statutes at L. 815; Peru, 18 Statutes at L. 719; Orange Free State, 18 Statutes at L. 751; Ecuador, 18 Statutes at L. 756; Belgium, 18 Statutes at L. 804, 22 Statutes at L. 972; Ottoman Empire, 19 Statutes at L. 572; Spain, 19 Statutes at L. 650; 22 Statutes at L. 991; Netherlands, 21 Statutes at L. 769; Japan, 24 Statutes at L. 1015. See, also, United States Revised Statutes, §§ 5270-5280.

fugitive from justice to the state under whose laws he is charged with crime, is upon the officer sent to effect his return; or on the person demanding it. It was formerly held that the proof of criminality should be as full and satisfactory as in the judgment of the magistrate would suffice to authorize a conviction if he were sitting at the trial of the accused.⁴

This, however, is no longer the law. The demanding party is never required to produce proof of the necessary facts which shall convince the court beyond all reasonable doubt; for an extradition proceeding is not, in strictness of law, regarded as a criminal trial, nor do the rules of evidence which apply to criminal trials apply to it. It possesses more of the character of a preliminary examination of a person accused of crime, the final determination of whose criminality will take place in the jurisdiction where the alleged crime was committed.⁵ Hence, according to the present state of the law, the commissioner or magistrate will do well to avoid acting in a technical spirit, or requiring the same amount or degree of proof that would be demanded to convict the accused before a jury.⁶

Some satisfactory and legal evidence of guilt will be required. But if the necessary facts, *i. e.*, that the accused is a fugitive, and that he is charged with crime, are satisfactorily proved, the examining magistrate ought to commit the accused to await the action of the executive directing his return, though the evidence of guilt does not possess that weight and cogency which would be required to convict him were he on trial before a jury.

But in any case the evidence to show criminality must be legal, and such as will create a probability that the alleged fugitive is guilty. Though it may be unsatisfactory and far from convincing yet if, on the whole, it may create conflicting presumptions and probabilities that the accused is guilty, then he should be com-

⁴ *Ex parte Kaine*, 3 Blatchf. (U. S.) 1, 14 Fed. Cas. 7597; *In re Macdonnell*, 11 Blatchf. (U. S.) C. C. 170, 16 Fed. Cas. 8772.

⁵ See Spear on Extradition, page 25.

⁶ *In re Breen*, 73 Fed. 458, 459. The complaint, signed by a foreign consul, on which is based a warrant of extradition issued by a United States com-

missioner, need not state the facts with the precision of an indictment; but it should set forth the substantial features of the crime so that the court can readily see therefrom that the offense is one of those which are enumerated in the treaty. *In re Adutt*, 55 Fed. 376, 379.

mitted.⁷ In other words it is generally required, both in international and interstate extradition, that such an amount and degree of evidence shall be produced before the commissioner or magistrate as would justify committing the accused for trial if the crime charged against him was alleged to have been committed in the state where the examination is had.⁸

§ 497. Fugitive character of the person claimed for extradition.—Whether the person whose extradition is demanded has fled from justice to the country or state in which he is found is a question to be determined in the first instance by the executive of that state.⁹ The proof that the accused is a fugitive from justice must be of such a character and force that the executive is satisfied that he is such, though it need not be such as will meet the requirements of legal evidence on a trial. A copy of an affidavit

⁷ *Sternaman v. Peck*, 80 Fed. 883, 26 C. C. A. 214; *In re Oteiza*, 136 U. S. 330, 336, 34 L. ed. 464, 10 Sup. Ct. 1031; *Pac. 596*; *Ex parte Reggel*, 114 U. S. 642, 652, 29 L. ed. 250, 5 Sup. Ct. 1148; *In re White*, 55 Fed. 54, 57, 5 C. C. A. 29, citing and approving

⁸ *In re Bryant*, 80 Fed. 282, 284; *Bryant v. United States*, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. 744; *In re Farez*, 7 Blatchf. C. C. 345, 8 Fed. Cas. 4645, 40 How. Pr. (N. Y.) 107; *In re Henrich*, 5 Blatchf. C. C. 414, 425, 12 Fed. Cas. 6369; *In re Doo Woon*, 18 Fed. 898, 899; *Ex parte Morgan*, 20 Fed. 298, 307; *Elias v. Ramirez*, 215 U. S. 393, 30 Sup. Ct. 131; *Benson v. McMahon*, 127 U. S. 457, 461, 8 Sup. Ct. 1240, 32 L. ed. 234, in which the court said, "We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him." *In re Oteiza*, 136 U. S. 330, 335, 34 L. ed. 464, 10 Sup. Ct. 1031, in which case the court held that there was no error in excluding evidence consisting of depositions offered on the part of the accused though the statute permitted such proof offered against him. *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. 291; *Dennison v. Christian*, 196 U. S. 637, 49 L. ed. 630, 25 Sup. Ct. 795. A prisoner who is allowed to go outside of a reformatory in the state of New York on parole under a statute of that state. he promising to obey the directions of the parole, which are that he shall go to Michigan, and who, instead of doing so, comes to Connecticut, is a fugitive from justice within the provisions of the United States constitution. *Drinkall v. Spiegel*, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486. A person may in law be regarded as a fugitive from justice when he has committed a crime in a state. and withdraws from the jurisdiction of its courts without waiting to abide the consequences of his action. *In re White*, 55 Fed. 54, 57, 5 C. C. A. 29, citing *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. 291.

⁹ *Hess v. Grimes* (Kan., 1897), 48

sworn to before a notary public or justice of the peace by the governor of the state demanding extradition alleging that the accused is or was a fugitive from justice has been held sufficient.¹⁰

Some few authorities hold that the determination of this question by the executive of the state is conclusive upon the courts; and, where this view is admitted to be the correct one, the courts will not, upon the return of a writ of *habeas corpus*, receive evidence to show that the accused was never in, and had not in fact fled from, the state which demands his return to its domain.

Other cases support the proposition that the decision of this question by the executive is reviewable by the federal courts. It must be made to appear from the evidence that the accused is a fugitive from the justice of the demanding state. The federal statute does not prescribe the character of the proof required to show that he is a fugitive. An affidavit, sworn to, and attested by the seal of the court in which an indictment is pending against the accused, and stating that "he is a fugitive from justice," and that he is then in the asylum state, has been held sufficient over an objection that such a statement is only a conclusion of law and does not state any facts.^{10a} And the accused ought to be permitted to disprove the allegation that he is a fugitive from justice by any proper evidence, as, for example, by proof that he had never been a resident of the state from which the demand came.¹¹

¹⁰ *State v. Clough*, 72 N. H. 178, 55 Atl. 554, 67 L. R. A. 946.

^{10a} *Ex parte Reggel*, 114 U. S. 642, 643, 29 L. ed. 250, 5 Sup. Ct. 1148. In the case of *Reggel*, 114 U. S. 642, 650, 652, the court, by Harlan, J., said: "It is within the power of each state, except as her authority may be limited by the constitution of the United States, to declare what shall be offenses against her laws, and citizens of other states, when within her jurisdiction, are subject to those laws. In recognition of this right * * * the words of the clause in reference to fugitives from justice were made sufficiently comprehensive to include every offense against the

laws of the demanding state, without exception as to the nature of the crime. * * * Upon the executive of the state in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding state. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding state."

¹¹ *Ex parte Smith* (The Mormon Prophet), 3 McLean C. C. (U. S.) 121, 137, 22 Fed. Cas. 12968; *In re Cook*, 49 Fed. 833; *In re Manchester*,

The determination of the question whether the person who is claimed to be a fugitive is "charged with treason, felony, or other crime," is exclusively for the examining magistrate or federal commissioner to decide upon all the facts in evidence. Proof that the defendant was in the demanding state when a crime was committed and when his arrest was sought he was found in another state shows that he is a fugitive from justice.¹² Whether the person whose extradition is demanded is charged with any crime is a question of fact to be shown by the evidence in the case. Whether the crime is extraditable under the constitution or under a treaty is a question of law. The determination of the former question cannot be reviewed under an exception that it is against the weight of the evidence. But the issue of law, whether the crime as proved is extraditable under the statute or treaty, is one involving the construction of a writing, and the judgment of the magistrate or commissioner thereon may be reversed if palpably erroneous in law.¹³

§ 498. Evidential rules governing interstate extradition.—The constitution of the United States provides,¹⁴ "that any person charged in any state with treason, felony or other crime, who shall flee from justice and be found subsequently in any other state of the Union, shall, on the demand of the executive of the state from whence he has fled, be delivered up to be removed to the state having jurisdiction of his crime."

At a very early period congress endeavored by statutory enactment to carry into effect this section of the constitution.¹⁵

5 Cal. 237; Jones v. Leonard, 50 Iowa 106, 32 Am. 116; Hartman v. Aveline, 63 Ind. 344, 30 Am 217; Wilcox v. Nolze, 34 Ohio St. 520, 521; *In re* White, 55 Fed. 54, 58, 5 C. C. A. 29; Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. 456, *aff'g* People v. Hyatt, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. 706, 60 L. R. A. 774; where accused was in the state for only one day.

¹² Strauss, *In re*, 126 Fed. 327, 63 C. C. A. 99; Hughes v. Pfanz. 138 Fed. 980, 71 C. C. A. 234; Pettibone v. Nichols, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. 111; Appleyard v. Massachusetts, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. 122.

¹³ Ornelas v. Ruiz, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. 689.

¹⁴ Art. 4, § 2.

¹⁵ United States Statute of 1793, c. 7, § 1. The act of 1793, U. S. R. S., § 5278, reads as follows: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or terri-

In construing this statute the courts have held: First, that the return of the fugitive from justice must have been demanded by the executive authorities of the state from whence he has fled. Second, it must affirmatively appear by the evidence that he is charged with the commission of some extraditable crime which is within the jurisdiction of its courts. The fact that he is charged with such a crime may be proved by the production of a warrant for his arrest,¹⁶ or an indictment duly certified and authenticated as provided by statute, supplemented by an affidavit reciting any other facts which are necessary to confer jurisdiction and charging him substantially with a crime against the laws of the state demanding his return.¹⁷

§ 499. Character, form and authentication of indictments, etc., in interstate extradition.—The documents accompanying the requisition papers to be admissible in evidence must be certified as authentic by the governor or chief magistrate of the state or territory from whence the person demanded has fled.¹⁸ The indictment which is produced to show that the accused is charged with a crime must allege some definite crime. If it does this, and if

tory to which such person has fled and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be dis-

charged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory."

¹⁶ *People v. Warden of City Prison*, 83 App. Div. (N. Y.) 456, 82 N. Y. S. 439; oral evidence as to requisition papers, 112 Am. St. 120, note; evidence of the law of the demanding state, 112 Am. St. 126.

¹⁷ *Ex parte Sternaman*, 77 Fed. 595; *Ex parte Reggel*, 114 U. S. 642, 649, 29 L. ed. 250, 5 Sup. Ct. 1148.

¹⁸ *Kingsbury's case*, 106 Mass. 223; *State v. Goss*, 66 Minn. 291, 68 N. W. 1089; *People v. Donohue*, 84 N. Y. 438; *Ex parte Powell*, 20 Fla. 806. See, also, Mississippi Code, 1892, § 2162; oral evidence as to requisition papers, 112 Am. St. 120, note.

it is also properly authenticated by the executive as required by statute, it will be sufficient proof of the fact that the accused is charged with crime to prevent his discharge from custody on the return of a writ of *habeas corpus*, though the indictment is inartistically drawn or is otherwise technically defective in form.¹⁹

An affidavit alleging upon information and belief that the fugitive has committed a crime is wholly insufficient as proof of criminality.²⁰ The general rule is that the affidavits and the requisition papers which are used as evidence in an interstate extradition proceeding need not be framed with extreme technical precision in order to be admissible. But they must show with clearness to the satisfaction of the magistrate that the party whose extradition is sought was in the demanding state at the time of the crime,²¹ that he is a fugitive from justice,²² as well as the character and venue of the crime with which he stands charged.²³

¹⁹ *Jackson v. Archibald*, 12 Ohio Cir. Ct. 155; *Davis's case*, 122 Mass. 324, 329; *In re Greenough*, 31 Vt. 279; *State v. O'Connor*, 38 Minn. 243, 36 N. W. 462; *In re Voorhees*, 32 N. J. L. 141; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. 291; *Ex parte Reggel*, 114 U. S. 642, 651, 29 L. ed. 250, 5 Sup. Ct. 1148; *Hayes v. Palmer*, 21 App. D. C. 450; *Ex parte Pierce*, 155 Fed. 663.

²⁰ *Ex parte Smith*, 3 McLean C. C. (U. S.) 121, 137, 22 Fed. Cas. 12968; *Ex parte Morgan*, 20 Fed. 298, 307. "It must appear, therefore, to the governor of the state to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the state making the demand, and, second, that the person demanded is a fugitive from the justice of that state. The

first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. The second is a question of fact which the governor of the state upon whom the demand is made must decide, upon such evidence as he may deem satisfactory." A certified copy of the law said to have been broken need not be furnished. The courts of the United States take judicial notice of the law of all the states. Remarks of the court in *Roberts v. Reilly*, 116 U. S. 80, 95-96, 29 L. ed. 544, 6 Sup. Ct. 291.

²¹ *People v. Conlin*, 15 Misc. (N. Y.) 303, 36 N. Y. S. 888.

²² *In re Heyward*, 1 Sandf. (N. Y. Super.) 701; *Ex parte Smith*, 3 McLean C. C. (U. S.) 121, 137-139, 22 Fed. Cas. 12968; *Dennison v. Christian*, 72 Neb. 703, 101 N. W. 1045, 117 Am. St. 817.

²³ *Ex parte Romanes*, 1 Utah 23; *In re Manchester*, 5 Cal. 237; *Ex*

If the indictment and the affidavit are properly authenticated as required by the statute, the court will not, upon the return of a writ of *habeas corpus*, receive evidence to prove or to disprove its validity, or to contradict its allegations, or generally to inquire into the guilt or innocence of the accused.²⁴

§ 500. **Constitutional and statutory regulation of the mode of proving and effect of records of other states.**—As regards the mode of proving the necessary facts in interstate extradition, it may be sufficient to call attention to the provision of the federal constitution which enacts that “full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”²⁵

To fully effectuate this constitutional provision congress has enacted “that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence such records are or shall be taken.”²⁶

parte Smith, 3 McLean C. C. (U. S.) N. Y. S. 888; *People v. Pinkerton*, 77 121, 134, 137, 22 Fed. Cas. 12068; *Ex N. Y. 245; In re White*, 55 Fed. 54, 58, *parte* Reggel, 114 U. S. 642, 651, 29 5 C. C. A. 29. So, also, of a record of a conviction, *Hughes v. Pflanz*, 138 L. ed. 250, 5 Sup. Ct. 1148; *State v. White*, 40 Wash. 560, 82 Pac. 907, 2 L. R. A. (N. S.) 563n; *Cheatham, Ex parte*, 50 Tex. Cr. 51, 95 S. W. 1077.

²⁴ *Ex parte Devine*, 74 Miss. 715, 22 So. 3; *Work v. Corrington*, 34 Ohio St. 64, 32 Am. 345n; *Ex parte Sheldon*, 34 Ohio St. 319; *State v. Schlemm*, 4 Harr. (Del.) 577; *People v. Conlin*, 15 Misc. (N. Y.) 303, 36

44 So. 827.

²⁵ Constitution of the United States, article 4, section 1.

²⁶ United States Statute, May 26, 1790; United States Statutes at Large, L. and B. Edition 122.

The attestation of the clerk which is required by the statute must be in form the same as that usually employed in the state whence it comes. If the court has a seal it must be affixed to the certificate of the clerk, while if it has none this fact must appear on the face of the certificate.²⁷

The certificate of the judge, to the effect that the attestation is in due form, must show on its face that the judge certifying is the chief or presiding judge at the date of certifying the record.²⁸ It must also show that the clerk who attests is at the date of the attestation the clerk of the court, and that his attestation is in due form. Where a court has gone out of existence, the clerk and presiding justice of another court with which it has been consolidated, or upon which its powers and jurisdiction have been conferred, may furnish the requisite certification and attestation.

The statute, despite the mandatory character of its language, has been held not to furnish an exclusive mode of authenticating public records. And for the reason that the statute refers expressly only to courts having a presiding judge, a clerk and a seal, it has been held that courts not of record, or those having only limited powers and jurisdiction, were not included in its terms. The copies of the records and the proceedings of such courts as, for example, courts of justices of the peace and minor municipal courts, are to be proved and authenticated according to the procedure of the state in whose tribunals they are to be used.²⁹ If the requirements of the federal statute are substantially complied with, a certified and attested copy ought not to be rejected because of mere formal verbal and technical irregularities, as, for example, because it does not show the identity of the accused, or that the court had competent jurisdiction, or the facts upon which his conviction was founded.³⁰

§ 501. General rules regulating the taking of evidence in foreign extradition.—In all cases of foreign extradition, the taking of the evidence and the examination of the accused, so far as these mat-

²⁷ For a full citation of civil and criminal cases, see Underhill on Evidence, § 148.

²⁸ *Settle v. Alison*, 8 Ga. 201, 52 Am. Dec. 393; *Stephenson v. Bannister*, 3

Bibb. (Ky.) 369, and cases cited Underhill on Evidence, note 4, p. 224.

²⁹ See Underhill on Evidence, p. 225, for cases.

³⁰ See cases cited in Underhill on Evidence, §§ 148, 159.

ters are not controlled by statute, must be conducted according to the laws of the state in which the proceedings are had. If the law of that state entitles the accused on his preliminary examination to testify in his own behalf, a person under examination for extradition is entitled to be so examined.⁸¹ But generally the rules and principles of the English common law as applied to criminal charges are not controlling to their fullest extent in cases of international extradition. Usually the statutes and treaties provide for the character of the evidence and what form it shall assume. Their provisions are controlling and under them it has been held that the accused is not entitled to be confronted with the witnesses against him.⁸²

So, too, the documentary evidence, if properly authenticated, must receive the same degree of credit and weight as proof in the court wherein it is offered, as would be accorded to living witnesses who give testimony personally in the presence of that court.⁸³

The federal commissioner should keep a record of all the oral evidence taken before him, written out in a narrative form and not by question and answer. He should note therein all objections to the admissibility of the evidence and the grounds of such objections. The party seeking the extradition of the fugitive ought to furnish the commissioner with an accurate translation of every piece of documentary evidence which is written in a foreign language, accompanied by an affidavit sworn to by the translator to the effect that the translation is correct.⁸⁴

The statute provides⁸⁵ that the commissioner shall receive the testimony of such witnesses as are offered by the accused. He need not adjourn the proceedings in order to permit the accused to procure depositions to prove an alibi.⁸⁶

⁸¹ *In re Farez*, 7 Blatchf. C. C. (U. S.) 345, 8 Fed. Cas. 4645, 40 How. Prac. (N. Y.) 107.

⁸² *In re Dugan*, 2 Lowell C. C. (U. S.) (Mass. District Court) 367, 7 Fed. Cas. 4120. The evidence of criminality must be such as according to the laws of the state where he is found justifies his apprehension and commitment if the crime had been committed there. *Pettit v. Walshe*, 194 U. S.

205, 48 L. ed. 938, 24 Sup. Ct. 657.

⁸³ *In re Farez*, 7 Blatchf. C. C. (U. S.) 345, 8 Fed. Cas. 4645; *Elias v. Ramirez*, 215 U. S. 398, 30 Sup. Ct. 131.

⁸⁴ *In re Henrich*, 5 Blatchf. C. C. (U. S.) 414, 425, 12 Fed. Cas. 6369.

⁸⁵ 3 Fed. Stat., § 5280; 22 U. S. Stat. at Large, p. 215, August 3, 1882.

⁸⁶ *In re Wadge*, 15 Fed. 864, aff'g 21 Blatchf. C. C. (U. S.) 300.

It is sufficient if there is some competent evidence of guilt or that probable cause exists for believing the accused guilty. The evidence of guilt need not be conclusive nor must the commissioner be absolutely certain of the guilt of the accused.

§ 502. Authentication by consular certificate of warrants and other papers used as evidence in international extradition.—The statute also provides that where any deposition, warrant or other papers, or copies thereof, shall be offered in evidence upon the hearing of any case, in which the extradition of an alleged fugitive is required, the same shall be received as evidence for all purposes of the hearing if they shall be legally authenticated so as to entitle them to be received for similar purposes in the courts and tribunals of the foreign country whence the accused is alleged to have escaped. And it is further provided that the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act.³⁷

In construing this statute the courts have held that it provides for the introduction of two sorts of documentary evidence. First. Original depositions, original warrants and original "other papers." Second. Copies of any such depositions, warrants or "other papers," which must be originals or copies of such originals as are legally entitled to be received in the tribunal of the foreign country as proof of criminality with respect to the offense charged if the inquiry were had in the foreign tribunal. And all papers are to be authenticated according to the law of the foreign country.³⁸

³⁷ United States v. Plaza, 133 Fed. 998.

³⁸ United States R. S., § 5271; *In re* Henrich, 5 Blatchf. C. C. (U. S.) 414, 425, 426, 12 Fed. Cas. 6369. See, also, *In re* Wadge, 16 Fed. 332, 333. In a case of international extradition, the certificate of the American ambassador to Great Britain to the effect that the papers containing the evidence of the commission of the

crime by the party held for extradition "are properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of Great Britain," is the proper form, and the documents are to be received as competent evidence. *In re* Breen, 73 Fed. 458, 459.

³⁹ *In re* Fowler, 4 Fed. 303, 309, 18 Blatchf. C. C. (U. S.) 430.

It would seem from the language of the statute that its provisions were mandatory. But it has been held that, under certain circumstances, the certificate, if it is presented in such a form as not to comply strictly with the statute, may be aided and supplemented by other evidence, either documentary or oral. Thus, where the consular certificate omitted to state expressly that depositions were legally authenticated so as to be receivable as valid evidence of criminality in the courts of the kingdom of Prussia, it was permitted to introduce the certificates of court officials of that country to the effect that the depositions were proper and valid evidence. The oral testimony of a police officer, to the effect that the depositions attached to the requisition papers had been signed and sworn to in his presence, that they were originals and that they would be received to show criminality in the tribunals of the foreign country, is sufficient to supplement an insufficient authentication by a diplomatic official.⁴⁰

§ 503. The competency of certified copies as evidence of criminality.—The competency of the evidence offered in cases of foreign extradition must be determined according to the law of the place where the proceeding is had. In the absence of statute, copies of *ex parte* depositions taken out of the jurisdiction, though properly attested by the clerk of the foreign court, are never evidence of the commission of a crime by the accused.⁴¹

If the fact to be proved is only the existence of a foreign record, as, for example, the fact that the accused had been convicted of a crime, a certified copy of the record is competent evidence of that fact, even in the absence of statute. But when the fact to be proved is the commission of a crime by the accused, and when, as in the present instance, such proof of that fact is required as would suffice to commit him on a preliminary examination were the venue of the crime laid in this country, then a different question is presented and a different rule applies.

⁴⁰ *In re Wadge*, 15 Fed. 864, 16 Fed. 332, 334, 21 Blatchf. C. C. (U. S.) 300; *In re Fowler*, 4 Fed. 303, 312, 18 Blatchf. C. C. (U. S.) 430, 437, 438. *In re Kaine*, 14 How. U. S. 103, 115, 116, 144, 146, 14 L. ed. 345, 10 N. Y. Leg. Observer, 257, 266; evidence required before the issuing of the governor's warrant, 92 Am. St. 731, note.

⁴¹ *In re Wadge*, 16 Fed. 332, 334;

Proof that there is legal and competent proof of criminality elsewhere on file in some other court is never equivalent to proof here. The documents, whether originals or copies, must be such as would be competent for a similar purpose, *i. e.*, as evidence of criminality, in the tribunals of the foreign country. The full certificate of the diplomatic officer that they are so is absolute and conclusive, and admits them in the court here, whether they are originals or copies. But if they are copies, and it does not appear either from this certificate or from some other competent evidence, either oral or written, that copies of original depositions are received by the foreign court for the purpose of proving criminality, they will not be received for that purpose here.⁴³

§ 504. **Proof of foreign laws and treaties in international extradition.**—In the case of foreign extradition, the foreign law, which the prisoner is charged with breaking, will not be judicially noticed by the federal court.⁴³ The existence, contents and character of the foreign law must be proved. This may usually be done, in the case of a foreign statute, by reading it from a printed book purporting to contain the statute in question; and which is properly attested or authenticated as a true copy of the statute by the supreme executive authority of the foreign country; or which is otherwise satisfactorily proved to have been published by proper authority and which is shown to have been received as proof of the statute in the courts of the foreign state.⁴⁴ Doubtless under the existing statute the certificate of the principal diplomatic or consular officer of the United States, to the effect that the book was authenticated, so as to entitle it to be received for a similar purpose in the foreign country, would be sufficient.⁴⁵

A practicing attorney of the foreign state, or some other person, official or otherwise, who has had some practice in the courts of the foreign state, and who is familiar with its laws, may testify to his knowledge or opinion as to what that law is. Such a witness, called to prove a foreign law, may refresh his memory by

⁴³ *In re McPhun*, 30 Fed. 57, 59, 60; p. 376, n. 4, for a full citation of *In re Fowler*, 4 Fed. 303, 312, 18 cases; 112 Am. St. 126, note.

Blatchf. C. C. (U. S.) 430, 439. See, ⁴⁴ See Underhill on Evidence, § 143. also, *Ex parte Ross*, 2 Bond. (S. Dist. p. 211.

Ohio) 252, 20 Fed. Cas. 12069. ⁴⁵ *In re Oteiza*, 136 U. S. 330, 337.

⁴⁶ See Underhill on Evidence, § 242, 34 L. ed. 464, 10 Sup. Ct. 1031.

reading from text-books of authority and from the reports of cases decided in the courts of the foreign country, and he may, perhaps, read such books to the court, provided he is able to swear that they are admitted as authorities by the courts of the foreign country.⁴⁶

All treaties entered into by the government of the United States with foreign nations are, as soon as they are confirmed by the senate of the United States, a component part of the supreme statutory law of the land. They possess the character and efficacy of an act of congress, and are to be regarded in that light for all purposes by the courts and by all officials attached to them. Hence the courts, both federal and state, will take judicial notice of their existence, the date upon which they became law, their contents and provisions, and the rights and obligations of all parties, public and private, under them.⁴⁷

So, too, the courts will take judicial notice of the existence of all foreign governments whose existence, either *de facto* or *de jure*, has been acknowledged by the executive branch of the federal government. Whether a government has been thus acknowledged is a question of fact to be proved when required by a certificate from the secretary of state, or, perhaps, by oral evidence of the fact that its diplomatic representatives have been duly received by our government.⁴⁸

§ 505. **Proof of laws in interstate extradition.**—The mode above described for proving foreign laws is applicable where the law of one state of the Union is to be proved in the courts of another state. But in many of the states the statutory law of a sister state may, under special statutes, be proved by reading the same from a printed volume which, upon its face, purports to contain the statutory law of that state.⁴⁹

⁴⁶ Underhill on Evidence, pp. 212, 213; 112 Am. St. 126, note.

⁴⁷ See Underhill on Evidence, § 243.

⁴⁸ United States v. Arredondo, 6 Peters (U. S.) 691, 8 L. ed. 547; Foster v. Neilson, 2 Peters (U. S.) 253, 314, 7 L. ed. 415. And for all full citation of cases on this question, see Underhill on Evidence, § 242, p. 378, note 1.

⁴⁹ Sloan v. Torrey, 78 Mo. 623; St. Louis, etc., R. Co. v. Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. 176n; Eastman v. Crosby, 8 Allen (Mass.) 206; and see cases fully cited in Underhill on Evidence, p. 213, and § 242, p. 377, note 1; 112 Am St. 126, note 1.

The federal courts will take judicial notice of all the state constitutions and of all statutes which are applicable to the subject of interstate extradition. The statutory law of the various states of the Union is in no sense a foreign law as regards the deliberations of the federal judges to be proved as the law of a foreign country. It must be taken notice of in the same manner as the laws of the United States are taken notice of by these courts.³⁹

³⁹ See remarks of Story, J., in 36 Fed. 841; *Jasper v. Porter*, 2 McOwings v. Hull, 9 Pet. (U. S.) 607, Lean C. C. (U. S.) 579, 13 Fed. Cas. 624, 9 L. ed. 246; *Jones v. Hays*, 4 7229; *Gormley v. Bunyan*, 138 U. S. McLean C. C. (U. S.) 521, 13 Fed. 623, 34 L. ed. 1086, 11 Sup. Ct. 453. Cas. 7467; *Hanley v. Donoghue*, 116 and see other cases fully cited in U. S. 1, 29 L. ed. 535, 6 Sup. Ct. 242; *Underhill on Evidence*, § 242, p. 373. *Course v. Stead*, 4 Dall. (U. S.) 22, n. 13. 1 L. ed. 724; *Newberry v. Robinson*,

CHAPTER XXXIII.

EVIDENCE OF PREVIOUS CRIME TO INCREASE PENALTY.

- § 506. Statutes enhancing the punishment of habitual criminals.
- 507. Constitutionality of legislation punishing habitual criminals.
- 508. Conviction of the former crime must have been prior to the commission of the crime now being tried.
- 509. Effect of pardon of former crime in excluding proof of prior conviction.
- 510. Setting out the former conviction in the indictment—Variance.
- 511. Effect of plea of not guilty.
- 512. Order of trying the issue of former conviction.
- 513. Necessity of proving discharge from prison.
- 514. Proof of the prior conviction—How made.
- 515. Proof of the identity of the accused with the person previously convicted.

§ 508. Statutes enhancing the punishment of habitual criminals.—

In England, and in very many of the states of the American Union, from the earliest times statutory enactments have existed by virtue of which a severer punishment has been inflicted upon the accused, if the crime of which he is convicted is a second, a third or a subsequent offense.¹

¹Section 688 of the New York Penal Code provides, "that a person, who, after having been convicted within this state, of a felony, * * * commits any crime, within this state, is punishable upon conviction of such second offense as follows: (1) If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment in a state prison for life; (2) if the subsequent crime is such that, upon a first conviction, the offender would

be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term nor more than twice the longest term, prescribed upon a first conviction." In the state of Massachusetts this matter is regulated by Statutes of 1817, chapter 176, which provide "that whenever any person who shall be convicted of crime, before any court competent to try the same, the punishment whereof shall be confinement to hard labor for any term of years, shall have been

These statutes, it will be observed, are highly penal in their character, and their application ought not to be extended to cases which do not, by the strictest rules of construction, come under their provisions. It is clear that they were intended by the legislature to prevent the repetition of crime by the same persons by imposing increased penalties upon old offenders, and inflicting a severer punishment upon the repetition of certain crimes.²

The purpose of all these statutes is the very laudable one of reforming offenders by grading the punishment for crime in such a manner that a person who has once offended against the law, and who has been convicted and punished for his crime, will be deterred from a repetition of his act by the fear of an enhanced punishment for a future crime. After the conviction of the earlier offense, the offender is given a period for amendment and reformation, and to enable him, if he will, to return to the paths of rectitude and usefulness. If he shall fail to profit by this opportunity for his moral rehabilitation and shall continue in his criminal career, he is presumed to be incorrigible, and the law demands that he shall be permanently secluded from association with other persons that they may not be contaminated by his pernicious example.

§ 507. Constitutionality of legislation punishing habitual criminals.—The statutes enhancing the punishment upon a subsequent conviction are not open to the objection that they are *ex post facto laws*, or in the nature of such laws, or that they are in any sense retrospective in their action.³ Nor can they, with

before sentenced to a like punishment by courts of this or of any other of the United States, whether such convict shall have been pardoned or not, he shall be sentenced to solitary imprisonment, etc., in addition to the punishment by law prescribed for the offense for which he shall be tried." See 105 Am. St. 983, note.

²*Ex parte Seymour*, 14 Pick. (Mass.) 40, 42.

³*Rand v. Commonwealth*, 9 Gratt. (Va.) 738; *People v. Raymond*, 96 N. Y. 38, 40; *Ross' Case*, 2 Pick.

(Mass.) 165, 170; *Ex parte Gutierrez*, 45 Cal. 429; *Com. v. Graves*, 155 Mass. 163, 165, 29 N. E. 579, 16 L. R. A. 256; *Sturtevant v. Com.*, 158 Mass. 598, 600, 33 N. E. 648; *Blackburn v. State*, 50 Ohio St. 428, 438, 36 N. E. 18; *Commonwealth v. Getchell*, 16 Pick. (Mass.) 452, 453; *Kinney v. State*, 45 Tex. Cr. 500, 78 S. W. 226, reversed in 79 S. W. 570; *Commonwealth v. Phillips*, 11 Pick. (Mass.) 28; *Herndon v. Commonwealth*, 105 Ky. 197, 48 S. W. 989, 20 Ky. L. 1114, 88 Am. St. 303; *White*

justice, be regarded as inflicting or imposing a double punishment for the one offense,⁴ or as inflicting a cruel or unusual punishment,⁵ or as putting the accused twice in jeopardy for the same offense.⁶

v. Commonwealth (Ky.), 50 S. W. 678, 20 Ky. L. 1942; Whorton v. Commonwealth, 7 Ky. L. 826; McDonald v. Massachusetts, 180 U. S. 311, 313, 45 L. ed. 542, 21 S. Ct. 389; People v. Craig, 195 N. Y. 190, 193, 88 N. E. 38, reversing 60 Misc. (N. Y.) 529, 112 N. Y. S. 781.

⁴ People v. McCarthy, 45 How. Pr. (N. Y.) 97; Chenowith v. Commonwealth (Ky.), 12 S. W. 585, 11 Ky. L. 561; People v. Raymond, 96 N. Y. 38, 40; Maguire v. State, 47 Md. 485, 497; Blackburn v. State, 50 Ohio St. 428, 438, 36 N. E. 18; Rand v. Commonwealth, 9 Gratt. (Va.) 738, 743; People v. Stanley, 47 Cal. 113, 116, 17 Am. 401; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; State v. Austin, 113 Mo. 538, 21 S. W. 31; Johnson v. People, 55 N. Y. 512; Kelly v. People, 115 Ill. 583, 4 N. E. 644, 56 Am. 184; People v. Bosworth, 64 Hun (N. Y.) 72, 19 N. Y. S. 114; Commonwealth v. Marchand, 155 Mass. 8, 9, 29 N. E. 578; Commonwealth v. Hughes, 133 Mass. 496, 497; Riley's Case, 2 Pick. (Mass.) 172; Hopkins v. Commonwealth, 3 Metc. (Mass.) 460, 467; State v. Benson, 28 Minn. 424, 425, 10 N. W. 471; Plumbly v. Commonwealth, 2 Metc. (Mass.) 413, 415; State v. Austin, 113 Mo. 538, 21 S. W. 31.

⁵ Moore v. Missouri, 159 U. S. 673, 677, 40 L. ed. 301, 16 Sup. Ct. 179; State v. Hodgson, 66 Vt. 134, 157, 28 Atl. 1089; People v. Stanley, 47 Cal. 113, 117, 17 Am. 401; Borck v. State (Ala. 1905), 39 So. 580; In re, Finley, 1 Cal. App. 198, 81 Pac. 1041;

State v. Dowden, 137 Iowa 573, 115 N. W. 211.

⁶ Moore v. Missouri, 159 U. S. 673, 677, 40 L. ed. 301, 16 Sup. Ct. 179; affirming Pace v. Alabama, 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. 637; and Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 11 S. Ct. 577; Kelly v. People, 115 Ill. 583, 4 N. E. 644, 56 Am. 184; Ingalls v. State, 48 Wis. 647, 658, 4 N. W. 785; People v. Lewis, 64 Cal. 401, 1 Pac. 490. In Rand v. Commonwealth, 9 Gratt. (Va.) 738, People v. Stanley, 47 Cal. 113, 17 Am. 401; McDonald v. Commonwealth, 173 Mass. 322, 53 N. E. 874, 73 Am. St. 293; State v. Hodgson, 66 Vt. 134, 28 Atl. 1089, on page 743, the court says: "No constitutional or other obstacle, however, seems to stand in the way of the legislature's passing an act declaring that persons thereafter convicted of certain offenses committed after the passage of the act, may, if shown to have committed like offenses before, be subjected to greater punishment than that prescribed for those whose previous course in life does not indicate so great a degree of moral depravity. One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him. He knew, or is presumed to have known, before the commission of the second offense, all the penalties denounced against it; and if, in some sense, the additional punishment may be said to be a consequence of the first offense (inasmuch as there could

§ 508. **Conviction of the former crime must have been prior to the commission of the crime now being tried.**—Many of the statutes regulating the punishment of habitual criminals expressly declare that it must appear in evidence that the subsequent crime was committed *after* the date of the prior conviction of the accused. This rule requiring it to be proved that the conviction of the earlier crime antedates the commission of the latter offense for which the accused is now on trial would doubtless apply even where the statute is silent on this point, as otherwise the offender would have had no opportunity to reform because of the salutary discipline of the punishment which he has received as a consequence of the first conviction.⁷

The infliction of the increased punishment is a consequence of the failure to reform on the part of the accused after his earlier punishment. Hence, if the latter crime has been committed prior to the conviction, it is no proof whatever that the sentence and punishment under such conviction had failed in their reformatory effect upon the accused.⁸

be no sentence for such punishment in the absence of proof of the first conviction), still it is not a necessary consequence, but one which could only arise on the conviction for the second offense, and one therefore, which being fully apprised of in advance, the offender was left free to brave or avoid." In construing such a statute the court, in *Commonwealth v. Graves*, 155 Mass. 163, 165, 29 N. E. 579, 16 L. R. A. 256, said: "It is prospective and not retrospective. It deals with offenders for offenses committed after its passage, but it provides that, in considering the nature of an offense and the condition into which the offender is brought by it, his previous conduct may be regarded."

* * * It is not unconstitutional as an *ex post facto* law. In punishing offenses committed after its passage, it punishes the offenders for a criminal habit whose existence cannot be proved without showing their volun-

tary criminal act done after they are presumed to have had knowledge of the statute. Such an act is a manifestation of the habit, which tends to establish and confirm it, and for which the wrongdoer may well be held responsible."

⁷ *Long v. State*, 36 Tex. 6; *People v. Butler*, 3 Cow. (N. Y.) 347; *Brown v. Commonwealth*, 100 Ky. 127, 37 S. W. 496, 18 Ky. L. 630; *Brown v. Commonwealth (Ky.)*, 61 S. W. 4, 22 Ky. L. 1582; *Rand v. Commonwealth*, 9 Gratt. (Va.) 738; *Commonwealth v. Welsh*, 2 Va. Cas. 57, 105 Am. St. 983, note; *Sharp v. Commonwealth (Ky., 1909)*; 124 S. W. 316.

⁸ In *Rand v. Commonwealth*, 9 Gratt. (Va.) 738, 746-748, the court says: "The statute intended that conviction should precede the second offense; that the mischief was a want of reformation by the first punishment, and that the previous conviction

§ 509. Effect of pardon of former crime in excluding proof of prior conviction.—Whether the fact that the accused has been pardoned for the prior crime will prevent a conviction of it from being considered in enhancing the punishment for the subsequent one has been differently determined. Usually the statute expressly provides that the increased penalty shall be imposed irrespective of the mode in which the accused has procured his discharge from his previous imprisonment. In one case, however, where the statute was silent, it was held that, as a pardon relieved the offender of all the consequences of his crime, one of which was his liability under the statute to receive an additional punishment in case of a subsequent conviction, the prior conviction was immaterial.⁹

But elsewhere it has been held that a pardon cannot be prospective in its operation, so as to operate to relieve an offender from the consequences of a future infraction of the criminal law. The increased punishment is not one of the consequences of the former crime from which the pardon relieves the prisoner, but grows out of and is the result of his failure to reform prior to the latter offense, upon which the pardon for an earlier crime cannot legally operate.¹⁰

§ 510. Setting out the former conviction in the indictment—Variance.—The commission of the former crime by the accused, its nature, and the date of its commission, together with the fact and date of his conviction and sentence, must be set forth at length in the indictment or information.¹¹ This is absolutely

tion was required as evidence that the mild correction for one offense had failed of its effect; that the legislature intended that the culprit should first hear the monitory voice of the law before the heavier doom should be announced."

⁹ *Edwards v. Commonwealth*, 78 Va. 39, 49 Am. 377; *State v. Martin*, 59 Ohio St. 212, 52 N. E. 188, 69 Am. St. 762, 43 L. R. A. 94.

¹⁰ *Mount v. Commonwealth*, 2 Duv. (Ky.) 93; *Williams v. People* 196 Ill. 173, 63 N. E. 681; *Herndon v. Com-*

monwealth, 105 Ky. 197, 48 S. W. 989, 20 Ky. L. 1114, 88 Am. St. 303; *State v. Manicke*, 139 Mo. 545, 41 S. W. 223; *People v. Price*, 53 Hun (N. Y.) 185, 6 N. Y. S. 833.

¹¹ *Evans v. State*, 150 Ind. 651, 50 N. E. 820; *People v. Sickles*, 156 N. Y. 541; 57 N. E. 288, affirming 26 App. Div. (N. Y.) 470, 472, 50 N. Y. S. 377; *People v. Price*, 119 N. Y. 650, 23 N. E. 1149; *People v. Craig*, 195 N. Y. 190, 194, 88 N. E. 38; *Wood v. People*, 53 N. Y. 511; *State v. Markuson*, 7 N. Dak. 155, 73 N. W. 82.

essential in order that the accused may be properly informed of the nature of the allegations against him and that he may thus be enabled to prepare his evidence to confute and disprove them.¹² It is not necessary to set forth in the indictment the entire record of the former trial and conviction.¹³ It is enough if the place and the nature of the crime are stated clearly, and the details of the conviction and sentence, including the date, are given with such precision as will enable the court to determine whether or no the case is within the statute.¹⁴ In case several prior convictions are alleged in the indictment it is no variance if only one is proved.¹⁵

§ 511. Effect of plea of not guilty.—Where a prior conviction is alleged in the indictment, a plea of not guilty generally puts the fact of prior conviction in issue, as well as the commission of the subsequent crime.¹⁶ If the accused, while pleading not guilty, voluntarily confesses a former conviction as laid, it is enough, and the jury may accept his admission as conclusive.¹⁷ But when the accused, on his arraignment, pleads not guilty merely, and says nothing as to his prior conviction, he cannot be asked on arraignment if he has been previously convicted of crime.¹⁸

§ 512. Order of trying the issue of prior conviction.—Where the accused pleads not guilty generally and an indictment, containing an allegation of his former conviction, is read to the jurors.

¹² *Maguire v. State*, 47 Md. 485, Pick. (Mass.) 40, 42; *Ex parte Dick*, 14 Pick. (Mass.) 86, 88.

¹³ *Plumbly v. Commonwealth*, 2 Metc. (Mass.) 413. The general rule is that the indictment must contain an averment of every fact necessary to justify the infliction of the proper punishment.

¹⁴ *Plumbly v. Commonwealth*, 2 Metc. (Mass.) 413.

¹⁵ *Wilde v. Commonwealth*, 2 Metc. (Mass.) 408, 410.

¹⁶ *Reg. v. Clark*, 6 Cox C. C. 210. Where proof of a conviction for a term of years is required, proof of a conviction for at least two years must be proved. *Ex parte Seymour*, 14

¹⁷ *People v. Carlton*, 57 Cal. 559; *People v. Lewis*, 64 Cal. 401, 1 Pac. 490; *People v. Gutierrez*, 74 Cal. 81, 83, 15 Pac. 444; *Ex parte Young Ah Gow*, 73 Cal. 438, 442, 445, 15 Pac. 76; *Hines v. State*, 26 Ga. 614. *Contra Thomas v. Commonwealth*, 22 Gratt. (Va.) 912, 916.

¹⁸ *Ex parte Young Ah Gow*, 73 Cal. 438, 15 Pac. 76.

¹⁹ *Ex parte Young Ah Gow*, 73 Cal. 438, 446, 15 Pac. 76; *People v. King*, 64 Cal. 338, 30 Pac. 1028.

it is extremely probable that the fact of his former conviction, as thus called to their attention, will prejudice him greatly in their minds, and tend to make them think that his prior character is bad.¹⁹ Notwithstanding this it is always proper, in the absence of a statute providing a contrary rule, that the indictment should be laid before the jury and read to them. And usually the state is permitted to put in the record of the prior conviction as a part of its case before the verdict is reached on the substantive crime.²⁰ Often by statute it is enacted that if the accused admits the prior conviction, and that he was the person thus convicted, the part of the indictment relating thereto need not be read to the jurors, nor have they any right or occasion to consider it in any way. No evidence of any sort relating to the prior conviction can then be produced before them, nor can they be charged thereon by the court.²¹ But in New York it has been held that as a prior conviction is a fact of criminality which the state must prove, the admission of a prior conviction by counsel for the accused does not preclude the state from proving it, particularly where the admission does not concede the prior conviction as alleged in the indictment and is made after the state has begun its case.²²

By virtue of the discretionary power of the court to regulate its own procedure, the court may withhold from the jurors the issue of former conviction until after a verdict is reached, and may then determine the issue by taking judicial notice of the prior conviction, or by the production of the record. But where this is done it may be that the issue of the identity of the accused

¹⁹ Commonwealth v. Morrow, 9 Phila. (Pa.) 583.

²⁰ Maguire v. State, 47 Md. 485, 497; State v. Manicke, 139 Mo. 545, 41 S. W. 223; People v. Sickles, 156 N. Y. 541, 51 N. E. 288, followed in People v. Craig, 195 N. Y. 190, 194, 88 N. E. 38; which expressly holds that a prior conviction is an essential element of the criminality of the prisoner and that it may and in fact must be proved by the state as a part of its case. Compare McWharther v. State, 118 Ga. 55, 44 S. E. 873; State v.

Smith, 129 Iowa 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539n.

²¹ People v. Meyer, 73 Cal. 548, 549, 550, 15 Pac. 95; *Ex parte* Young Ah Gow, 73 Cal. 438, 443-451, 15 Pac. 76, construing sections 1093, 1158 of California Code.

²² People v. Jordan, 125 App. Div. (N. Y.) 522, 109 N. Y. S. 840. The rule is the same as to the right of the state to prove a prior conviction even when it was conceded before the jury was impanelled. People v. Sickles, 156 N. Y. 541, 51 N. E. 288.

with the man mentioned in the record may come up, and this issue of identity cannot then be tried by the jury to whom it of right belongs.

In England it is provided by statute²³ that the accused shall only be called on to plead to so much of the indictment as charges the subsequent offense. If he pleads guilty, or is found guilty, he shall then be asked whether he has previously been convicted, and if he denies that he has the jury may determine the fact.²⁴

§ 513. Necessity of proving discharge from prison.—Where the statute provides in terms for a subsequent crime committed “after a conviction and a discharge from prison, by reason of expiration of sentence or pardon,” it will be necessary not only to prove the conviction but the discharge from prison as well. The fact of the expiration of the term of imprisonment or the pardon is material and must be affirmatively proved. Neither can be presumed from mere lapse of time, so as to require that the accused shall be compelled to prove that he was not discharged.²⁵ The fact of the discharge may be proved by a certified copy of the prison record where such a record is admissible by statute, or by the oral testimony of a prison official who has a competent knowledge of the fact. The mode of proving pardons is elsewhere fully elucidated.²⁶

§ 514. Proof of the prior conviction—How made.—The prior conviction of the accused can only be proved by the production in court of an attested or duly authenticated copy of the record, which usually must be certified as a true copy by the clerk, under the seal of the court, if it have a seal.²⁷ A statute which provides

²³ 24 and 25 Vic., ch. 96, § 116, and ch. 99, § 37.

²⁴ Reg. v. Fox, 10 Cox C. C. 502; Reg. v. Martin, L. R. 1 C. C. 214; Reg. v. Hilton, 8 Cox C. C. 87, 5 Jur. N. S. 47, 28 L. J. M. C. 28, 7 W. R. 59; Reg. v. Woodfield, 16 Cox C. C. 314.

²⁵ Wood v. People, 53 N. Y. 511, 514.

²⁶ See *ante*, § 208.

²⁷ Maguire v. State, 47 Md. 485, 497; Reg. v. Clark, 20 Eng. L. & E. 582; Commonwealth v. Miller, 8 Gray (Mass.) 484, 485; Kane v. Commonwealth, 109 Pa. St. 541, 545; Commonwealth v. Phillips, 11 Pick (Mass.) 28, 30; Commonwealth v. Hughes, 133 Mass. 496, 497; Rector v. Commonwealth, 80 Ky. 468, 470, construing Kentucky General Statutes, chap. 25, art. 1, § 12; State v.

for proof of previous conviction by the record lets in only the verdict, judgment of conviction and sentence, and the previous indictment is inadmissible.²⁸ Nor can the prosecution show the facts relating to the prior offense. Sometimes the docket entries of the clerk have been received when no other record has been kept, or where the record was not made up.²⁹ And in case documentary evidence cannot be procured the prior conviction may be proved by parol, if no objection is made.³⁰

The issue of the prior conviction of the prisoner is for the jury, involving, as it does, a question of the identity of the person now accused with the person whose name is mentioned in the record of the prior conviction.³¹ It has been held that proof of a prior conviction is not open to the objection that it tends to prejudice the jury by showing that the accused has been guilty of a separate and independent crime; or because it tends to establish his bad character before he has put his character in issue, as the purpose of this evidence is not solely to prove bad character.³² The state is not bound to prove as a part of its case that the prior conviction had not been vacated, set aside or reversed, and if such be the case the burden of proof is on the accused.³³

§ 515. Proof of the identity of the accused with the person previously convicted.—The identity of the accused with him who was previously convicted must be proved and the burden of proof is

Vaughan, 199 Mo. 108, 97 S. W. 879; Oliver v. Commonwealth, 113 Ky. 228, 67 S. W. 983, 24 Ky. L. 84; People v. Meyer, 73 Cal. 548, 15 Pac. 95; *Ex parte* Young Ah Gow, 73 Cal. 438, 15 Pac. 76; Mitchell v. State, 52 Tex. Cr. 37, 106 S. W. 124, 105 Am. St. 983, note; People v. Koehler, 146 Ill. App. 541.

²⁸ Tall v. Commonwealth (Ky.), 110 S. W. 425, 33 Ky. L. 541. Nor can the prosecution show the facts relating to the prior offense.

²⁹ State v. Hines, 68 Me. 202, 203; State v. Neagle, 65 Me. 468, 469.

³⁰ State v. Rockett, 87 Mo. 666. The certificate of the clerk need not show

that a sentence was had. State v. Hines, 68 Me. 202, 203.

³¹ State v. Lashus, 79 Me. 504, 506, 11 Atl. 180; State v. Robinson, 39 Me. 150, 155; State v. Spaulding, 61 Vt. 505, 17 Atl. 844; State v. Freeman, 27 Vt. 523, 527; State v. Haynes, 35 Vt. 570, 572; Rector v. Commonwealth, 80 Ky. 468, 471; Maguire v. State, 47 Md. 485, 497.

³² Johnson v. People, 55 N. Y. 512, 514, affirming 65 Barb. (N. Y.) 342, and compare Kane v. Commonwealth, 109 Pa. St. 541, 545.

³³ Tall v. Commonwealth (Ky.), 110 S. W. 425, 33 Ky. L. 541.

on the state.³⁴ The question whether the person who was convicted at the former trial is identical with the person who is now accused, and who is now on trial, is one of fact for the jury.³⁵ The defendant's admission of identity will not be sufficient to establish it.³⁶ But, in the absence of this, the identity must be proved.³⁷

The identity of the name of the convict mentioned in the record with the name of the prisoner at the bar, is some evidence of identity of person. Whether it shall be conclusive depends on the connecting circumstances.³⁸ In most cases, however, identity of name alone is not sufficient,³⁹ but ought to be supplemented by other evidence, preferably by that of an eye-witness of the former trial or by that of some acquaintance of the prisoner.⁴⁰

It is never necessary to produce an eye-witness who can swear of his own knowledge that he saw the accused convicted.⁴¹ The proof of the identity may relate to the identity while the accused was in custody under the prior sentence.⁴² In con-

³⁴ State v. Smith, 129 Iowa 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539n.

³⁵ State v. Freeman, 27 Vt. 523; State v. Haynes, 35 Vt. 570, 572; Hines v. State, 26 Ga. 614; State v. Lashus, 79 Me. 504, 11 Atl. 180.

³⁶ Kane v. Commonwealth, 109 Pa. St. 541, 545.

³⁷ Commonwealth v. Briggs, 7 Pick. (Mass.) 177, 179; Reg. v. Leng, 1 F. & F. 77.

³⁸ State v. Lashus, 79 Me. 504, 506, 11 Atl. 180; State v. Court (Mo., 1910), 125 S. W. 451.

³⁹ State v. Smith, 129 Iowa 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539n; Reg. v. Levy, 8 Cox C. C. 73; Reg. v. Crofts, 9 C. & P. 219, 38 E. C. L. 137; Reg. v. Leng, 1 F. & F. 77.

⁴⁰ See, also, *ante* cases, cited page 668, note 20, as to identity of persons named in marriage certificates. In the case of State v. Lashus, 79 Me. 504, 506, 11 Atl. 180, the court said: "The identity of the defendant on

trial, with the person named in the record is a question of fact. The identity of name is some evidence of identity of person, more or less potent, according to connecting circumstances, but it is not, certainly in this case, sufficiently conclusive to authorize the court to take it from the jury."

⁴¹ Reg. v. Leng, 1 F. & F. 77, 78.

⁴² Thus, in an English case, evidence that the prisoner was brought to the Leeds Borough Gaol under a warrant which is produced, which is signed by the same magistrate, which bears the same date, having the same names of prosecutor and prisoner, and for the same offense, and having the same kind and duration of punishment as was imposed under the commitment, and which are recited in the certificate of the record, has been held sufficient to prove identity. Reg. v. Leng, 1 F. & F. 77, 78. In Reg. v. Crofts, 9 C. & P. 219, the governor of

clusion it may be said that the principal crime charged for which the accused is now on trial will be presumed to be the only one that the accused has ever committed until the contrary is proved.⁴⁸

the gaol was permitted to testify on the issue of identity as follows: "The prisoner was in my custody before the Newbury Borough Sessions, in October, 1837; I sent him to Newbury at that time; I was not at the trial, but I received him back with an order

from the Newbury Sessions; and he remained in my custody for four months under that sentence." This was held sufficient.

⁴⁸ *Kilbourn v. State*, 9 Conn. 560, 563; *People v. Cook*, 45 Hun (N. Y.) 34, 37; 1 Bish. Cr. Law, § 961.

CHAPTER XXXIV.

NEWLY-DISCOVERED EVIDENCE.

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| § 516. General considerations. | § 519. Credibility of the new evidence. |
| 517. Diligent efforts to find and to procure the evidence in season must be shown. | 520. Materiality and relevancy of the newly-discovered evidence. |
| 518. Burden of proof—The new evidence must be set out in the affidavits. | 521. New evidence impeaching merely. |
| | 522. The new evidence must not be cumulative merely. |

§ 516. **General considerations.**—In the absence of a permissive statute, a court has no power to grant a new trial in case of a felony on account of newly-discovered evidence. As regards misdemeanors, a court possessing general jurisdiction has inherent power at common law to grant a new trial on motion, if it shall appear that justice will be advanced thereby. So far as felonies are concerned, the right of the accused to a new trial, upon the grounds of newly-discovered evidence, is wholly the creature of statutes, which usually provide for the cases in which the right may be recognized,¹ and the mode in which its exercise may be secured. The right to a new trial is never absolute.² Whether a new trial shall be granted upon the grounds of newly-discovered evidence is in the legal discretion of the court. If this discretion is exercised in a legal and proper manner, the

¹“Where it is made to appear, by affidavit, that upon another trial, the defendant can produce evidence such as, if before received, would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of

their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed.” N. Y. Code Criminal Procedure, § 465, subd. 7.

²State v. Pell (Iowa, 1909), 119 N. W. 154; People v. Jones, 115 N. Y. S. 800; Byers v. Territory, 1 Okla. Cr. 677, 100 Pac. 261, 103 Pac. 532; Thomas v. State, 129 Ga. 419, 59 S. E. 246.

action of the court denying a motion for a new trial is not reversible. But if the discretion of the court is exercised arbitrarily or capriciously, or in such a manner as to work a manifest injustice to an innocent person, so that it can be said to be clearly and unmistakably abused, the action of the court will not be regarded as final.³

§ 517. Diligent efforts to find and to procure the evidence in season must be shown.—The accused, when moving for a re-trial upon the grounds of newly-discovered evidence, must show by affidavits that he used due diligence to procure the evidence in time for use at the trial if he knew of its existence prior to his con-

³ *People v. Trezza*, 128 N. Y. 529, 28 N. E. 533, 8 N. Y. Cr. 291, 295; *People v. Lane*, 31 Hun (N. Y.) 13, 15; *Commonwealth v. Ruisseau*, 140 Mass. 363, 365, 5 N. E. 166; *People v. Demasters*, 109 Cal. 607, 608, 42 Pac. 236; *People v. Urquidas*, 96 Cal. 239, 242, 31 Pac. 52; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *United States v. Williams*, 1 Cliff. C. C. 5, 28 Fed. Cas. 16707; *State v. Powell*, 51 Wash. 372, 98 Pac. 741; *State v. Brown*, 121 La. 599, 46 So. 664. It may be well in this place to call attention to the rule which, in the absence of a statute prescribing when a motion for a new trial must be made, requires that it shall be made before the expiration of the term at which the trial was had. *People v. Bradner*, 107 N. Y. 1, 13 N. E. 87; *People v. Hovey*, 30 Hun (N. Y.) 354; *Ex parte Holmes*, 21 Neb. 324, 32 N. W. 69. In *Chandler v. Thompson*, 30 Fed. 38, the court, on page 44, says: "The statute conferring jurisdiction upon the Federal courts to grant new trials expressly provides that such power should be exercised 'for reasons which new trials have been usually granted in courts of law.' This provision applies only to jury

trials, and is directory to the courts, to be governed by the rules and principles of the common law. The courts of the common law have usually granted new trials when the verdict is against the weight of the evidence, or contrary to law; * * * for the admission of illegal evidence, or the rejection of competent evidence; or when a party has been deprived of evidence by accident and without fault on his part, or is taken by surprise in a matter that he could not reasonably anticipate, for misdirection of the court upon material questions of law or for serious irregularity in the trial; or misconduct of the jury; or unfair conduct of the prevailing party; or manifest injustice has been done, * * * when the losing party has discovered material evidence since the trial, and satisfied the court that he had used due diligence in preparing his case for trial; that the newly-discovered evidence will tend to prove a material fact which was not directly in issue on the trial, or was not then known and investigated by proof, and will probably produce a different result, * * * and is not merely cumulative."

viction. He must state facts in the affidavits explicitly and specifically accounting for his failure to produce such evidence and constituting a proper degree of diligence on his part.⁴ A mere allegation that he used due diligence will not suffice. The affiant ought to set forth with reasonable length and with some particularity the various measures resorted to by him to procure the production of the evidence at his trial. He ought also, if it is possible, to state the reasons why his efforts were not successful. But he must state facts, and not mere conclusions, opinions or guesses.⁵

The reasons for requiring the exercise of diligence by the accused in this connection are obvious. If the existence and the character of the evidence were known to him while his trial was pending, and if he could have procured it in season by the exer-

⁴Harper v. State, 131 Ga. 771, 63 S. E. 339; State v. Pell, 140 Iowa 655, 119 N. W. 154; Evans v. State, 55 Tex. Cr. 649, 117 S. W. 820; Williams v. State, 4 Ga. App. 853, 62 S. E. 525; People v. Landiero, 192 N. Y. 304, 85 N. E. 132; Parker v. State, 3 Ga. App. 336, 59 S. E. 823; Davis v. State, 52 Tex. Cr. 149, 106 S. W. 144; Rogers v. State, 129 Ga. 589, 59 S. E. 288; Day v. State, 91 Miss. 239, 44 So. 813; State v. Sargood, 80 Va. 412, 68 Atl. 515, 130 Am. St. 992; State v. Hall, 97 Iowa 400, 66 N. W. 725; Sconyers v. State, 85 Ga. 672, 678, 12 S. E. 1069; Lynch v. State, 84 Ga. 726, 730, 11 S. E. 842; Statham v. State, 86 Ga. 331, 12 S. E. 640; Ford v. State, 91 Ga. 162, 164, 17 S. E. 103; Gaddis v. State, 91 Ga. 148, 151, 16 S. E. 936; Meurer v. State, 129 Ind. 587, 29 N. E. 392; Aholtz v. People, 121 Ill. 560, 13 N. E. 524; Bean v. People, 124 Ill. 576, 585, 16 N. E. 656; State v. Koontz, 31 W. Va. 127, 5 S. E. 328; Field v. Commonwealth, 89 Va. 690, 694, 16 S. E. 865; State v. Gunagy, 84 Iowa 177, 182, 183, 50 N. W. 882; Washington v. State, 35 Tex. Cr. 154, 32 S. W. 693; Bell v. State (Tex.), 20 S. W. 362; McVey v. State, 23 Tex. App. 659, 5 S. W. 174; State v. Moses, 139 Mo. 217, 40 S. W. 883; State v. Musick, 101 Mo. 260, 14 S. W. 212; State v. Lichliter, 95 Mo. 402, 408, 8 S. W. 720; State v. Keaveny, 49 La. Ann. 667, 21 So. 730; State v. Hanks, 39 La. Ann. 234, 236, 1 So. 458; State v. Washington, 36 La. Ann. 341; People v. McCurdy, 68 Cal. 576, 10 Pac. 207; People v. Jones (Cal.), 8 Pac. 611; People v. Freeman, 92 Cal. 359, 28 Pac. 261; Klink v. People, 16 Colo. 467, 27 Pac. 1062.

⁵State v. Crawford, 99 Mo. 74, 80, 12 S. W. 354; Taylor v. State, 132 Ga. 235, 63 S. E. 1116; Orr v. State, 5 Ga. App. 76, 62 S. E. 676; Cheek v. State, 171 Ind. 98, 85 N. E. 779. Where the accused submits proper affidavits showing facts constituting diligence on his part, the state may offer counter affidavits for the purpose of proving that he did not use due diligence. Smith v. State, 143 Ind. 685, 687, 42 N. E. 913; People v. Casena, 90 Cal. 381, 383, 27 Pac. 300.

cise of diligence, it was his duty to do so at the earliest opportunity.⁶ A person indicted for a crime and on trial cannot be allowed to speculate upon the outcome of his trial and to hold back evidence which he may easily procure, with the hope and expectation that, should the proof against him be more convincing than he anticipates, he can put the state to the additional expense of another trial, at which the evidence that he has suppressed can be introduced. The law favors a full discovery of all relevant evidence which has a bearing upon the criminality of the defendant. It will not permit the accused to mask his batteries, and, having thus drawn all the fire of the prosecution, he cannot, after having been convicted, take the chances of a new trial in which everything would be in his favor.

Hence the relevancy of the evidence, its cogency and credibility, and even the reasonable probability that its introduction, if a new trial is granted, may result in the acquittal of the accused, will not relieve him from the consequences of his prior laches.

§ 518. Burden of proof—The new evidence must be set out in the affidavits.—The burden of proof to show that the accused has complied with all the requirements of the law is on the party moving for the new trial.⁷ The motion for a new trial must be accompanied by and be based upon a proper affidavit, sworn to by the accused, showing in detail all the essential jurisdictional facts, unless some valid reason exists for its non-production.⁸

So, too, all the facts which constitute the newly-discovered evidence ought to be set forth at reasonable length, either in the affidavit of the accused, or in an affidavit of the witness whom he expects to testify to them. This is absolutely necessary in order that the court may ascertain the materiality and credibility of the testimony, and may determine if it be cumulative or not.⁹

⁶ *People v. Landiero*, 192 N. Y. 304, 85 N. E. 132.

⁷ *People v. Fice*, 97 Cal. 459, 32 Pac. 531.

⁸ *State v. Laycock*, 136 Mo. 93, 100, 37 S. W. 802; *State v. Nagel*, 136 Mo. 45, 50, 37 S. W. 821; *State v. Mc-*

Laughlin, 27 Mo. 111; *State v. Campbell*, 115 Mo. 391, 393, 22 S. W. 367; *State v. Ray*, 53 Mo. 345; *Weeks v. State*, 79 Ga. 36, 3 S. E. 323; *Dean v. State*, 93 Ga. 184, 18 S. E. 557.

⁹ *State v. Moses*, 139 Mo. 217, 49 S. W. 883; *State v. Hollier*, 49 La. Ann.

· § 519. **Credibility of the new evidence.**—As a result of the requirement that the new evidence must be such as would, had it been introduced at the trial, have probably resulted in the acquittal of the accused, it is necessary that it shall appear to the court hearing the motion that it is probably true.¹⁰

The witness who is expected to testify must appear to the court to be credible. His credibility is to be determined by the judge hearing the motion,¹¹ who may examine him in open court, and he may also examine any other person who has made an affidavit which is offered to support the motion in order to test his credibility.¹² And the prosecuting attorney may submit affidavits of persons who know the reputation for veracity of the proposed witness, and who are able and willing to swear that they would not believe him under oath.¹³

The admission by a witness for the prosecution that he had sworn falsely at the trial does not alone constitute new evidence. Even though he shall state that he deliberately gave false testimony to some material facts, and it shall also appear that the conviction of the accused was largely owing to his testimony, it does not follow that a retrial ought to be had; for the court may not believe his present statement is true and made in good faith. But if the present statement of the witness is so far contradictory

371, 21 So. 633; *People v. Eppinger*, 114 Cal. 350, 46 Pac. 97; *Richardson v. State*, 47 Ark. 562, 2 S. W. 187; *Slater v. United States*, 1 Okl. Cr. 275, 98 Pac. 110. In a case where the accused moved for a new trial on the ground that another person had confessed the commission of the crime of which he stood convicted, he was required to state in his affidavit the name of the person, his residence and whether his attendance could be procured in season. *State v. Miller*, 3 Wash. St. 131, 28 Pac. 375.

¹⁰ *Lawrence v. State*, 36 Tex. Cr. 173, 36 S. W. 90; *Clark v. State*, 38 Tex. Cr. 30, 40 S. W. 992; *Grant v. State*, 97 Ga. 789, 25 S. E. 399; *People v. Mayhew*, 19 Misc. (N. Y.) 313, 44 N. Y. 206, construing Code Crim.

Pro., § 465, subd. 7; *Johnson v. State*, 85 Ga. 561, 11 S. E. 844; *Neill v. State*, 79 Ga. 779, 4 S. E. 871; *State v. Tall*, 43 Minn. 273, 45 N. W. 449; *People v. Noonan*, 14 N. Y. S. 519, 60 Hun (N. Y.) 578, without opinion, 38 St. Reporter (N. Y.) 854; *People v. Lane*, 1 N. Y. Cr. 548, 31 Hun (N. Y.) 13; *People v. Henry*, 127 App. Div. (N. Y.) 489, 111 N. Y. S. 1005.

¹¹ *People v. Shea*, 16 Misc. (N. Y.) 111, 38 N. Y. 821.

¹² *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046; *Glidewell v. State*, 15 Lea (Tenn.) 133; N. Y. Code Cr. Pro., § 465, and see *United States v. Angney*, 15 Wash. Law Rep. 560.

¹³ *Grant v. State*, 97 Ga. 789, 25 S. E. 399.

of his previous testimony as to wholly obliterate it and destroy its effect, the court ought to grant a retrial if it believes the statement to be credible.¹⁴

§ 520. Materiality and relevancy of the newly-discovered evidence.

—The accused must show by affidavits that the new evidence would have been material if it had been offered at his trial and, had it been produced and admitted, that it would have probably resulted in his acquittal.¹⁵ It must appear to the satisfaction of the court that, if a new trial is granted, it is reasonably probable that, on the introduction of the new evidence, the accused will be acquitted. If the new evidence is so weak, unsatisfactory or inconclusive, or if it is so far reconcilable with the guilt of the accused, that it will not bring about a different result, then, as a new trial would be useless, it will not be granted.

The moving party must show that the new evidence would have been admitted as relevant to show his innocence had it been offered on his former trial. The irrelevancy of the evidence alone may prevent the granting of a new trial. On the other hand mere relevancy alone is not sufficient to admit the evidence if it is incredible, cumulative, unconvincing or otherwise unsatisfactory.¹⁶

¹⁴ *Dennis v. State*, 103 Ind. 142, 151, 2 N. E. 349.

¹⁵ *Taylor v. State*, 132 Ga. 235, 63 S. E. 1116; *Reyes v. State*, 55 Tex. Cr. 422, 117 S. W. 152; *Howell v. State*, 5 Ga. App. 612, 63 S. E. 600; *Weatherby v. State* (Miss., 1909), 48 So. 724; *Fleming v. State*, 54 Tex. Cr. 339, 114 S. W. 383; *Ludwig v. State*, 170 Ind. 648, 85 N. E. 345; *Nioum v. Commonwealth*, 128 Ky. 685, 108 S. W. 945, 33 Ky. L. 62; *Gibbs v. United States*, 7 Ind. T. 182, 104 S. W. 583; *Washington v. State*, (Tex. Cr. 1907), 105 S. W. 789; *Davis v. State*, 52 Tex. Cr. 149, 106 S. W. 144; *Field v. Commonwealth*, 89 Va. 690, 694, 16 S. E. 865; *People v. Lane*, 1 N. Y. Cr. 548, 31 Hun (N. Y.) 13; *Tolleson v. State*, 97 Ga. 352,

23 S. E. 993; *State v. Armstrong*, 48 La. Ann. 314, 19 So. 146; *People v. Stanford*, 64 Cal. 27, 28 Pac. 106; *Cooper v. State*, 91 Ga. 362, 18 S. E. 303; *Williams v. United States*, 137 U. S. 113, 34 L. ed. 590, 11 Sup. Ct. 43; *State v. Foster*, 79 Iowa 726, 45 N. W. 385; *United States v. Smith*, 1 Sawyer (U. S.) 277, 27 Fed. Cas. 16341; *United States v. Gibert*, 2 Sumn. (U. S.) 19, 25 Fed. Cas. 15204.

¹⁶ *Humphrey v. State*, 78 Wis. 569, 47 N. W. 836; *Field v. Commonwealth*, 89 Va. 690, 694, 16 S. E. 865; *State v. Keaveny*, 49 La. Ann. 667, 21 So. 730; *Briscoe v. State*, 95 Ga. 496, 20 S. E. 211. Where the new evidence presents a theory of the case utterly at variance with the statement of the accused which he made at his trial,

§ 521. New evidence impeaching merely.—A motion for a new trial ought to be denied where the evidence which the accused proposes to introduce merely impeaches that of a witness at the former trial whose evidence was credible or fully corroborated.¹⁷

§ 522. The new evidence must not be cumulative merely.—A motion for a new trial on the ground of newly-discovered evidence must be denied, if it appears to the court that the evidence would have been cumulative merely if it had been introduced at the trial.¹⁸

the new trial was held to be properly refused. *Grant v. State*, 97 Ga. 789, 25 S. E. 399.

¹⁷ *State v. Pell*, 140 Iowa 655, 119 N. W. 154; *Bailey v. State* (Miss.), 48 So. 227, 20 L. R. A. (N. S.) 409; *Shelton v. State*, 132 Ga. 413, 64 S. E. 262; *Clark v. State*, 5 Ga. App. 605, 63 S. E. 606; *State v. Sebastian*, 215 Mo. 58, 114 S. W. 522; *Harrolson v. State*, 54 Tex. Cr. 452, 113 S. W. 544; *Fletcher v. People*, 117 Ill. 184, 189, 7 N. E. 80; *Hudspeth v. State*, 55 Ark. 323, 18 S. W. 183; *State v. Potter*, 108 Mo. 424, 22 S. W. 89; *State v. Potts*, 83 Iowa 317, 49 N. W. 845; *Pease v. State*, 91 Ga. 18, 19, 16 S. E. 113; *Marable v. State*, 89 Ga. 425, 15 S. E. 453; *Statham v. State*, 84 Ga. 17, 10 S. E. 493; *Reid v. State*, 81 Ga. 760, 8 S. E. 431; *Dominick v. State*, 81 Ga. 715, 8 S. E. 432; *Johnson v. State*, 83 Ga. 553, 10 S. E. 207; *Ramsey v. State*, 89 Ga. 198, 202, 205, 15 S. E. 6; *Sutherlin v. State*, 108 Ind. 389, 391, 9 N. E. 298; *Meurer v. State*, 129 Ind. 587, 588, 29 N. E. 392; *Evans v. State*, 67 Ind. 68; *Winsett v. State*, 57 Ind. 26; *Grate v. State*, 23 Tex. App. 458, 5 S. W. 245; *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295; *Field v. Commonwealth*, 89 Va. 690, 694, 16 S. E. 865; *Whitehurst v. Commonwealth*, 79 Va. 556, 559; *Read*

v. Commonwealth, 22 Gratt. (Va.) 924; *State v. Chambers*, 43 La. Ann. 1108, 10 So. 247. In case the new evidence would be merely cumulative, or would only serve the purpose of impeachment, a new trial should not be granted though the party was surprised by the witness who is to be impeached. *Meurer v. State*, 129 Ind. 587, 588, 29 N. E. 392.

¹⁸ *Young v. State*, 131 Ga. 498, 62 S. E. 707; *People v. Probst*, 237 Ill. 390, 86 N. E. 588; *State v. Turner*, 122 La. 371, 47 So. 685; *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096; *Adams v. State*, 55 Fla. 1, 46 So. 152; *Hamblin v. State*, 81 Neb. 148, 115 N. W. 850; *Rogers v. State*, 129 Ga. 589, 59 S. E. 288; *Clements v. State*, 80 Neb. 313, 114 N. W. 271; *People v. Demasters*, 109 Cal. 607, 608, 42 Pac. 236; *People v. Cesena*, 90 Cal. 381, 383, 27 Pac. 300; *People v. Urquidas*, 96 Cal. 239, 242, 31 Pac. 52; *People v. Hong Quin Moon*, 92 Cal. 41, 27 Pac. 1096; *Langdon v. People*, 133 Ill. 382, 409, 24 N. E. 874; *Fletcher v. People*, 117 Ill. 184, 7 N. E. 80; *Stalcup v. State*, 129 Ind. 519, 522, 28 N. E. 1116; *Sutherlin v. State*, 108 Ind. 389, 391, 9 N. E. 298; *Meurer v. State*, 129 Ind. 587, 29 N. E. 392; *Smith v. State*, 143 Ind. 685, 688, 42 N. E. 913; *State v. Tyson*, 56 Kan. 686, 44 Pac. 609, 689;

The court must decide whether the evidence offered is cumulative. Cumulative evidence is additional evidence tending to prove facts of the same general character as those supported by other evidence previously produced. Such evidence merely repeats in substance and effect what has already been put in proof by other evidence of the same character. Thus, for example, if the accused has endeavored to prove an alibi at his trial, and for this purpose has introduced the testimony of one or more witnesses who have sworn that, at the time of the crime, he was in another place, the evidence of another witness that, at the same time, he had seen him in that place would clearly be cumulative. Or, if the issue in the trial was his insanity, and he had called medical experts to sustain his allegation of mental incapacity, the testimony of other experts to this same fact would be cumulative and inadmissible. But the new evidence is not cumulative where it is of a different kind or character from evidence given to sustain the same point on the prior trial.¹⁹

State v. Rohrer, 34 Kan. 427, 8 Pac. 718; State v. Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. 284; State v. Gleason, 68 Iowa 618, 619, 27 N. W. 785; State v. Johnson, 72 Iowa 393, 401, 34 N. W. 177; State v. Potts, 83 Iowa 317, 319, 49 N. W. 845; State v. Whitmer, 77 Iowa 557, 560, 42 N. W. 442; Scruggs v. State, 35 Tex. Cr. 622, 34 S. W. 951; King v. State, 91 Tenn. 617, 20 S. W. 169; People v. Peacock, 5 Utah 240, 14 Pac. 332; United States v. Eldredge, 5 Utah 161, 13 Pac. 673; Casey v. State, 20 Neb. 138, 29 N. W. 264; State v. Hendrix, 45 La. Ann. 500, 12 So. 621; State v. Hanks, 39 La. Ann. 234, 236, 1 So. 458; State v. Lamothe, 37 La. Ann. 43, 44; Williams v. Commonwealth (Ky.), 18 S. W. 364, 13 Ky. L. 753; State v. Woodward, 95 Mo. 129, 8 S. W. 220; Tripp v. State, 95 Ga. 502, 20 S. E. 248; Dale v. State, 88 Ga. 552, 561, 15 S. E. 287; Greer v. State, 87 Ga. 559, 13 S. E. 552; Neill v. State, 79 Ga. 779, 4 S. E. 871; Bond v. Commonwealth, 83 Va. 581, 3 S. E. 149; State v. Starnes, 97 N. Car. 423, 2 S. E. 447; State v. Workman, 39 S. Car. 151, 17 S. E. 694; People v. Noonan, 14 N. Y. S. 519, 38 N. Y. St. 854, 60 Hun (N. Y.) 578, without opinion.

¹⁹ Fletcher v. People, 117 Ill. 184, 190, 7 N. E. 80, citing Wharton on Crim. Pl. & Practice, 870; Long v. State, 54 Ga. 564, and see People v. Leighton, 1 N. Y. Crim. 468. In People v. Lane, 31 Hun (N. Y.) 13, it was held that newly-discovered evidence of general good character was not cumulative when the accused had not offered any proof of good character on his trial though his character for veracity had been impeached.

CHAPTER XXXV.

EVIDENCE IN BASTARDY PROCEEDINGS.

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| <p>§ 523. Bastardy proceedings—Whether criminal or civil in their character.</p> <p>524. Degree of proof required—Doctrine of reasonable doubt not applicable.</p> <p>525. Evidence for the jury from the inspection of the child.</p> <p>526. Presumption of legitimacy.</p> <p>527. Evidence rebutting the presumption of legitimacy.</p> <p>528. The relations of the parties.</p> <p>529. Competency and credibility of the prosecutrix.</p> | <p>§ 530. Variance in proving the date of the conception.</p> <p>531. The reputation of the prosecutrix.</p> <p>532. Sexual intercourse with other men during the period of gestation.</p> <p>533. Admissibility of the admissions and declarations of the parties.</p> <p>534. Evidence of the preliminary examination.</p> <p>535. Evidence of compromise and settlement.</p> |
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§ 523. Bastardy proceedings—Whether criminal or civil in their character.—In the absence of statute at the common law no responsibility rested upon the father of an illegitimate child to provide for its care, education or maintenance, or for the expenses of the lying-in or nursing.¹ But at the present time in nearly every state of the Union statutes exist casting this responsibility upon him, and providing for enforcing the same by appropriate legal proceedings, which are usually commenced at the instance of the mother.²

¹ Moncrief v. Ely, 19 Wend. (N. Y.) 405; Birdsall v. Edgerton, 25 Wend. (N. Y.) 619; Vetten v. Wallace, 39 Ill. App. 390, 396; Glenn v. State, 46 Ind. 368, 376; State v. Tieman, 32 Wash. 294, 73 Pac. 375, 98 Am. St. 854.

² State v. Mize, 117 N. Car. 780, 781, 23 S. E. 330, Code N. Car., § 31. Some statutes provide that the proceeding may be initiated by a superin-

tendent or overseer of the poor or other similar official. Where such is the case the mother has no power to prosecute the proceeding, or to appeal from any order which is made therein. People v. Ogden, 8 App. Div. (N. Y.) 464, 40 N. Y. S. 827; People v. Shulman, 8 App. Div. (N. Y.) 514, 40 N. Y. S. 779; construing N. Y. Code Cr. Pro., § 840. Cf. State v. Bunker, 7 S. Dak. 639, 65 N. W. 33

A statutory mode of ascertaining who is the father of the child and of compelling the father to assume the responsibility for its support, is a bar to a civil suit against him brought by any person who has incurred expense in caring for or supporting the child.³ Whether the proceedings given by the statute are civil or criminal is a question which has received much consideration in the cases. In some states the begetting of a bastard is a statutory misdemeanor;⁴ and, because of this fact, a discussion of the rules governing the procedure and the presentation of evidence in bastardy proceedings will not be out of place in this treatise. The current of the authorities favors the view that the proceedings under the statute by virtue of which the father of the bastard is compelled to contribute towards its support⁵ is a

"They (the proceedings) are partly for the benefit of the complainant, and may be instituted in her name, and partly for the purpose of indemnifying the public, and may be instituted in the name of the people." *Sutfin v. People*, 43 Mich. 37, 4 N. W. 509; *State v. Patterson*, 18 S. Dak. 251, 100 N. W. 162.

³ *Nixon v. Perry*, 77 Ga. 530, 3 S. E. 253.

⁴ *State v. Ostwalt*, 118 N. Car. 1208, 1216, 24 S. E. 660, 32 L. R. A. 396; *Myers v. Stafford*, 114 N. Car. 689, 690, 19 S. E. 764; construing Code N. Car., § 35; *State v. Cagle*, 114 N. Car. 835, 19 S. E. 766; *State v. Brunson*, 38 S. Car. 263, 268, 16 S. E. 1001, 37 Am. St. 752n, 19 L. R. A. 362; General Statutes, S. Car., § 1582; Georgia Code, § 4564, as amended by Act of March 20, 1866; *Cady v. St. Clair Cir. Judge*, 139 Mich. 618, 102 N. W. 1025, 12 Det. Leg. N. 2.

⁵ *Smith v. Lint*, 37 Me. 546, 547; *State v. Blackburn*, 61 Ark. 407, 33 S. W. 529; *People v. Harty*, 49 Mich. 490, 492, 13 N. W. 829; *People v. Cole*, 113 Mich. 83, 71 N. W. 455;

Glenn v. State, 46 Ind. 368, 376; *State v. Shoemaker*, 62 Iowa 343, 17 N. W. 589, 49 Am. 146; *Lewis v. People*, 82 Ill. 104; *State v. McIntosh*, 64 N. Car. 607; *Millett v. Baker*, 42 Barb. (N. Y.) 215; *People v. Phalen*, 49 Mich. 492, 494; *Corcoran v. Higgins*, 194 Mass. 291, 80 N. E. 231; *State v. Liles*, 134 N. Car. 735, 47 S. E. 750; *Harley v. Jonia Circuit Judge*, 140 Mich. 642, 104 N. W. 21, 12 Det. Leg. N. 260; *Gooding v. State*, 39 Ind. App. 42, 78 N. E. 257. But compare *State v. Rogers*, 119 N. Car. 793, 26 S. E. 142, 143; *Baker v. State*, 56 Wis. 568, 14 N. W. 718; *Jackson v. State*, 29 Ark. 62; *Semon v. People*, 42 Mich. 141, 3 N. W. 304; *Oldham v. State*, 5 Gill (Md.) 90; *Bake v. State*, 21 Md. 422; *Dorgan v. State*, 72 Ala. 173; *In re Lee*, 41 Kan. 318, 21 Pac. 282; *State v. Lang* (N. Dak., 1910), 125 N. W. 558; *Paulk v. State*, 52 Ala. 427, holding that this proceeding is criminal or quasi-criminal in its character. Where the statute in terms provides that the issue of paternity shall be tried in a court which has an

civil action, though not in the sense of that term as it is used in a statute forbidding arrest in a civil action.⁶

And the amount charged against the father of the bastard as the result of the statutory proceeding is not a debt within the meaning of a statutory or constitutional provision prohibiting imprisonment for debt.⁷

§ 524. Degree of proof required—Doctrine of reasonable doubt not applicable.—The rules and principles of the law of evidence which are applicable to civil proceedings are also applicable to bastardy proceedings. The defendant may be compelled to testify as a witness for the mother of the child,⁸ and, in case of the absence of any material witnesses, their depositions may be available as evidence.⁹

The burden of proof to show the paternity of the child is upon its mother, but this fact need never be proved by her beyond a

exclusive criminal jurisdiction, provides also that the proceedings shall be commenced by a warrant, as is the case in other criminal actions, uses the words "accused," "acquitted," and "convicted," and furthermore provides that the defendant shall be liable to an execution to the same extent as are those convicted of misdemeanors, the conviction is irresistible that the legislature intended to make it a criminal offense. *State v. Brewer*, 38 S. Car. 263, 268, 16 S. E. 1001, 1004, 37 Am. St. 752n, 19 L. R. A. 362.

⁶ *Hodgson v. Nickell*, 69 Wis. 308, 34 N. W. 118; *State v. Brewer*, 38 S. Car. 263, 268, 37 Am. St. 752n, 19 L. R. A. 362. Where a statute, as Acts 1879, chapter 92, § 2, provides that the accused, if he is found to be the father of the child, may be fined a certain sum for the benefit of the school fund, the proceedings may be regarded as criminal. Hence a statute limiting the right of appeal on the part of the state in criminal actions is applicable in such case. *State v. Ostwalt*, 118 N. Car. 1208, 1216, 24 S. E.

660, 32 L. R. A. 396, construing S. Car. Code, § 1237. In *State v. Allrick*, 63 Minn. 328, 65 N. W. 639, it was held that a statutory provision relating to appeals in civil actions had no application whatever to a bastardy proceeding.

⁷ *State v. Brewer*, 38 S. Car. 263, 268, 16 S. E. 1001, 1003, 37 Am. St. 752n, 19 L. R. A. 362; *In re Wheeler*, 34 Kan. 96, 8 Pac. 276; *Musser v. Stewart*, 21 Ohio St. 353; *Ex parte Cottrell*, 13 Neb. 193, 13 N. W. 174; *State v. Mushied*, 12 Wis. 561; *State v. Jager*, 19 Wis. 235; *Bookhout v. State*, 66 Wis. 415, 28 N. W. 179. Where the defendant is acquitted the costs cannot be taxed against the county or other governmental subdivision instituting the proceeding, as is the rule in criminal proceedings. But the rule may be otherwise in the case of express statutory provisions. *State v. Blackburn*, 61 Ark. 407, 33 S. W. 529.

⁸ *Booth v. Hart*, 43 Conn. 480.

⁹ *State v. Hickerson*, 72 N. Car. 421, 422; *Richardson v. People*, 31 Ill. 170

reasonable doubt,¹⁰ nor to the reasonable and conclusive satisfaction of the jury.¹¹

A verdict casting the paternity of the child on the accused ought to be sustained though it is supported by a preponderance of the evidence only.¹²

§ 525. Evidence for the jury from the inspection of the child.—

An irreconcilable diversity of opinion exists upon the propriety of permitting the child, whose paternity is in issue, to be inspected by the jury. No principle of law ought to be permitted to operate to prevent the mother from having her infant child with her in the court-room during the trial.¹³ The maternal instinct, and, perhaps, necessity both may prompt her to have the child with her; and, if such is the case, it may be very difficult to prevent the members of the jury from making an inspection of the child, and

¹⁰ *Dibble v. State*, 48 Ind. 470, 471; *Askren v. State*, 51 Ind. 592, 593; *Priest v. State*, 68 Ind. 569; *Reynolds v. State*, 115 Ind. 421, 422, 17 N. E. 909; *Dukehart v. Coughman*, 36 Neb. 412, 414, 54 N. W. 680; *State v. Nichols*, 29 Minn. 357, 13 N. W. 153; *State v. Black*, 89 Iowa 737, 738, 55 N. W. 105; *Satterwhite v. State*, 28 Ala. 65; *Knowles v. Scribner*, 57 Me. 495; *People v. Phalen*, 49 Mich. 492, 494, 13 N. W. 830; *Semon v. People*, 42 Mich. 141, 149, 3 N. W. 304; *Stovall v. State*, 9 Baxt. (Tenn.) 597, 598; *Lewis v. People*, 82 Ill. 104; *State v. Rogers*, 79 N. Car. 609, 610. But see *contra*, *Van Tassel v. State*, 59 Wis. 351, 352, 18 N. W. 328; *State v. Knutson*, 18 S. Dak. 444, 101 N. W. 33; *Norwood v. State*, 45 Md. 68; *Sonnenberg v. State*, 124 Wis. 124, 102 N. W. 233; *Alminowicz v. People*, 117 Ill. App. 415; *Busse v. State*, 129 Wis. 171, 108 N. W. 64.

¹¹ *Miller v. State*, 110 Ala. 69, 20 So. 392.

¹² *State v. Romaine*, 58 Iowa 46, 49, 11 N. W. 721; *Altschuler v. Algaza*,

16 Neb. 631, 21 N. W. 401; *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155; *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823; *State v. Bunker*, 7 S. Dak. 639, 65 N. W. 33; *People v. Tripicer-sky*, 38 N. Y. S. 696, 4 App. Div. (N. Y.) 613, not reported in full. So, too, counsel representing the prosecutrix may, in summing up, comment upon the failure of the defendant to testify in his own behalf in denial of the charge against him. *State v. Snure*, 29 Minn. 132, 12 N. W. 347; *Ingram v. State*, 24 Neb. 33, 37 N. W. 943; *Miller v. State*, 110 Ala. 69, 20 So. 392.

Character of victim of crime, 14 L. R. A. (N. S.) 733, note; evidence of declarations to show maternity, 11 L. R. A. (N. S.) 1052, note; evidence of husband or wife to prove illegitimacy, 69 Am. St. 571, note.

¹³ *Hutchinson v. State*, 19 Neb. 262, 266, 27 N. W. 113; *State v. Patterson*, 18 S. Dak. 251, 100 N. W. 162 (holding that counsel may call attention to the child where it is in court). *Esch v. Graue*, 72 Neb. 719, 101 N. W. 978.

a comparison of its features with those of the accused, though their attention is not expressly called to the matter. The question is has the court a right to instruct the jury in express terms that they may, from a personal examination of the child, and from a comparison of its appearance, features and complexion with similar characteristics of the accused, draw the inference that he is the father of the child? The right of the court to give such an instruction is supported by very many of the authorities.¹⁴ But the evidence thus procured by visual inspection has often been excluded, particularly when the child was very young. If the infant is so young and so immature and undeveloped that its features have not assumed a permanent character, any resemblance, fancied or real, would doubtless be misleading.¹⁵

¹⁴ *State v. Britt*, 78 N. Car. 439, 442; *State v. Woodruff*, 67 N. Car. 89, 91, 92; *State v. Horton*, 100 N. Car. 443, 448, 6 S. E. 238, 6 Am. St. 613; *State v. Arnold*, 13 Ired. (N. Car.) 184; *Hutchinson v. State*, 19 Neb. 262, 266, 27 N. W. 113; *Scott v. Donovan*, 153 Mass. 378, 379, 26 N. E. 871; *Finnegan v. Dugan*, 14 Allen (Mass.) 197; *Risk v. State*, 19 Ind. 152, 153; *State v. Smith*, 54 Iowa 104, 106, 6 N. W. 153, 37 Am. 192; *Crow v. Jordon*, 49 Ohio St. 655, 656, 32 N. E. 750; *Gilmanton v. Ham*, 38 N. H. 108, 115. Compare, *Johnson v. Walker*, 86 Miss. 757, 39 So. 49, 109 Am. St. 733n, 1 L. R. A. (N. S.) 470n; *Shailer v. Bullock*, 78 Conn. 65, 61 Atl. 65, 112 Am. St. 87.

¹⁵ *Risk v. State*, 19 Ind. 152, 153; *Overlock v. Hall*, 81 Maine, 348, 351, 17 Atl. 169; *State v. Danforth*, 48 Iowa 43, 47, 30 Am. 387; *Hanawalt v. State*, 64 Wis. 84, 85-89, 24 N. W. 489, 54 Am. 588; *Gaunt v. State*, 50 N. J. L. 490, 493; *Reitz v. State*, 33 Ind. 187; *Copeland v. State* (Tex., 1897), 40 S. W. 589; *Benes v. People*, 121 Ill. App. 103. In those states where the proceeding is not regarded as criminal in its character, the ac-

cused will not be allowed to prove his good character, nor can the prosecutrix attack it. *Houser v. State*, 93 Ind. 228; *Sidelinger v. Bucklin*, 64 Main 371; *Low v. Mitchell*, 18 Maine 372. "The resemblance of the child to the accused alone, however striking it may be, is insufficient evidence to go to the jury as sole proof of paternity. It is merely one circumstance to be considered in connection with other relevant evidence. The child is regarded as an exhibit from which the jury alone are to draw inferences without any oral comments or accompanying explanations by witnesses in the same manner applicable to any relevant evidence. The personal appearance of the infant, his form, features and complexion, as they appear to the eyes of the jury, being evidence of facts within the common knowledge of most men, is an invasion of their province and a usurpation of their powers to admit the opinions of expert or other witnesses upon such points in connection with the inspection itself." *Jones v. Jones*, 45 Md. 144, 148; *Warlick v. White*, 76 N. Car. 175, 179. In *Clark v. Bradstreet*, 80 Maine 454, on p. 456, 15 Atl. 56, 6

Whether an inspection by the jury in court be permitted or not, it is very well settled that an inspection by the jury, out of court, during an adjournment, is erroneous. But perhaps such an error might be cured by the judicial instruction that the jury must not consider the appearance of the child in determining its paternity.¹⁶

Resemblance of features is largely a matter of opinion, and on this point the jurors are as competent to judge as any witnesses. Hence, a witness cannot testify that the child which is in court, and which the jurors can see, resembles the defendant,^{16a} though, on the other hand, a witness may testify for the defendant that the child resembles some other man, who, it is alleged, has had sexual intercourse with the mother.¹⁷

§ 526. Presumption of legitimacy.—It was the rule at the common law that if the husband was within the four seas, *i. e.*, if he was resident either in Great Britain or Ireland, the issue of the wife born during coverture was conclusively presumed to be legitimate. The only exception to this rule was where the husband was shown to be actually impotent.¹⁸

But in the early days of the present century this rule received

Am. St. 221, where it was sought to have an inspection of a six weeks old child, the court said: "Where the child was a mere infant, such evidence is too vague, uncertain and fanciful, and if allowed, would establish not only an unwise, but a dangerous and uncertain rule of evidence." In the case of *People v. Carney*, 29 Hun (N. Y.) 47, where a young child was exhibited to the jury, the court said: "This evidence enabled the court to compare the color of the child's eyes with those of the defendant who was present in court. We do not regard this kind of evidence as safe or proper."

* * * Common observation reminds us that in families of children, different colors of hair and eyes are common and that it would be danger-

ous doctrine to permit a child's paternity to be questioned or proved by the comparings of the color of its hair or eyes with that of the alleged parent."

¹⁶ *La Matt v. State*, 128 Ind. 123, 124, 27 N. E. 346. It seems that an infant may be exhibited to the jurors to enable them to determine the question whether a mulatto child can possibly be born of parents both of whom are white. *Watkins v. Carlton*, 10 Leigh (Va.) 560. See remarks of court on p. 576.

^{16a} *McCalman v. State*, 121 Ga. 491, 49 S. E. 609.

¹⁷ *State v. Britt*, 78 N. Car. 439; *Paulk v. State*, 52 Ala. 427.

¹⁸ 1 Black Comm. 457; Coke Litt. 244.

some very substantial modifications,¹⁹ and it is now the law that the presumption of legitimacy may be rebutted though it is not shown that the husband is out of England.²⁰ If access be shown, meaning by that word the opportunity for sexual intercourse between the parties to a marriage, the presumption of legitimacy is and always has been very strong.²¹ But where non-access at the date of the conception is proved to the satisfaction of the court, the presumption is readily rebuttable, even when the parties to the marriage cohabit after the conception of the child.²² So, in a bastardy proceeding the presumption of legitimacy which attaches to the child of a married woman may be rebutted by proving the non-access of the husband or by showing his actual impotency.²³

A man who, knowing a woman is pregnant, marries her during her pregnancy, is conclusively presumed to be the father of the unborn child. The putative father of a bastard is not responsible for its support or maintenance, under such circumstances, where another man has thus agreed to stand *in loco parentis* to the unborn child,²⁴ even though the child is born so soon after the date of the marriage that its conception must have necessarily preceded it.²⁵ But it will not be presumed that a man who marries the

¹⁹ Foxcroft's case, 1 Rolle Abr. 359.

²⁰ Reg v. Murrey, 1 Salk. 122; Pendrell v. Pendrell, 2 Stra. 925; Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451; Morris v. Davies, 5 C. & F. 163.

²¹ Plowes v. Bossey, 31 L. J. Ch. 681; Vernon v. Vernon, 6 La. An. 242; Woodward v. Blue, 107 N. Car. 407, 12 S. E. 453, 22 Am. St. 897, 10 L. R. A. 662n. Thus in one case it was held that the issue of a marriage, which was conceived while the parties thereto were living together, would be conclusively presumed to be legitimate, though it was affirmatively proved that the wife had been guilty of adultery. Banbury Peerage Case, 1 Sim. & Stu. 153.

²² Bullock v. Knox, 96 Ala. 195, 11 So. 339; State v. Worthingham, 23 Minn. 528, 534; Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451; Herring v.

Goodson, 43 Miss. 392, 396; Cross v. Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778; Vetten v. Wallace, 39 Ill. App. 390, 397; Dean v. State, 29 Ind. 483, 485; State v. Pettaway, 3 Hawks (N. Car.) 623.

²³ State v. McDowell, 101 N. Car. 734, 735, 7 S. E. 785; State v. Lavin, 80 Iowa 555, 562, 46 N. W. 553; State v. Britt, 78 N. Car. 439. See, also, cases cited in last note.

²⁴ Miller v. Anderson, 43 Ohio St. 473, 476, 477, 3 N. E. 605, 54 Am. 823; State v. Shoemaker, 62 Iowa 343, 344, 17 N. W. 589, 49 Am. 146; State v. Romaine, 58 Iowa 46, 48, 11 N. W. 721; Rhyne v. Hoffman, 6 Jones Eq. (N. Car.) 335; State v. Herman, 13 Ired. (N. Car.) 502.

²⁵ Dennison v. Page, 29 Pa. St. 420, 72 Am. Dec. 644n, 5 Amer. Law Reg. (O. S.) 469.

mother of a bastard which was born before the marriage is its father.²⁶

§ 527. Evidence rebutting the presumption of legitimacy.—Neither husband nor wife can testify to the fact of non-access during coverture to rebut the presumption of legitimacy in an action brought by a married woman against one whom she claims is the father of her bastard child.²⁷ The rule is stringent and excludes *all* evidence, direct or collateral, from which the fact of non-access might be inferred.²⁸

The fact of non-access may be established by other evidence. It may be proved that the husband was absent from the wife at the date when the child was conceived. If it appears that the husband and the wife were not living together at the time of the

²⁶ *Janes's Estate*, 30 W. N. Cases Pa. 166.

²⁷ *Easley v. Commonwealth* (Pa., 1887), 11 Atl. 220; *Mink v. State*, 60 Wis. 583, 585, 19 N. W. 445, 50 Am. 386; *Cope v. Cope*, 1 Moody & R. 269; *Commonwealth v. Shepherd*, 6 Binney (Pa.) 283, 285, 6 Am. Dec. 449; *Chamberlain v. People*, 23 N. Y. 85, 88, 80 Am. Dec. 255; *State v. Pettaway*, 3 Hawks N. Car. 623; *Rex v. Sourton*, 5 Ad. & E. 180; *Vetten v. Wallace*, 39 Ill. App. 390, 397. The fact that the other parent is dead does not alter this rule. 1 Taylor Evidence 837, 838. The recent statutory regulations removing common law disqualifications do not remove them unless it is expressly so stated. *Tioga County v. South Creek Township*, 75 Pa. St. 433. The fact that the mother of the child was a single woman will be held to be sufficiently proved by her uncontradicted testimony to the effect that she was engaged to marry the defendant and that she is unmarried at the time of trial. *La Plant v. People*, 60 Ill. App. 340. The fact that the brother of the accused with-

out his knowledge attempted to compromise the matter with the mother is no evidence of his guilt. *People v. Hawks*, 107 Mich. 249, 65 N. W. 100.

²⁸ Questions such as "Who was with you on a certain date?" or "Where was your husband on that date?" are objectionable as tending to prove non-access indirectly. "The presumption of the law is in such a case that the husband had access to the wife, and this presumption must be overcome by the clearest evidence that it was impossible for him by reason of impotency or imbecility, or entire absence from the place where the wife was during such time, to have had access to the wife, or to be the father of the child. Testimony of the wife even tending to show such fact, or of any fact from which such non-access could be inferred, or of any collateral fact connected with this main fact, is to be most scrupulously kept out of the case; and such non-access and illegitimacy must be clearly proved by other testimony." *Mink v. State*, 60 Wis. 583, on page 585, 19 N. W. 445, 50 Am. 386.

alleged conception, and could not have had sexual intercourse at that date, the presumption of legitimacy is overcome. So where it appears from the evidence that the husband has been absent from the country for a period which is longer than the period of gestation of the child, as when the parties had separated years before and had since resided in cities which are widely separated, the fact of non-access may be regarded as conclusively established.²⁹

§ 528. The relations of the parties.—Evidence of all facts which tend to prove the intimate relations which existed between the accused and the prosecutrix, including an engagement and mutual

²⁹ *Rex v. Luffe*, 8 East 193; *State v. Lavin*, 80 Iowa 555, 562, 46 N. W. 553, citing cases fully; *Haworth v. Gill*, 30 Ohio St. 627, 628; *Commonwealth v. Shepherd*, 6 Binn. (Pa.) 283, 286, 6 Am. Dec. 449; *Watts v. Owens*, 62 Wis. 512, 22 N. W. 720; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255; *Herring v. Goodson*, 43 Miss. 392, 396; *Dean v. State*, 29 Ind. 483, 485; *Boykin v. Boykin*, 70 N. Car. 262, 264, 16 Am. 776; *Pittsford v. Chittenden*, 58 Vt. 49; *Cross v. Cross*, 3 Paige (N. Y.) 139, 23 Am. Dec. 778; *Rex v. Maidstone*, 12 East 550. In a bastardy case if the husband had access his impotence must be clearly proved. *Commonwealth v. Shepherd*, 6 Binney (Pa.) 283, 286, 6 Am. Dec. 449; *Commonwealth v. Wentz*, 1 Ashmead (Pa.) 269, 270. "Non-access cannot be proved by either the husband or the wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law." By the court in *Dennison v. Page*, 29 Pa. St. 420, 72 Am. Dec. 644n; *Rex v. Book*, 1 Wils. 340; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. 260; *Corson v. Corson*, 44 N. H. 587. "That issue born in wedlock, though begotten before, is presumptively legitimate is an axiom of law so well established, that to cite authorities in support of it, would be a mere waste of time. So the rule that the parents will not be permitted to prove non-access for the purpose of bastardizing such issue is just as well settled. Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact, that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child, is a proposition which shocks our sense of right and decency, and hence the rule of law which forbids it." By the court in *Tioga County v. South Creek Township*, 75 Pa. St. 433, 436.

promise to marry,³⁰ is relevant.³¹ Thus, acts of sexual intercourse, other than the one alleged to have resulted in pregnancy,³² and opportunity for the intercourse prior to the conception,³³ are always relevant.

Advances and attempts by the accused to have sexual intercourse with prosecutrix at other times, though not successful, are always relevant to show the desire for such intercourse.³⁴

A letter proved or admitted to have been written by the defendant to the prosecutrix, containing expressions showing the intimacy and affection between them, is admissible.³⁵

³⁰ *Gemmill v. State*, 16 Ind. App. 154, 43 N. E. 909.

³¹ *Strickler v. Grass*, 32 Neb. 811, 814, 49 N. W. 804.

³² *Ramey v. State*, 127 Ind. 243, 244; 26 N. E. 818; *Gemmill v. State*, 16 Ind. App. 154, 43 N. E. 909; *State v. Smith*, 47 Minn. 475, 476, 50 N. W. 605; *Harty v. Malloy*, 67 Conn. 339, 35 Atl. 259; *People v. Schilling*, 110 Mich. 412, 68 N. W. 233.

³³ *Goodwine v. State*, 5 Ind. App. 63, 68, 31 N. E. 554; *Harty v. Malloy*, 67 Conn. 339, 35 Atl. 259; *Thayer v. Davis*, 38 Vt. 163; *Francis v. Rosa*, 151 Mass. 532, 24 N. E. 1024; *Benton v. Starr*, 58 Conn. 285, 20 Atl. 450. "The previous familiarity or intimacy existing between the parties was a circumstance bearing on the probability of the alleged sexual intercourse which is the subject of the prosecution. It tended to illustrate the relation of the parties to each other at the time when, as is claimed by the prosecutrix, the child to which she gave birth was begotten, and this relation has always been considered proper evidence as well for one party as the other." *Thayer v. Davis*, 38 Vt. 163, on page 164. Evidence that both before and after the date of the conception of the child the complain-

ing witness was accustomed to sleep with a man who could have easily been the father of the child, has been received to impeach her credibility. *State v. Read*, 45 Iowa 469.

³⁴ *Baker v. State*, 69 Wis. 32, 38, 33 N. W. 52; *Walker v. State*, 92 Ind. 474. The accused may be compelled on cross-examination to answer such questions relating to other acts of intercourse. *State v. Klitzke*, 46 Minn. 343, 345, 49 N. W. 54.

³⁵ *Williams v. State*, 113 Ala. 58, 21 So. 463, 464; *Walker v. State*, 92 Ind. 474; *Sullivan v. Hurley*, 147 Mass. 387, 18 N. E. 3; *La Matt v. State*, 128 Ind. 123, 27 N. E. 346; *Beers v. Jackman*, 103 Mass. 192. "In proof of unlawful sexual intercourse, the adulterous disposition of the parties at the time may be shown. To this end, the antecedent and subsequent conduct and declarations of the parties, if it has a tendency to prove the fact, is admissible. It is a matter of common observation, that a criminal intimacy is usually of gradual development, and, when established, is likely to continue between the parties. The act itself is the strongest evidence of the existence of the disposition, and it has been recently held that for the purpose of proving it, an act of adul-

It has been held that the accused cannot be permitted to prove that the mother had attempted to procure an abortion,³⁶ though, on the other hand, she may show that he had advised her to procure an abortion,³⁷ and had offered her medicine for that purpose,³⁸ as tending to prove the intimate relations existing between them.³⁹

§ 529. Competency and credibility of prosecutrix.—The mother is a competent,⁴⁰ and perhaps an indispensable, witness.⁴¹ Her evidence is in law no less credible than that of the accused,⁴² the credibility and weight of the evidence of both being for the jury. But they may consider the pecuniary interest of the accused in denying the paternity of the child as likely to affect his credibility.⁴³ In the absence of any statute requiring the testimony of the prosecutrix to be corroborated, the jury may find that the accused is the father of the child upon the testimony of the mother alone, provided they shall believe it is credible.⁴⁴

§ 530. Variance in proving the date of the conception.—The precise date of the conception is not material except so far as a failure to prove it precisely on the part of the mother may invalidate

tory at another time may be shown.
* * * It has long been held that prior acts of familiarity were admissible to render it not improbable that the act might have occurred." By the court in *Beers v. Jackman*, 103 Mass. 192, p. 193.

³⁶ *Sweet v. Sherman*, 21 Vt. 23, 29.

³⁷ *Miller v. State*, 110 Ala. 69, 20 So. 392.

³⁸ *McIlvain v. State*, 80 Ind. 69, 72; *Nicholson v. State*, 72 Ala. 176.

³⁹ A rumor which was prevalent in the neighborhood that the prosecutrix had been improperly intimate with the accused is not admissible to prove the paternity of the child. *Saint v. State*, 68 Ind. 128, 130.

⁴⁰ *Bowers v. Wood*, 143 Mass. 182, 184, 9 N. E. 534. If married she may

testify to the absence of her husband. *Evans v. State*, 165 Ind. 369, 74 N. E. 244, 2 L. R. A. (N. S.) 619n, rehearing denied, 75 N. E. 651.

⁴¹ *Reg. v. Armitage*, 27 L. T. 41, L. R. 7 Q. B. 773.

⁴² *State v. Ginger*, 80 Iowa 574, 46 N. W. 657; *Roberts v. State*, 84 Wis. 361, 363, 54 N. W. 580; *Altschuler v. Algaza*, 16 Neb. 631, 21 N. W. 401.

⁴³ *McClellan v. State*, 66 Wis. 335, 337, 28 N. W. 347.

⁴⁴ *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155; *State v. McGlothlen*, 50 Iowa 544, 545, 9 N. W. 893; *Miller v. State*, 110 Ala. 69, 20 So. 392; *Evans v. State*, 165 Ind. 369, 74 N. E. 244, 2 L. R. A. (N. S.) 619n, rehearing denied, 75 N. E. 651; *Matteson v. People*, 122 Ill. App. 66.

the credibility and effect of her evidence.⁴⁵ But the act of intercourse must be shown to have occurred on such a date as will satisfy the jury that the infant, whose paternity is in question, was the result of it.

§ 531. **The reputation of the prosecutrix.**—The general rule is that the reputation of the prosecutrix is irrelevant.⁴⁶ The responsibility of the accused for the support of the bastard depends upon its paternity, not upon the good or bad reputation of the mother. Hence, the court should not permit questions to be put to her tending to prove her immoral actions with other men, merely for the sake of impeaching her, by showing her evil reputation. Under some circumstances, however, her adultery with other men may become relevant.⁴⁷

§ 532. **Sexual intercourse with other men during the period of gestation.**—The prosecutrix may be questioned as to acts of sexual intercourse with other men when the sole object of the questions is to ascertain the paternity of the child. Any question put to her for this purpose involving her immorality with other men must relate to actions coming within a period during which the child might have been conceived.⁴⁸

⁴⁵ *Francis v. Rosa*, 151 Mass. 532, 24 N. E. 1024; *Ross v. People*, 34 Ill. App. 21; *Holcomb v. People*, 79 Ill. 409; *Hamilton v. People*, 46 Mich. 186, 9 N. W. 247.

⁴⁶ *Sidelinger v. Bucklin*, 64 Maine 371; *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823; *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439; *People v. Wilson*, 136 Mich. 298, 99 N. W. 6, 10 Det. Leg. N. 1047; *State v. O'Rourke* (Neb., 1909), 124 N. W. 138; *Clow v. Smith* (Neb., 1909), 124 N. W. 140.

⁴⁷ "The character for chastity of a woman who appears in court to affiliate her bastard child is pretty effectually impeached without further proof on the subject; but that has no direct bearing upon the question to be tried—whether the accused is the father of such child. Of course, he may

show what her reputation is for truth and veracity, and thus attack the credibility of her testimony, but that is as far as he can go on questions of reputation." By the court in *Bookhout v. State*, 66 Wis. 415, 28 N. W. 179.

⁴⁸ *Humphrey v. State*, 78 Wis. 569, 571, 47 N. W. 836; *Ginn v. Commonwealth*, 5 Litt. (Ky.) 300; *Burris v. Court*, 34 Neb. 187, 191, 51 N. W. 745; *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823; *Goodwine v. State*, 5 Ind. App. 63, 31 N. E. 554; *Whitman v. State*, 34 Ind. 360; *People v. Kaminisky*, 73 Mich. 637, 639, 41 N. W. 833; *State v. Giles*, 103 N. Car. 391, 9 S. E. 433; *State v. Britt*, 78 N. Car. 439, 440; *Scharf v. People*, 34 Ill. App. 400; *Holcomb v. People*, 79 Ill. 409; *Easdale v. Reynolds*, 143 Mass. 126, 128, 9 N. E. 13; *Bowen v. Reed*, 103

The questions must indicate explicitly the time and place of the sexual intercourse and the name of the person with whom it is alleged that it was indulged in.⁴⁹

If the woman denies the sexual intercourse, it may be proved by the testimony of a man who can testify that she has had intercourse with him.⁵⁰ And on the other hand it is relevant to prove that, prior to the date of the conception, the mother had received no attention from any man except the accused.⁵¹

The length of the period over which the inquiry into the illicit relations of the prosecutrix with other men may extend is not definitely fixed by the cases. A great deal depends on the circumstances of each case, and particularly on the obstetrical facts as they appear from the medical testimony or otherwise. In the majority of cases it is futile to extend the inquiry more than three weeks later or earlier than the probable date of the conception of the child. If we assume that the length of the period of gestation is about ten lunar months or nine calendar months, or say about two hundred and eighty days, a question as to intercourse with any other man at a date a month or more prior or subsequent to the beginning of the period of gestation would clearly be inadmissible, unless it is also shown that the illicit in-

Mass. 46; *Commonwealth v. Moore*, 3 Pick. (Mass.) 194, 197; *Sabins v. Jones*, 119 Mass. 167, 171; *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439; *State v. Karver*, 65 Iowa 53, 55, 21 N. W. 161; *Olsen v. Peterson*, 33 Neb. 358, 50 N. W. 155; *Sang v. Beers*, 20 Neb. 365, 30 N. W. 258; *Benham v. State*, 91 Ind. 82; *Walker v. State*, 6 Blackf. (Ind.) 1; *Marks v. State*, 101 Ind. 353; *People v. Schildwachter*, 5 App. Div. (N. Y.) 346, 39 N. Y. S. 288; *State v. Coatney*, 8 Yerg. (Tenn.) 210; *Short v. State*, 4 Harr. (Del.) 568; *Kintner v. State*, 45 Ind. 175; *Crawford v. State*, 7 Baxt. (Tenn.) 41; *Anon*, 37 Miss. 54; *People v. Keefer*, 103 Mich. 83, 61 N. W. 338; *Zimmerman v. People*, 117 Ill. App. 54; *Ankeny v. Rawhouser* (Neb.

1901), 95 N. W. 1053; *Guthrie v. State* (Neb. 1901), 96 N. W. 243. "In this class of cases an innovation has been made on the strict rules of cross-examination, so far as to permit the defendant to ask the woman whether, within the period of gestation, she has had intercourse with other men." By the court in *Holcomb v. People*, 79 Ill. 409.

⁴⁹ *Meyncke v. State*, 68 Ind. 401.

⁵⁰ *State v. Read*, 45 Iowa 469; *People v. Kaminsky*, 73 Mich. 637, 639, 41 N. W. 833; *McCoy v. People*, 65 Ill. 439; *Williams v. State*, 113 Ala. 58, 21 So. 463, 465; *State v. Perkins*, 117 N. Car. 698, 23 S. E. 274, or by her admissions in writing. *Walker v. State*, 165 Ind. 94, 74 N. W. 614.

⁵¹ *Curran v. People*, 35 Ill. App. 275.

timacy existed between the same persons at or very near to the time of conception.⁵²

If the prosecutrix is proved to have indulged in promiscuous sexual intercourse with other men at or about the date she alleges the child was conceived, she will not be permitted to state while on the stand that she became pregnant as the result of any particular act of intercourse. Her testimony on that point would be merely an inference. If she had submitted to the embraces of several men on or about the same date, it is impossible for any person, in view of her physical organization and for physiological reasons, to state positively who is the father of the child, however readily paternity may be determined when sexual intercourse with only one man is in question.⁵³

§ 533. Admissibility of the admissions and declarations of the parties.—In some of the states the declarations of the mother of the child made during her travail and which are continued or persisted in subsequently, and which charge a particular person with its paternity, are received as original evidence both for and against the accused.⁵⁴ Whether declarations of this sort are receivable in the absence of a statute is an undecided point. Some authorities hold that they are not admissible either to corroborate

⁵² *State v. Phillips*, 5 Ind. App. 122, 31 N. E. 476; *Ronan v. Dugan*, 126 Mass. 176, 177; *State v. Granger*, 87 Iowa 355, 54 N. W. 79; *Duck v. State*, 17 Ind. 210; *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155; *Scharf v. People*, 34 Ill. App. 400; *Sabins v. Jones*, 119 Mass. 167. In a recent case where the child was born on the 8th day of June, 1888, the prosecutrix was required to answer the question, "Did you have sexual intercourse with any other man than the accused at any time between August 10 and November 1, 1887?" *Pike v. People*, 34 Ill. App. 112; and see, also, *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439. It is the exclusive right of the jury to determine the probable length

of the period of gestation as a question of fact on the circumstances of the case. *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823.

⁵³ *Baker v. State*, 47 Wis. 111, 2 N. W. 110.

⁵⁴ Mass. Public Stat., c. 85, 16 Maine Rev. Stat., c. 97, section 6; *Robbins v. Smith*, 47 Conn. 182; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871. *Contra*, *State v. Tipton*, 15 Mont. 74, 38 Pac. 222; *Richmond v. State*, 19 Wis. 307. The expression used in one statute is, "having been put to the discovery of the truth of such statement at the time of her travail." *Wilson v. Woodside*, 57 Maine 489; *Burns v. Donoghue*, 185 Mass. 71, 69 N. E. 1060.

her testimony or as evidence directly on the issue.⁵⁵ But elsewhere it has been held that statements made, both before and after the birth of the child, that the accused is its father, should be received.⁵⁶

Declarations are to be regarded as made during travail, if they are proved to have been uttered between the instant that the pains of labor begin and the moment when the delivery of the child is completed by the severance of the umbilical cord.⁵⁷

They will be admitted though the child is born subsequently to the making of the charge against the defendant.⁵⁸

The admission of the prosecutrix that another man is the father of the child is receivable as a contradictory statement for the purpose of impeachment.⁵⁹

But the statements of third persons as to the paternity of the child not made in her presence and constituting no part of the *res gestæ* of any relevant act are never received.⁶⁰ On the other hand all the utterances of the accused having any bearing on his relations with the prosecutrix, as, for example, his promise to marry her, are admissible against him.⁶¹

⁵⁵ State v. Hussey, 7 Iowa 409; Sidelinger v. Bucklin, 64 Maine 371, 373; State v. Lowell, 123 Iowa 427, 99 N. W. 125; Sidelinger v. Bucklin, 64 Me. 371; Ray v. Coffin, 123 Mass. 365; State v. Spencer, 73 Minn. 101, 75 N. W. 893, 76 N. W. 48; Stoppert v. Nierle, 45 Neb. 105, 63 N. W. 382; Wilkins v. Metcalf, 71 Vt. 103, 41 Atl. 1035.

⁵⁶ Harty v. Malloy, 67 Conn. 339, 35 Atl. 259; Benton v. Starr, 58 Conn. 285, 20 Atl. 450; Welch v. Clark, 50 Vt. 386; Baxter v. Gormley, 186 Mass. 168, 71 N. E. 575.

⁵⁷ Tacey v. Noyes, 143 Mass. 449, 451, 9 N. E. 830; Scott v. Donovan, 153 Mass. 378, 379, 26 N. E. 871. For other definitions of "travail" see Dennett v. Kneeland, 6 Maine 460; Bacon v. Harrington, 5 Pick. (Mass.) 63, 64; Drowne v. Stimpson, 2 Mass. 441, 443, 444, limiting it to the birth of the child.

⁵⁸ Bowers v. Wood, 143 Mass. 182, 184, 9 N. E. 534.

⁵⁹ Houser v. State, 93 Ind. 228; E. N. E. v. State, 25 Fla. 268, 6 So. 58; Johnson v. People, 140 Ill. 350, 20 N. E. 895; Meyncke v. State, 68 Ind. 401; People v. White, 53 Mich. 537, 19 N. W. 174. The admissions of the prosecutrix as to the paternity of the child ought to be received with extreme caution. Morris v. State, 101 Ind. 560, 562. A statement by the prosecutrix that it is necessary for a woman to get in the family way in order to procure a husband is not admissible as impeachment. Johnson v. People, 140 Ill. 350, 29 N. E. 895.

⁶⁰ Prince v. Gundaway, 157 Mass. 417, 418, 32 N. E. 653; Benton v. Starr, 58 Conn. 285, 20 Atl. 450.

⁶¹ Laney v. State, 109 Ala. 34, 19 So. 531; Woodward v. Shaw, 18 Maine 304, 307; Sale v. Crutchfield, 8 Bush (Ky.) 636; Miller v. State, 110 Ala.

Some of the statutes require that an accusation made during pregnancy shall be continued in subsequently. This requirement that the mother shall be constant refers only to the name of the man who is accused. A variance as regards the time, place or other circumstance of the intercourse will not render the declaration incompetent, though perhaps affecting its credibility.⁶² In conclusion it may be said that the mother is a competent witness to prove her own declarations,⁶³ though such evidence may be more valuable and convincing if coming from another witness.⁶⁴

§ 534. Evidence of the preliminary examination.—When, prior to the trial, a preliminary examination is had, the record thereof may be given in evidence in favor of either party at the trial, and, if lost, the contents may be proved orally by testimony from the prosecutrix or any other person who was present.⁶⁵ But the judgment in an action, brought by the mother to recover damages for her seduction, is not competent to prove the paternity of the child in a subsequent bastardy proceeding.⁶⁶

69, 20 So. 392. Evidence by the physician who attended the prosecutrix that she told him who was the father of the child is not a communication of information within a statute forbidding disclosures of information necessary to enable him to act as a surgeon or to prescribe as a physician. *People v. Cole*, 113 Mich. 83, 71 N. W. 455.

⁶² *Woodward v. Shaw*, 18 Maine 304; *Totman v. Forsaith*, 55 Maine 360.

⁶³ *Reed v. Haskins*, 116 Mass. 198, 199.

⁶⁴ *Murphy v. Spence*, 9 Gray (Mass.) 399. "The general object was to give competency to a witness, who, by the general rule of evidence, would be excluded as interested, in a case in which, without such evidence, the mischief intended to be cured would be irremediable. The danger of such evidence was not overlooked by the leg-

islature and was intended to be guarded against by placing the witness in such circumstances at the time of her accusation as would in all probability insure her veracity. In the time of her utmost peril, with the fear of death and judgment before her eyes, it was wisely thought that a false accusation would rarely if ever be made; upon the same principle that the declarations of a person *in extremis* which may affect the life of a party accused of murder are admitted, though not under the sanction of an oath." *Maxwell v. Hardy*, 8 Pick. (Mass.) 560, on p. 561.

⁶⁵ *Hoff v. Fisher*, 26 Ohio St. 7, 8; *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382; *McLaughlin v. Joy*, 100 Me. 517, 62 Atl. 648; *McCalman v. State*, 121 Ga. 491, 49 S. E. 609.

⁶⁶ *Glenn v. State*, 46 Ind. 368.

§ 535. **Evidence of compromise or settlement.**—Inasmuch as a proceeding to affiliate a bastard child is generally regarded as in the nature of a civil action, no objection, either in law or upon the ground of public policy, can exist to prevent a compromise or extra-judicial settlement between the parties. A note given to settle such an action is valid and based on good consideration, and cannot be invalidated on the grounds that such a compromise is against public policy, or contrary to good morals.⁶⁷ The primary object of the proceeding is not to determine the paternity of the child, but to compel its father to provide for its support. If, therefore, the defendant is willing to do this voluntarily, the proceedings ought to be dismissed; for if the action is brought to a termination, favorable to the complainant, the defendant cannot be compelled to do any more.⁶⁸

Hence, it is always relevant to show in evidence that the defendant has voluntarily recognized the claim of the illegitimate child, and has entered into an agreement by which he is effectually bound to provide for its care and support, and for the lying-in and nursing expenses and medical attendance of the mother.

⁶⁷ *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

⁶⁸ See *People v. Wheeler*, 60 Ill. App. 351.

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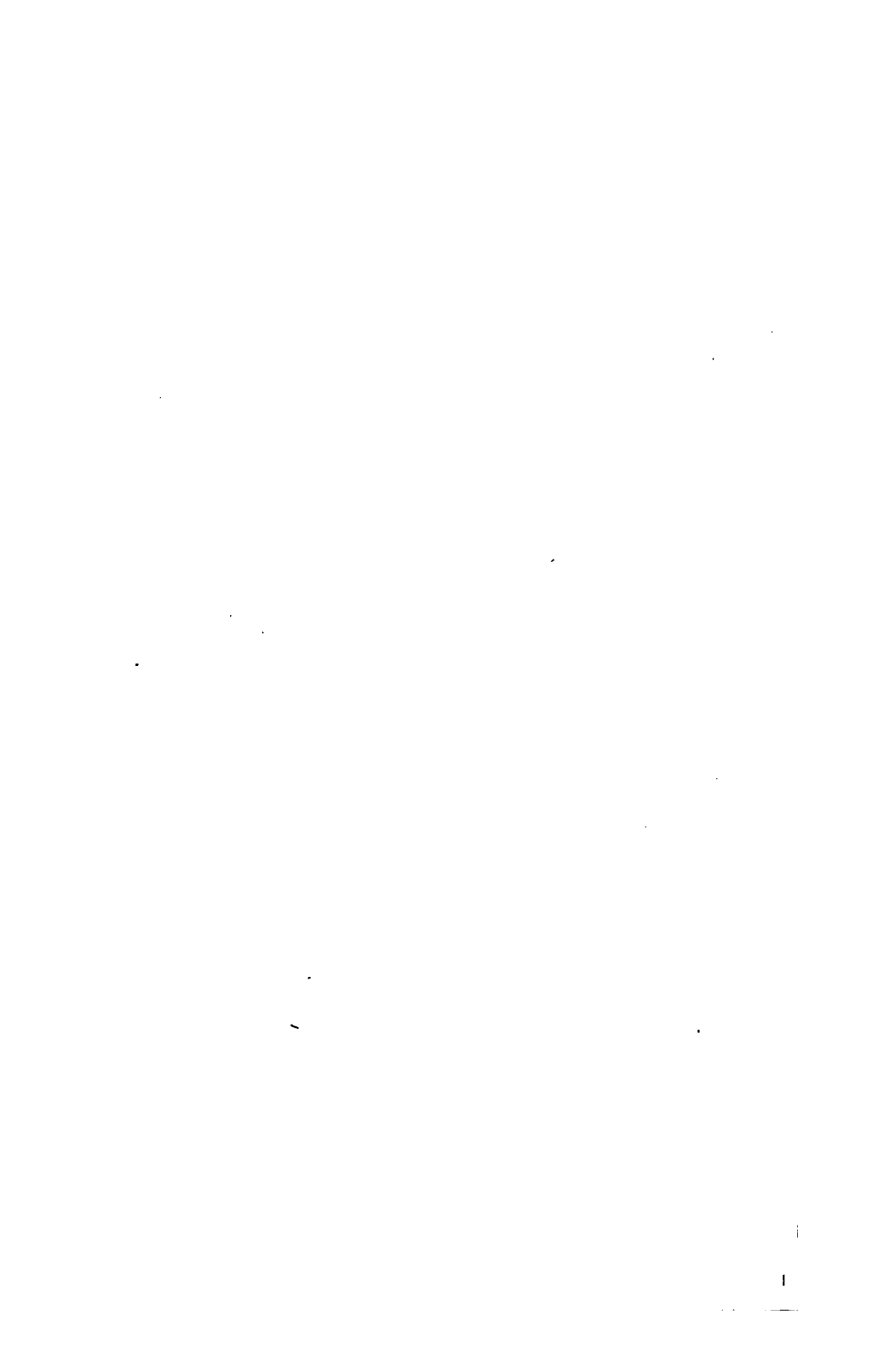
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WRITTEN INSTRUMENTS,

See BEST EVIDENCE; PRIMARY EVIDENCE.

Whole Number of Pages, 1118.







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